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Memorandum

To: Brian Christianson, Chair, Rock-Koshkonong Lake District
From: Attorney Mary Beth Peranteau
Date: December 2, 2010
Re: RKLD/Indianford: Procedure to Apply for Exemption from FERC Hydro Licensing

The Federal Power Act (“FPA”) contains the requirements for licensing of hydroelectric facilities, including provisions for obtaining an exemption for small (nameplate capacity less than 15 MW) hydro.

This memo will outline the procedure for obtaining a license exemption for the Indianford Dam, including information regarding the previous application submitted by Indianford Water Power Company, Inc. (“IWPC”) and whether the information previously filed could be used in some form to satisfy RKLD’s filing requirements.

I. Preliminary Permit

For any license or exemption sought under the FPA, the applicant may submit a preliminary permit application under Sections 4(f) and 5 of the FPA (16 U.S.C. §§ 797(f) and 798). The sole purpose of securing a preliminary permit is to maintain the priority of the application (for up to 3 years) for the purpose of enabling the permittee “to make examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.” 16 U.S.C. § 798. The preliminary permit does not grant any authority to undertake any construction on the proposed project. Preliminary permits are not transferable, expire 36 months from the effective date, and may be canceled by order of the Commission upon failure of permittees to comply with conditions thereof “or for other good cause shown after notice and opportunity for hearing.” The permit requires the permittee to file progress reports every 6 months that describe the nature and timing of what the permittee has done in pursuit of obtaining the information required to file its application.

The preliminary permit does not expedite FERC's processing of an eventual license or exemption application. Nor does it seem strictly necessary to secure the priority of RKLD's application over competing developers, since RKLD has sole control of the site. However, there may be some public relations value to obtaining a preliminary permit from FERC.

The contents of an application for a preliminary permit are set forth in 18 CFR §§ 4.32 and 4.81. The applicant is required to provide basic information about the permittee(s), the location of the project, the counties, municipalities and individual property owners in and around the project location, and a fair amount of detail regarding the dimensions and configuration of the project, age and condition of structures, spillways, powerhouse, turbines, generators, etc., detail regarding the impoundment dimensions, estimated transmission facilities, energy output, legal description of lands within the project boundary, and studies to be conducted and their estimated cost, sources of financing, and maps of the project area.

II. Application for License Exemption

The statutory authority to obtain a FERC license exemption is set forth in 16 U.S.C. § 823a. That section provides an exemption to FPA licensing requirements for hydro facilities with a capacity of 15 megawatts or less. Section 823a(c) requires that the applicant for an exemption consult with federal and state fish and wildlife agencies, and that the exemption “shall include” [mandatory] terms and conditions as those agencies deem appropriate “to prevent loss of, or damage to, such resources.” In addition, 16 U.S.C. § 2705 (PURPA) authorizes FERC to grant a license exemption to projects with a capacity of 5 MW or less, that use for the generation of electricity an existing dam (*i.e.*, one in existence on or before July 22, 2005), subject to the same limitations to ensure protection for fish and wildlife as well as other environmental concerns as those which are set forth in subsections (c) and (d) of 16 U.S.C. § 823a.

The Wisconsin DNR has delegated authority under the Federal Power Act to impose mandatory terms and conditions on license exemptions, notwithstanding any other authority or limits on its authority under State law.

The Code of Federal Regulations in 18 CFR Part 4 sets forth the specific procedural steps and filing requirements for obtaining a FERC license exemption for a small hydro project. In general, the filing requirements consist of an “initial consultation package,” followed by an application for exemption. IWPC filed its initial consultation package about 8 months after filing a preliminary permit application. It never filed an application – apparently giving up on the process some 30 months after the preliminary permit was issued. Based on my review of the docket, it appears that the uncertainty introduced by RKLD's petition to increase water levels influenced this outcome.

18 CFR § 4.38 Consultation requirements

This regulation requires a prospective applicant for an exemption to consult with “the relevant Federal, State, and interstate resource agencies, including . . . the United States Fish and Wildlife Service, . . . the United States Environmental Protection Agency, . . . the appropriate State fish and wildlife agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act). . . .” WDNR is the certifying agency under the Clean Water Act.

