

138 FERC ¶ 62,297

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Kenai Hydro, LLC

Project No. 13212-002

ORDER ISSUING SUCCESSIVE PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(March 23, 2012)

1. On October 3, 2011, Kenai Hydro, LLC (Kenai Hydro) filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the Grant Lake Project. The project would be located on Grant Lake and Creek, near the town of Moose Pass, in Kenai Peninsula Borough, Alaska. The project would occupy federal lands managed by the Chugach National Forest.

I. Project Proposal

2. The proposed project would consist of: (1) either (a) a 2-foot-high by 120-foot-long, concrete gravity dam at Grant Lake, or (b) a natural lake outlet, with a 48-inch-diameter pipe extending back into Grant lake, a gate house, regulating gate, controls, and monitoring equipment; (2) Grant Lake, the project reservoir, with a total storage capacity of 15,900 acre-feet and a water surface area of 1,790 acres at full pool elevation of 700 feet above mean sea level; (3) a 3,200-foot-long, 10-foot-diameter horseshoe tunnel; (4) a 72-inch-diameter, 360-foot-long, welded steel penstock; (5) a 200-foot-long open channel tailrace; (6) a 45-foot by 60-foot by 30-foot-high powerhouse containing two horizontal Francis type turbine units totaling 5 megawatts (MW) (1 x 4 MW unit and 1 x 1 MW unit) of generating capacity; and (7) a transmission line consisting of either a 3.5-mile-long, 24.9 kilovolt (kV) transmission line, or a 1-mile-long, 115 kV transmission line, connecting the powerhouse to the City of Seward's or to Chugach Electric's transmission line. The total energy output would be 19,700 megawatt-hours, which would be sold to a local utility.

¹ 16 U.S.C. § 797(f) (2006).

II. Background

3. The Commission issued public notice of Kenai Hydro's preliminary permit application on December 29, 2011. Timely motions to intervene were filed by the U.S. Department of Agriculture, Forest Service (Forest Service) and the Kenai River Watershed Foundation (Kenai River) on January 24, 2012 and January 27, 2012, respectively.² The Center for Water Advocacy (Center) filed an out-of-time motion to intervene on February 28, 2012 and filed an amended the motion to intervene on the same day.³ Kenai River filed comments with its motion to intervene. Comments were also filed by the State of Alaska, Department of Natural Resources (Natural Resources) on February 27, 2012. The Forest Service and the Center did not file comments.

III. Discussion

4. 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,⁴ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁵ Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.⁶

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Regulations. *Id.* § 385.214(a)(3) (2011).

³ The Center for Water Advocacy's motion to intervene was approved by notice issued March 16, 2012.

⁴ 16 U.S.C. § 802 (2006).

⁵ *See, e.g., Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

⁶ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it 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

(continued)

5. The applicant has previously held a preliminary permit for this site under Project No. 13212-000. The Commission will grant successive permits if it concludes that the applicant has diligently pursued the requirements of its prior permits in good faith. Kenai Hydro has provided information to Commission staff demonstrating that it is currently making progress with the analysis of the project's feasibility, and towards the development of its proposed project. It is expected that during this permit term, agency consultation will be conducted and a development application will be prepared pursuant to sections 4.38 and 4.41 of the Commission's regulations.

6. The Commission usually does not prescribe in great detail what a permittee must accomplish under a permit. However, a successive permit can warrant a greater degree of Commission oversight. Therefore, we will monitor the progress of the permittee's activities. If the permittee fails to make significant progress toward developing a development application, the permit may be subject to cancellation.

7. In general, Kenai River's and Natural Resources' comments concern the proposed project's potential environmental effects, economic impacts to the local economy, and/or current land-use conflicts in the project's area. However, we note that a preliminary permit does not authorize a permittee to undertake construction of the proposed project or any ground disturbing activities. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied. As such, the concerns raised by Kenai River and Natural Resources, are not relevant to the preliminary permit application, in that they address the potential effects of constructing and operating the proposed project. However, these issues are appropriately addressed during the development of the applicant's license application and through the Commission's licensing process.

IV. Permit Information

8. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the development of a license application. On August 6, 2009, Kenai Hydro filed a Notice of Intent (NOI) and Pre-Application Document (PAD)⁷ for the Grant Lake Project and is utilizing the Commission's TLP for the licensing of the project.⁸ Notice of the NOI and PAD and

any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); *see also Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

⁷ Kenai Hydro filed a revised PAD on May 3, 2010.

⁸ Kenai Hydro's TLP request was approved on September 15, 2009.

approving use of the TLP was issued on September 16, 2009. On May 11, 2010, Notice of scoping meetings, environmental site review, and soliciting scoping comments was issued. Commission staff hosted an evening and a daytime scoping meeting on June 2 and June 3, 2010, respectively. An environmental site review was held on June 2, 2010. Kenai Hydro is currently preparing its license application for the proposed project.

9. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-month period from the effective date of this permit. A progress report must describe the nature and timing of what the permittee has done under the pre-filing requirements of section 4.38 and Part 5 of the Commission's regulations for the specific reporting period. A permit may be cancelled if a permittee fails to file a timely progress report or if the report does not demonstrate that progress is being made by the permittee. The late filing of a report or the supplementation of an earlier report in response to a notice of probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

10. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.⁹

The Director orders:

(A) A preliminary permit is issued for the Grant Lake Project No. 13212-002 to Kenai Hydro, LLC, for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

⁹ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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(C) 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 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2011).

Timothy J. Welch, Chief
West Branch
Division of Hydropower Licensing

Form P-1 (Revised April 2011)**FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the 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 application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. No later than the last day of each six-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling.asp>. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

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