

141 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Lock 14 Hydro Partners, LLC
Lock 12 Hydro Partners, LLC

Project Nos. 13213-004
13214-004

ORDER ON REHEARING AND REINSTATING LICENSE APPLICATIONS

(Issued December 20, 2012)

1. Lock 12 Hydro Partners, LLC (Lock 12 Hydro) and Lock 14 Hydro Partners, LLC (Lock 14 Hydro) have filed timely requests for rehearing of the Acting Director, Division of Hydropower Licensing's August 8, 2012 letter orders. The Acting Director's orders rejected as patently deficient Lock 12 Hydro's license application for the proposed 2.64-megawatt (MW) Ravenna Project No. 13214 and Lock 14 Hydro's license application for the proposed 2.64-MW Heidelberg Project No. 13213. Lock 12 Hydro and Lock 14 Hydro contend that the applications' deficiencies do not warrant their rejection and ask that the Commission reinstate the applications and provide an opportunity to correct the deficiencies.¹ For the reasons discussed below, we grant rehearing and allow the applicants 90 days to cure the deficiencies.

Background

2. On September 19, 2008, Lock 14 Hydro was issued a 36-month preliminary permit to study the feasibility of developing the hydropower potential of the proposed Kentucky Lock and Dam 14 Project No. 13213.² The project would be located on the

¹ The license application for the Ravenna Project and the license application for the Heidelberg Project (hereinafter referred to collectively as license applications) are, in all relevant respects, identical and are therefore treated together for purposes of this order.

² *Lock 14 HydroPartners*, 124 FERC ¶ 62,210 (2008).

Kentucky River at the existing Lock and Dam 14, owned by Kentucky River Authority, in Lee County, Kentucky. Also on September 19, 2008, Lock 12 Hydro was issued a 36-month preliminary permit to study the feasibility of developing the hydropower potential of the proposed Kentucky Lock and Dam 12 Project No. 13214.³ The project would be located on the Kentucky River at the existing Lock and Dam 12, owned by Kentucky River Authority, in Estill County, Kentucky.

3. On October 11, 2010, during the preliminary permit terms, Lock 14 Hydro and Lock 12 Hydro filed pre-application documents (PADs),⁴ notices of intent to file license applications (NOIs), and requests to use the traditional licensing process (TLP)⁵ for the projects. On December 10, 2010, Commission staff granted the applicants' requests to use the TLP.⁶

4. The permits expired August 31, 2011. On September 1, 2011, Lock 14 Hydro and Lock 12 Hydro filed applications for successive preliminary permits for the projects. On the same day, FFP Project 106, LLC and FFP Project 107, LLC filed competing preliminary permit applications for the proposed Project No. 14271 and Project No. 14274, respectively. On November 22, 2011, the Commission issued notice of the

³ *Lock 12 Hydro Partners*, 124 FERC ¶ 62,211 (2008).

⁴ A pre-application document is a filing that initiates a process for preparing a license application. A PAD provides the Commission and stakeholders with existing information relevant to the project proposal that is in the potential applicant's possession and enables stakeholders to identify issues and related information needs, develop study requests and study plans, and prepare documents analyzing any applications that may be filed. 18 C.F.R. § 5.6 (2012). The PAD is required to be filed simultaneously with the notification of intent to seek a license. *See* 18 C.F.R. § 5.6(a) (2012).

⁵ *See* 18 C.F.R. § 5.3(b) (2012). A potential license applicant must request to use either the TLP or the alternative licensing process (ALP) before preparing a license application. The Integrated Licensing Process is the default process that an applicant must use unless it receives Commission authorization to use the TLP or ALP. *See* 18 C.F.R. § 5.1(f) (2012).

⁶ *See* Notice of Intent to File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process, issued December 10, 2010 in the Project Nos. 13213-001 and 13214-001 dockets; and *see* Commission staff's letter orders, issued December 10, 2010, granting Lock 14 Hydro Partners' request and Lock 12 Hydro's request to use the TLP in preparing the license applications for Project No. 13213 and Project No. 13214, respectively.

competing preliminary permit applications and established January 23, 2012, as the deadline for filing comments, protests, motions to intervene and for competing permit or development applications. Pursuant to the notice, any entity wishing to file a competing development application could file a notice of intent to do so by January 23, 2012, and the application itself by May 22, 2012.⁷

5. On January 18, 2012, Lock 14 Hydro and Lock 12 Hydro each filed notices of intent to file competing license applications for the projects.