The prospective applicant must promptly contact each of the appropriate resource agencies and members of the public likely to be interested in the proceeding, and provide them with a detailed set of information (the “Initial Consultation Package”).¹ Information required to be provided includes:

Requirement 18 USC § 4.38(2)	IWPC Filing	Notes
Detailed maps showing project boundaries, land descriptions of the entire project area, also showing the specific location of all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities.	Appendix 2: “Gazeteer” type map; Appendix 3: USGS contour map; Appendix 4: two detail maps showing roads and project boundaries; Appendix 6: Photos	Readily obtainable from public sources. NOTE that applicant must demonstrate that it owns or has an option to purchase all the real property interests required for the project, including the right-of-way for transmission lines.
A general engineering design of the proposed project, with a description of any proposed diversion of a stream through a canal or penstock.	Section 2.B. and Appendix 5: Mead & Hunt plan and section views of powerhouse and spillway	RKLD has possession of M&H engineering drawings/reports done on behalf of Rock County as part of the purchase agreement.
A summary of the proposed operational mode of the project.	Section 2.C; Appendix 7: WDNR water level order (4/25/1991)	Run-of-river mode was specified by USFW and WDNR in consultations.
Identification of the environment to be affected, the significant resources present, and the applicant's proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time.	Section 3; Appendix 9: wetland mapping; Appendix 10: Lake Koshkonong Survey Map; Appendix 11: Rock River fish survey (1989-90); Appendix 12: WDNR correspondence re: fish passage; Appendix 13: animals potentially in study area;	Updates for several items are likely available. Joint RKLD-DNR water level study from 2002 now available. WDNR comments (June 2001) indicated fisheries data needed to be updated, and noted a partially completed fisheries study to determine water flow distribution and water level impacts on fish movement in and

¹ NOTE: It appears that the Initial Consultation Package submitted by IWPC was essentially a draft version of its application because it included all the sections required under 18 CFR § 4.107 (see below) for an exemption application. It appears that this approach would enable resource agencies or others to point out any mistake or inadequacy in the proposed application before it is filed.

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<p>Identification of the environment to be affected, the significant resources present, and the applicant's proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time (cont'd).</p>	<p>Appendix 14: threatened and endangered species; Appendix 15: excerpts from Lower Rock River Basin WQ Management Plan (Feb. 1998 draft); Appendix 16: Wisconsin WQ Standards; Appendix 17: EPA Stored Water Quality; Appendix 18: Urban Services Area of Dane Co.; Appendix 19: 1990 Rock County Land Use Study; Appendix 20: Jefferson County Land Use Plan (Oct. 1999); Appendix 21: Rock River Recreational Boating Survey (1989-1990); Appendix 22: Wisconsin Outdoor Recreation Plan (2000-2005); Appendix 23: Rock County Park and Outdoor Rec Plan (1997-2002); Appendix 24: Excerpts from Jefferson Co Parks and Open Space Plan; Appendix 25: Excerpts from Dane County Parks and Open Space Plan; Appendix 26: Archeological Survey correspondence</p>	<p>out of reservoir. DNR also referenced a forthcoming fish passage rule and reserved the right to require a fish passage at a later date.</p>
<p>Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations.</p>	<p>Section 2.D., including tables and graphs, some of which appear to be MA-RS generated.</p>	<p>More recent streamflow and water regime information likely to be in the possession of MA-RS from water level proceedings.</p>
<p>A statement (with a copy to the Commission) of whether or not the applicant will seek benefits under section 210 of PURPA by satisfying the requirements for qualifying hydroelectric small power production facilities.</p>	<p>Nothing included</p>	<p>PURPA was amended in 2005 to eliminate the requirement that utilities purchase energy from small power producers ("qualifying facilities") at avoided cost. Market rates would apply to negotiation.</p>

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<p>Detailed descriptions of any proposed studies and the proposed methodologies to be employed.</p>	<p>Section 4: IWPC proposed to use existing information for environmental studies; already conducted historic evaluation and shoreline archeological study</p>	<p>USFW and DNR requested that the applicant contract for an incremental flow release/stage analysis below the dam to study dam operation during low flow periods.</p> <p>USFW and DNR requested monitoring of temperature and D.O. levels over a 12-month period.</p> <p>USFW wanted an updated wildlife survey; and wanted the application to describe wetland species composition and relative abundance, referencing 2000 aquatic plant survey.</p> <p>USFW wanted detailed plans for : (1) R-O-R operation specifics; (2) emergency and planned shutdowns; (3) documenting compliance with operating rules; (4) log sluicing; (5) drawdowns; (6) feasibility study to prevent fish entrainment/mortality; and (7) drought contingency plan.</p>
<p>Any statement required by § 4.301(a) of this part.</p>		<p>Under this regulation, the applicant must inform resource agencies that it intends to seek an exemption to licensing requirements.</p>

The prospective applicant must confer with the above-referenced resource agencies and interested members of the public on project design, the impact of the proposed project (including a description of any existing facilities, their operation, and any proposed changes), reasonable hydropower alternatives, and what studies the applicant should conduct. While there are formal deadlines for resource agencies to submit comments after the application for exemption is filed (see below), it appears that the agencies routinely file comments on the ICP.

