

156 FERC ¶ 62,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Whitewater Green Energy, LLC

Project No. 14383-006

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

(Issued August 10, 2016)

1. On January 22, 2016, the Whitewater Green Energy, LLC (Whitewater Green Energy) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA)¹ to study the feasibility of the proposed Whitewater Hydroelectric Project No. 14383-005 (Whitewater Project or project), to be located on Russel and Whitewater Creeks, near the town of Idanha, in Marion and Linn Counties, Oregon. The project would be located entirely on U.S. Department of Agriculture's Forest Service (Forest Service) lands.

I. Project Proposal

The proposed project would consist of the following new facilities: (1) a 9.5-foot-high, 40-foot-wide weir on Russell Creek; (2) a 19,500-foot-long, 60-inch-diameter steel penstock; (3) a 50-foot-long by 40-foot-wide concrete powerhouse containing one Pelton turbine rated at 11 megawatts; (4) a 160-foot-long, 72-inch-diameter tailrace discharging into Whitewater Creek; (5) an underground 2.25-mile-long, 12.4 kilovolts transmission line extending from the powerhouse to a point of interconnection with a local utility transmission line; (6) an access road running alongside the penstock route; and (7) appurtenant facilities. The estimated annual generation of the Whitewater Creek Project would be 95.04 gigawatt-hours.

II. Background

2. The Commission issued public notice of Whitewater Green Energy's permit application on April 29, 2016. The Oregon Department of Fish and Wildlife and the Forest Service filed timely notices of intervention.² American Rivers, American Whitewater, Oregon Wild, and WaterWatch of Oregon collectively filed timely motions

¹ 16 U.S.C. § 797(f) (2012).

² Timely notices of intervention filed by the Forest Service and state fish and wildlife agencies are granted by operation of Rule 214(a)(2). 18 C.F.R. § 385.214 (2015).

to intervene and comments.³ Oregon Wild also individually filed timely motions to intervene and comments. The U.S. Department of the Interior filed a letter stating that it had no comments.

III. Discussion

3. Oregon Wild expresses concern with the project's effects on soils and geologic, aquatic, terrestrial recreation, and cultural resources, as well as hydrologic and fluvial movements of wood and sediment. Oregon Wild also expresses concern about the possibility of project failure due to erosion, landslide, or tree fall.

4. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

5. Oregon Wild also expresses concern that the project would not be consistent with two conservation plans (the Northwest Forest Plan and the U.S. Fish and Wildlife Service's 2011 Revised Recovery Plan for the Northern Spotted Owl).

6. These comments are premature at the permit stage, as consistency with management plans is determined during the licensing process.

IV. Permit Information

7. 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

³ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's regulations. 18 C.F.R. § 385.214(c) (2015).

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.").

project and to prepare a license application, it grants no land-disturbing or other property rights.⁶

8. Whitewater Green Energy has previously held a preliminary permit for this site under Project No. 14383-000. The Commission will grant successive permits if it concludes that the applicant has diligently pursued the requirements of its prior permits in good faith. Whitewater Green Energy has filed a Notice of Intent (NOI) and a Pre-Application Document (PAD), and has completed most of the studies demonstrating it has made progress during its prior permit term 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 completed and a development application will be filed pursuant to sections 5.17 and 5.18 of the Commission's regulations.

9. The Hydropower Regulatory Efficiency Act of 2013 authorizes the Commission to extend preliminary permit terms for not more than two additional years if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.⁷ Given that the legislation suggests that five years is a sufficient maximum period to prepare a development application, it seems appropriate, as a general matter, to limit to two years any subsequent permits that follow three-year initial permits. Thus, as indicated below, this successive preliminary permit is granted for a 24-month term.

10. 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, the Commission 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.

11. 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

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 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 Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. 798(b) (2012)).

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.

12. 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.⁸

The Director orders:

(A) A preliminary permit is issued for the Whitewater Hydroelectric Project No. 14383 to Whitewater Green Energy, LLC for a period effective the first day of the month in which this permit is issued, and ending either 24 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.

(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. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

Janet Hutzell, Chief
Midwest Branch
Division of Hydropower Licensing

⁸ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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.

Document Content(s)

P-14383-006Order.DOC.....1-5