6. Lock 14 Hydro filed its license application for the 2.64-MW Heidelberg Project No. 13213 on May 16, 2012. The proposed project would be located on the Kentucky River, in Lee County, Kentucky, and would consist of: an existing concrete lock and dam; an existing 182-acre reservoir; a powerhouse containing four generating units with a total installed capacity of 2.64 MW to be constructed integral to the abandoned lock; and a 1,000-foot-long, 12.47-kilovolt (kV) transmission line.

7. On February 2, 2012, Lock 12 Hydro filed with the Commission a draft license application for the 2.64-MW Ravenna Project No. 13214, and on May 16, 2012, it filed its final license application. The proposed project would be located on the Kentucky River, in Estill County, Kentucky, and would consist of: an existing concrete lock and dam; an existing 345-acre reservoir; a powerhouse containing four generating units with a total installed capacity of 2.64 MW to be constructed within the abandoned lock chamber; and a 1,500-foot-long, 12.47-kV transmission line.

8. On August 8, 2012, the Acting Director rejected Lock 12 Hydro's and Lock 14 Hydro's applications as patently deficient, pursuant to section 4.32(e)(2) of the Commission's regulations.⁸ In rejecting the applications, the Acting Director determined for each project that the Initial Statement and documentation of consultation with certain entities were lacking, and Exhibits A, F, and E were deficient. The applicants filed timely requests for rehearing of the rejections.

Discussion

9. On rehearing, Lock 12 Hydro and Lock 14 Hydro acknowledge that there are indeed deficiencies in the license applications, but contend that they can promptly remedy the deficiencies and provide the information requested in the rejection letters. The applicants argue that the nature and extent of the deficiencies do not rise to the level

⁷ See 18 C.F.R. § 4.36 (2012).

⁸ See 18 C.F.R. § 4.32(e)(2) (2012). Under section 4.32(e)(2), the Director is authorized to reject an application within 90 days of its filing date if it "patently fails to substantially comply with the requirements" of the Commission's regulations.

of patent deficiencies that warrant summary rejection of the applications. They contend that their license applications demonstrate diligent consultation and good faith efforts to submit applications that substantially comply with the Commission's regulations.

10. The Commission's deadlines for submitting competing applications are to provide "competing applicants that have already completed, or very quickly can complete, all necessary studies and pre-filing consultations, a short additional time to complete their applications."⁹ At the same time, these deadlines "discourage the submission of prematurely-filed, poorly-prepared [license] applications."¹⁰

11. Applications that do not conform to the pre-filing consultation and filing requirements of our regulations may be considered either deficient or patently deficient, depending on the nature and extent of the deficiencies.¹¹ Our regulations provide that where a license application "patently fails to substantially comply" with our application requirements, the application will be rejected as patently deficient.¹² In contrast, where an application substantially complies with the requirements of our regulations, but is in some respects deficient, it will not be summarily rejected. Instead, the applicant may be afforded additional time, *not to exceed 90 days*, to provide the missing information (emphasis added).¹³

12. As discussed below, we conclude that the deficiencies, taken alone or together, are not serious enough to render the applications patently deficient.

A. Section 4.38 requirements

13. Applications prepared using the TLP are subject to the pre-filing consultation requirements of 4.38 of the regulations.¹⁴ Section 4.38(a) of the regulations requires that, before filing an original license application, the applicant must consult with federal and state resource agencies, appropriate state fish and wildlife agencies, state water management agencies, the state water quality certification agency, and as pertinent here,

⁹ *Application for License, Permit, and Exemption from Licensing for Water Power Projects*, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,632 at 31,266.

¹⁰ *Id.*

¹¹ *See* 18 C.F.R. §§ 4.32(e) and 5.20 (2012).

¹² *See* 18 C.F.R. §§ 4.32(e)(2) and 5.20(b) (2012).

¹³ *See* 18 C.F.R. §§ 4.32(e)(1) and 5.20(a) (2012).

