

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Lake Shannon Hydroelectric Company, LLC

Project No. 12677-001

ORDER DENYING REHEARING

(Issued February 16, 2007)

1. On October 3, 2006, Commission staff issued a three-year preliminary permit to Lake Shannon Hydroelectric Company, LLC (Lake Shannon) to study the feasibility of the Scoggins Dam Hydroelectric Project No. 12677, proposed to be located at Scoggins Dam, a feature of the U.S. Department of Interior, Bureau of Reclamation's (Reclamation) Tualatin Water Supply Project in Washington County, Oregon. Clean Water Services and the Joint Water Commission (petitioners)<sup>1</sup> jointly filed a request for rehearing, asking that the Commission rescind the preliminary permit. For the reasons discussed below, we deny rehearing.

**Discussion**

2. On rehearing, petitioners argue that the permit application should be denied because the proposed project conflicts with the current authorized expansion plans for Scroggins Dam. Specifically, in response to growing water demands, the Tualatin Project water supply users initiated a Tualatin Basin Water Supply Feasibility Study in 2001. The study considers options for water management for the Tualatin River Basin that take into account population growth, industrial and agriculture demands, aquifer storage and recovery, and improvements in water quality. The preferred water

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<sup>1</sup> Clean Water Services is an Oregon state entity responsible for meeting federal and state water quality standards for the Tualatin River and its tributaries. Petitioner Joint Water Commission is an Oregon intergovernmental entity representing municipal water providers with contractual rights to use water from Henry Hagg Lake, which is impounded by Reclamation's Scoggins Dam.

development option being studied would raise Scoggins Dam 40 feet to increase available water storage by 50,000 acre feet and allow for a larger reservoir draft. One feature of this preferred option would be a pipeline that would use the existing hydraulic head from Scoggins Dam to transport water to downstream users. According to petitioners, the current schedule for finalizing the expansion plans is 2010.

3. Petitioners further state that, given the substantial financial commitments (past and future) the project partners have made, “there is no reason to believe that the planning of the modifications to Scoggins Dam will not proceed.”<sup>2</sup> They assert that, for these reasons, any hydroelectric project studied by Lake Shannon during the permit term would conflict with the proposed modifications to Scoggins dam currently being studied, and accordingly ask that we rescind the permit and not issue another one until final plans for the Tualatin expansion are complete.<sup>3</sup> To support their position, petitioners cite to a 1985 Commission order denying a license application in *Borough of Weatherly, Pennsylvania*.<sup>4</sup>

4. We find no basis for rescinding Lake Shannon’s preliminary permit. The purpose of a preliminary 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 development application. The Commission will not issue preliminary permits where there is a permanent legal bar to granting a license application.<sup>5</sup> However, that is not the case here.

5. Unlike a license, a permit does not authorize the exercise of the right of eminent domain, does not authorize construction or site access, and does not guarantee that a

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<sup>2</sup> Request for rehearing at 5. Congress has authorized Reclamation to participate in the above-described studies and has appropriated funds through Fiscal Year 2006 to partially fund an environmental impact statement (EIS) for the proposed project expansion. In addition, according to petitioners, they themselves have already spent approximately 4 million dollars on development of the draft EIS. *Id.*

<sup>3</sup> Petitioners state that Reclamation also objects to issuance of a permit at this time, citing to Reclamation comments filed in the permit proceeding. Reclamation did not however seek rehearing of the order issuing permit.

<sup>4</sup> 30 FERC ¶ 61,310 (1985), *reh’g denied*, 32 FERC ¶ 61,398 (1985).

<sup>5</sup> See, e.g., *Town of Summerville, W. Va. v. FERC*, 780 F.2d 1034, 1038-39 (D.C. Cir. 1986).

project will ultimately be licensed.<sup>6</sup> Project proposals at the permit stage are fluid and any eventual application for license may differ in important aspects from the proposal set forth in the permit application. The potential lack of feasibility of a project is thus not a relevant consideration in deciding whether to issue a permit.<sup>7</sup> Therefore, comments and objections relating to the potential effects of actually constructing and operating a project are premature at preliminary permit stage.<sup>8</sup>

6. Furthermore, petitioners' reliance on *Borough of Weatherly* is misplaced. In that case, the Commission denied a license application for a project at a U.S. Army Corps of Engineers' (Corps) dam that had an "undisputed conflict" with congressionally authorized modifications to the Corps' dam.<sup>9</sup> That is clearly not the case here. Neither the Tualatin expansion proposal nor the project proposed in Lake Shannon's permit application is a final, concrete proposal that can be evaluated for potential conflicts.<sup>10</sup>

7. For the above reasons, we affirm the issuance of a preliminary permit to Lake Shannon.

8. In the alternative, Lake Shannon asks that, if we do not rescind the permit, we condition it to require Lake Shannon to (a) reimburse petitioners for expenses incurred by petitioners in modifying their water supply feasibility studies caused by permit issuance,

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<sup>6</sup> See *Akron Hydroelectric Company*, 76 FERC ¶ 61,232 (1996), citing *Eagle Mountain Energy Company*, 62 FERC ¶ 61,066 (1993), aff'd sub nom. *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519 (D.C. Cir. 1994).

<sup>7</sup> See *Robert A. Davis*, 53 FERC ¶ 61,040 (1990).

<sup>8</sup> See *Alpyn Creek Development Corp.*, 49 FERC ¶ 61,380 (1989); *Hudson River-Black River Regulatory District*, 33 FERC ¶ 61,122 (1985). Congress has not yet authorized construction of the proposed expansion of the Tualatin Water Supply Project. The design, feasibility, and potential impacts of the proposed expansion are thus subject to reevaluation and any conflict with Lake Shannon's proposed hydroelectric project is therefore uncertain.

<sup>9</sup> See 32 FERC ¶ 61,398 at 61,892 (1985).

<sup>10</sup> We note that the Borough of Weatherly prepared its license application under a preliminary permit that it held for the site. See 14 FERC ¶ 62,285 (1981). In addition, in 1986 after the Borough's license application was denied, it filed for, and was granted, another preliminary permit to continue studying the site. See 34 FERC ¶ 62,322 (1986).

and (b) compensate petitioners for permittee use of data from studies funded by petitioners.

9. We deny the request as well beyond the purpose and scope of a preliminary permit. As noted, a permit is issued only to allow the permit holder to investigate the feasibility of a project. It confers no property rights,<sup>11</sup> and does not authorize access to a site or to information that would not otherwise be available to permit holders.

The Commission orders:

The joint request for rehearing filed in this proceeding on November 2, 2006, by Clean Water Services and the Joint Water Commission is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>11</sup> Thus, a permit holder can only enter lands its 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.