18 CFR § 4.107 Contents of application for exemption from licensing.

The application for exemption must contain an introductory statement in the format specified in the rule (identifying the applicant, project location and other basic details), and the following exhibits containing the specified information (there is no specification in this regulation for Exhibits B-D):

- A. Description of the small hydroelectric power project and its proposed mode of operation, including information concerning the existing dam and impoundment, existing and proposed generating units, how the plant is to be operated, graphs showing flow duration curves, generation estimates and hydraulic capacity, planned date of operations, any necessary repairs and modifications.
- E. Environmental report including description of environmental setting, vegetative cover, fish and wildlife resources, recreational resources, historical and archeological resources, threatened and endangered species, and expected environmental impacts of construction and operation of the project. The contents of this exhibit will be affected by pre-application consultations with resource agencies. For example USFW directed IWPC to provide more detail regarding wetland species composition and relative abundance.
- F. A set of drawings showing the structures and equipment of the project that conforms to 18 CFR § 4.41(g).
- G. Map of the project and boundary, conforming to 18 CFR § 4.41(h) requirements.

18 CFR § 4.34 Consultation on terms and conditions; filing deadlines

All comments on the application, including mandatory and recommended terms and conditions or prescriptions under Section 10(j) of the FPA (these are routinely referred to as “Section 10(j) conditions”) must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. Unless FERC finds that the Section 10(j) conditions are inconsistent with the FPA, they will become mandatory conditions of the exemption.

An interested party may obtain an extension of time from the Commission to file comments or reply comments only upon a showing of “good cause” or “extraordinary circumstances.” Late-filed terms and conditions or prescriptions do not become mandatory conditions of the exemption. Instead, they will be considered on their merits by FERC, as long as “such consideration would not delay or disrupt the proceeding.”

In addition to their roles in the consulting process and submitting Section 10(j) mandatory conditions, WDNR is the certifying agency for issuance of water quality certification (“WQC”) under Section 401(a) of the Clean Water Act, which provides that “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency certification [of compliance with the Clean Water Act] from the state in which the discharge originates.”

The language of the Clean Water Act, as interpreted by federal courts, gives the state a great deal of leeway in setting water quality standards and demanding that projects that require WQC meet specific criteria (such as a particular stream flow requirement) based on open-ended “use criteria” for a particular project and a particular waterway. Chs. NR 102-105, Wis. Admin. Code set forth water quality standards for state surface waters, pursuant to sec. 281.15(2)(b), Stats. See Chapters NR 102 and NR 104.

Within 60 days of the date of issuance of FERC’s notice that the application is ready for environmental analysis, the applicant must either file a copy of the water quality certification (“WQC”) issued by WDNR, or a copy of the applicant’s request for WQC, or evidence that WQC was waived. Waiver can occur by DNR’s failure to act within one year of receiving a written request for WQC.

18 CFR § 4.93 Action on exemption applications

FERC will circulate a notice of application for exemption to interested agencies and Indian tribes at the time the applicant is notified that the application is accepted for filing. License exemptions contain standard conditions under 18 CFR § 4.94.

The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act, as specified in exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of exemption application. The Commission may also require that the exempt facilities be modified in structure or operation in the future “in order to best develop, conserve, and utilize in the public interest the water resources of the region,” and if not modified, may revoke the exemption.

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The Commission may revoke the exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the effective date of the exemption. If an exemption is revoked under this article, the Commission will not accept a subsequent application for exemption from licensing or a notice of exemption from licensing for the same project within two years of the revocation.

In addition, under sec. 4.93(c), the Commission may prescribe terms or conditions in addition to those set forth in 4.94, in order to: “(1) protect the quality or quantity of the related water supply for agricultural, municipal, or industrial consumption; (2) otherwise protect life, health, or property; (3) avoid or mitigate adverse environmental impact; or (4) conserve, develop, or utilize in the public interest the water power resources of the region.”