¹⁴ 18 C.F.R. § 4.38 (2012).

with the federal agency administering any United States lands *occupied by the project* and “any Indian tribe that may be affected by the proposed project.” (Emphasis added.) The rejection letters found that the applications failed to comply with section 4.38(a) in that they contained no evidence of consultation with: (1) the Forest Service because the proposed projects would be located on, *or adjacent to*, national forests; and (2) any Indian tribes that may be affected by the project.¹⁵

14. With respect to national forest lands, the license applications stated that the projects did not affect federal lands, but the applications’ Exhibit G project boundary maps showed that the projects were located within the boundaries of national forests. Relying on the project boundary maps, Commission staff believed that the projects occupied national forest lands, and the failure to consult with the Forest Service was a deficiency in the applications. On rehearing, the applicants point out that the license applications state that the Ravenna and Heidelberg Projects would not be located on federal lands.¹⁶ The applicants explain that the projects would be located adjacent to, but not occupy, Forest Service lands.¹⁷ Because the Commission’s regulations do not require pre-filing consultation with the Forest Service for projects adjacent to Forest Service lands, the applicants’ lack of pre-filing consultation with the Forest Service is not a deficiency. However, given the proximity of the projects to the Forest Service lands, it would be appropriate to require this consultation as additional information needed to process the applications.¹⁸ Therefore, we are requiring, as additional information, that the applicants consult with the Forest Service and provide documentation of the consultation.

15. With respect to consultation with Indian tribes that may be affected by the project, the applicants acknowledge the failure to consult, explaining that it was the result of

¹⁵ The rejection letter noted that, although the license applications had stated that there were no Indian tribes that would be affected by the project, the Kentucky Heritage Council (in a June 7, 2012 email to Commission staff that was placed in the public records of the proceedings on August 7, 2012) had identified 13 tribes that may have an interest in the proposed projects.

¹⁶ See License Applications at 2 and Exhibit G maps attached to the applications. In their rehearing requests, Lock 12 Hydro and Lock 14 Hydro state that the Forest Service is an adjacent land owner. See Requests for rehearing at 4.

¹⁷ Thus, the projects would occupy private property (owned by the Kentucky River Authority) that is located within the external boundaries of the national forests.

¹⁸ The applicants have indicated their willingness to do so in their rehearing requests.

flawed research on the basis of which the applicants concluded that there were no Indian tribes to consult. However, the Kentucky Heritage Council has identified 13 tribes that historically were located in Kentucky and thus may have an interest in the proposed projects.¹⁹ The applicants state that they are “fully prepared to promptly conduct that consultation.”²⁰ The applicants appear to have substantially complied with the consultation requirements of section 4.38(a) of the regulations and have documented consultation with state and federal agencies and stakeholders. We find that the failure to consult with Indian tribes is a deficiency, but that it, either alone or in combination with the other deficiencies, does not warrant rejection of the applications as patently deficient. The applicants will have 90 days from the date of this order to provide documentation of consultation with Indian tribes.

16. Section 4.38(c) of the regulations requires a potential applicant to “diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies and Indian tribes” that are necessary for the Commission to make an informed decision regarding the merits of the application.²¹ The rejection letters determined that the applications were deficient because they did not “identify or provide details of any cultural resource studies, including agency recommendations for, or comments on, such studies.” In fact, the applications show that, beginning in 2009 the applicants conducted pre-filing consultation and held site visits for cultural resource issues with various resource agencies, including the Kentucky Department of Natural Resources and Environmental Protection, the Kentucky Department of Parks, and the Kentucky State Historic Preservation Officer.²² However, there is no evidence that any of the resource agencies requested cultural resource studies. The applications cannot be found deficient for a failure to provide such information if it is not requested by the agencies.

17. The rejection letters found that the applications failed to identify any relevant comprehensive plans for the Commonwealth of Kentucky or contain any explanation of

¹⁹ See the email, dated June 7, 2012, from Kentucky Heritage Council to Commission staff (placed in the public records of the proceedings on August 7, 2012).

²⁰ Requests for Rehearing at 4.

²¹ 18 C.F.R. § 4.38(c) (2012). The studies must be completed prior to filing an application if the results are needed to determine the impact of the project on important natural or cultural resources. 18 C.F.R. § 4.38(c)(1)(i)(B) (2012).

²² See License Applications at page E-n-1 through E-n-65. The applicants assembled resource agency recommendations into a Memorandum of Agreement for review by all consulting entities.

the proposed projects' consistency with such plans, as required by section 4.38(f)(6) of the regulations.²³ While this is indeed a deficiency in the applications, it is not a serious deficiency that would warrant their rejection as patently deficient. The applicants should be able to provide this information within the 90 days provided by our regulations.

B. Section 4.32(a) requirements

18. The applicants failed to submit an Initial Statement with their applications, as required by section 4.32(a) of the regulations.²⁴ Inasmuch as the applicants provided much of this information in their preliminary permit applications and NOI/PADs, they should be able to provide this information within the 90 days provided by our regulations.

C. Section 4.61 of the regulations

19. The rejection letters found that: (1) Exhibit A of the applications did not provide dimensions of the dam, dike and lock/tailrace, and how the transmission line would be built (above ground on poles, or buried), as required by section 4.61(c)(1)(viii) of the Commission's regulations;²⁵ and (2) Exhibit F of the applications (i.e., the project design drawings) was not clearly legible and did not include elevation or section views of some of the project facilities, as required by section 4.61(e) of the regulations (which incorporates the requirements of section 4.41(g) of the regulations). We agree that these are deficiencies in the applications, but the applicants should be able to provide this information within the 90 days provided by our regulations.

20. Sections 4.61(d)(2) of the regulations describes the Exhibit E requirements for license applications for projects like the ones we have here (i.e., major project, less than 5-MW capacity, at an existing dam). The rejection letters found that Exhibit E of the applications was deficient because it failed to include: a description of post-construction re-seeding and/or vegetation methods; and descriptions, including acreages, of the terrestrial vegetation and wildlife within the project boundary, the vegetation that would be cleared due to project-related activities, then re-seeded and/or re-vegetated, and the vegetation that would be permanently lost due to construction of project facilities.

²³ 18 C.F.R. § 4.38(f)(6) (2012).

²⁴ 18 C.F.R. § 4.32(a) (2012). An Initial Statement includes a list of the names and addresses for every county, city, town, or local political subdivision in which any part of each project would be located. There is only one county that each project would be located within; those counties were consulting entities during the applicants' pre-filing application process.

²⁵ 18 C.F.R. § 4.61(c)(1)(viii) (2012) (requires the sizes, capacities, and construction materials of all project features).

21. While ultimately Commission staff may need this information to process the applications, section 4.61(d)(2) of our regulations²⁶ is more general in nature and does not specifically require that this information be included in Exhibit E. Therefore, the applicants' failure to provide the information was not a deficiency. Rather, to the extent staff needs this information to make an informed decision on the license applications, it may request it as additional information.

22. In addition, the rejection letters found that Exhibit E of the applications was deficient because it lacked a description of the location of proposed construction sites for project facilities, lacked a discussion of potential project effects to soils and wetlands and specific measures to mitigate soil impacts, and contained an insufficient discussion regarding threatened and endangered species (and their critical habitat) in the project area. A review of the Exhibit Es indicates that the applications included discussions of wetlands, soils, and endangered species that met the requirements of section 4.61(d)(2) of the regulations. To the extent Commission staff needs more detailed information to process the application, staff may request it as additional information.

23. Section 4.61(d)(2)(i) requires that the Exhibit E include a description of the environmental setting of the proposed project, including among other things, archeological resources, scenic, and aesthetic resources.²⁷ The license applications included a January 27, 2012 letter from the Kentucky Heritage Council to the applicants, stating that the proposed projects and related transmission lines would potentially have direct and indirect effects on cultural resources. In light of the agency's comments, the Exhibit E should have included a discussion of these potential impacts. This is a deficiency in the applications, but the applicants should be able to provide this information within the 90 days provided by our regulations.

24. Section 4.61(d)(2)(i) requires that the Exhibit E include a discussion of any sites included in, or eligible for inclusion in, the National Register of Historic Places (National Register).²⁸ On June 28, 2012, the Kentucky State Historic Preservation Office (Kentucky SHPO) filed a letter stating that it considers Lock and Dam 14 and Lock and Dam 12 eligible for listing in the National Register. The rejection letters found that Exhibit E of the license applications was deficient, because it did not identify or provide a description of any sites included in, or eligible for inclusion in, the National Register. The license applications did include descriptions of the locks and dams, but not in terms of their eligibility for listing in the National Register. We agree that this is a deficiency

²⁶ 18 C.F.R. § 4.61(d) (2012).

²⁷ *See* 18 C.F.R. § 4.61(d)(2)(i) (2012).

²⁸ 18 C.F.R. § 4.61(d)(2)(i) (2012).

in the applications, but the applicants should be able to provide this information within the 90 days provided by our regulations.

25. The rejection letters found that Exhibit F of the license applications was deficient, because it did not include a supporting design report to demonstrate that existing and proposed structures are safe and adequate to fulfill their stated functions.²⁹ The regulations specifically require that an applicant submit the supporting design report with its license application. The applicants' failure to file a supporting design report is a serious deficiency and may be difficult to correct in the 90 days provided by our regulations. However, given the nature of the deficiencies, either alone or in combination with the other deficiencies, we believe that the applicants should be given an opportunity to provide the missing information. Accordingly, we will grant Lock 12 Hydro's and Lock 14 Hydro's rehearing requests and reinstate their applications.

26. Section 4.32(e)(1) of our regulations³⁰ provides that applicants will be afforded a maximum of 90 days to cure deficiencies in their applications. We will give Lock 12 Hydro and Lock 14 Hydro 90 days to correct the deficiencies. If the deficiencies are not corrected within the 90-day period commencing with the issuance date of this order, the applications will be rejected.³¹

The Commission orders:

(A) The request for rehearing filed by Lock 12 Hydro Partners, LLC on September 6, 2012, in the Ravenna Hydroelectric Project No. 13214 proceeding is granted.

(B) The request for rehearing filed by Lock 14 Hydro Partners, LLC on September 6, 2012, in the Heidelberg Hydroelectric Project No. 13213 proceeding is granted.

(C) Lock 12 Hydro Partners, LLC's application for license for Project No. 13214 is reinstated as of its original filing date, as deficient, pursuant to section 4.32(e)(1) of the Commission's regulations, 18 C.F.R. § 4.32(e)(1) (2012).

²⁹ Section 4.61(e) of the regulations incorporates the requirements of section 4.41(g) of the regulations.

³⁰ 18 C.F.R. § 4.32(e)(1) (2012).

³¹ Correcting the deficiencies means providing complete and satisfactory information. If the applicants have questions about the level of detail that is necessary, they may consult with Commission staff.

(D) Lock 14 Hydro Partners, LLC's application for license for Project No. 13213 is reinstated as of its original filing date, as deficient, pursuant to section 4.32(e)(1) of the Commission's regulations, 18 C.F.R. § 4.32(e)(1) (2012).

(E) Within 90 days of the issuance date of this order, Lock 12 Hydro Partners, LLC and Lock 14 Hydro Partners, LLC shall file the following information and documentation to correct deficiencies in their license applications for Project No. 13214 and Project No. 13213, respectively:

1. Consultation. Provide evidence of consultation with any Indian tribe that may be affected by the proposed projects, as required by 18 C.F.R. § 4.38(a) (2012). See the June 7, 2012 email from the Kentucky Heritage Council, placed in the record on August 7, 2012, and identifying 13 Indian tribes that may have an interest in each of the proposed projects.

2. Comprehensive Plans. Pursuant to 18 C.F.R. § 4.38(f)(6) (2012), provide an explanation of how and why each project would, would not, or should not, comply with any relevant comprehensive plan, as defined in section 2.19 of the Commission's regulations, 18 C.F.R. § 2.19 (2012), for the Commonwealth of Kentucky, and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan.

3. Initial Statement. Provide an initial statement that sets forth the information required under 18 C.F.R. §4.32(a)(2), (3), and (4) (2012).

4. Exhibit A. Pursuant to 18 C.F.R. § 4.61(c)(1)(viii) (2012), provide in the Exhibit A, the sizes, capacities, and construction materials of all project features, including the dimensions of the dam, dike, and lock/tailrace, and provide a description of how the transmission line will be built (above ground on poles or buried).

5. Exhibit E. Pursuant to 18 C.F.R. § 4.61(d)(2)(ii) (2012), provide in the Exhibit E (Environmental Report):

a. description of the expected environmental impacts on resources, including soils, wetlands (and other fish and wildlife resources), and cultural resources, from proposed construction or development and proposed operation of each project, including a discussion of the potential for archeological resources to occur at the proposed projects (including the proposed transmission line corridors) and to be affected by the proposed projects;

b. a discussion of Lock and Dam 14 and Lock and Dam 12 as eligible for listing in the National Register of Historic Places, including a description of the expected environmental impacts of the construction and operation of the project on these historic properties.

6. Exhibit F.

a. Pursuant to 18 C.F.R. §§ 4.61(e) and 4.41(g) (2012), clarify the Exhibit F drawings to legibly show all major project structures in sufficient detail (with dimensions and labels) to provide a full understanding of the project, including plans (overhead view), elevations (front view), profiles (side view), and sections; and supporting information used as the basis of design.

b. Pursuant to 18 C.F.R. §§ 4.61(e) and 4.41(g)(3)-(4) (2012), submit a Supporting Design Report.

(F) Within 90 days of the issuance date of this order, Lock 12 Hydro Partners, LLC and Lock 14 Hydro Partners, LLC shall supplement their license applications for Project No. 13214 and Project No. 12313, respectively, by filing additional information documenting consultation with the Forest Service.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.