

UNITED STATES OF AMERICA 156 FERC ¶ 62,104
 FEDERAL ENERGY REGULATORY COMMISSION

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| FFP Project 57, LLC | Project Nos. P-14486-001 |
| FFP Project 56, LLC | P-14487-001 |
| FFP Project 55, LLC | P-14488-001 |
| FFP Project 119, LLC | P-14489-001 |
| FFP Project 118, LLC | P-14490-001 |

ORDER DENYING EXTENSION OF PRELIMINARY PERMIT TERMS

(Issued August 5, 2016)

1. On June 30, 2016, Rye Development (Rye) filed, on behalf of its subsidiaries, timely applications for a two-year extension of its preliminary permits for the following proposed projects: the Kentucky River Lock and Dam #4 Water Power Project No. 14486 (Kentucky River #4 Project), the Kentucky River Lock and Dam #3 Water Power Project No. 14487 (Kentucky River #3 Project), the Kentucky River Lock and Dam #2 Water Power Project No. 14488 (Kentucky River #2 Project), the Green River Lock and Dam #2 Water Power Project No. 14489 (Green River #2 Project), and the Green River Lock and Dam #1 Water Power Project No. 14490 (Green River #1 Project).

2. Each of the Kentucky River projects would be located at a lock and dam owned and operated by the Kentucky River Authority in Franklin County, Kentucky. Each of the Green River projects would be located at a U.S. Army Corps of Engineers' (Corps) lock and dam. The Green River #2 Project would be located on the Green River in McLean County, Kentucky, and the Green River #1 Project would be located on the Green River in Henderson County, Kentucky. For the reasons discussed below, Rye's requests for an extension are denied.

I. Background

3. On August 28, 2013, Commission staff issued Rye preliminary permits to study the feasibility of the proposed Kentucky River #4 Project,¹ Kentucky River #3 Project,² Kentucky River #2 Project,³ Green River #2 Project,⁴ and Green River #1 Project.⁵

¹ See 144 FERC ¶ 62,179 (2013).

² See 144 FERC ¶ 62,180 (2013).

³ See 144 FERC ¶ 62,181 (2013).

4. Each of the five proposed projects would utilize an existing lock and dam and consist of an intake channel, a powerhouse containing two generating units, a tailrace with a retaining wall, a substation; and a transmission line.

5. On June 30, 2016, Rye filed timely requests for a two-year extension of the five existing preliminary permits above, which are all due to expire on July 31, 2016.

II. Discussion

A. Good Faith and Reasonable Diligence Standard

6. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits to potential license applicants for a period of up to three years.⁶ In 2013, Congress amended the FPA to provide that a preliminary permit can be extended once for not more than two additional years beyond the three-year term allowed, if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.⁷

7. In general, pursuing the requirements of a permit in good faith and with reasonable diligence has meant that, at a minimum, a permittee timely filed progress reports, consulted with resource agencies, and conducted environmental studies, such that Commission staff is able to discern from the permittee's progress reports a pattern of progress toward the preparation of a development application.

8. As specified in Rye's preliminary permits, "during the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application." The preliminary permit further notes that the "pre-filing process begins with preparation of a Notice of Intent (NOI) and PAD pursuant to sections 5.5 and 5.6 of the Commission's regulations."⁸

⁴ See 144 FERC ¶ 62,182 (2013).

⁵ See 144 FERC ¶ 62,183 (2013).

⁶ 16 U.S.C. § 797f (2012).

⁷ Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. § 798(b)).

⁸ 18 C.F.R. §§ 5.5 and 5.6 (2015).

9. During the 35 months Rye has held these preliminary permits, it has not initiated the pre-filing consultation process or demonstrated a pattern of progress toward the development of a license application such as documentation of consultation meetings on the need for environmental studies or documentation of progress toward the completion of any needed environmental studies. Instead, although the corresponding progress reports that Rye filed under its preliminary permits were timely, they are identical, only mentioning an ongoing feasibility evaluation and review for each project. The final report for each project concludes with the declaration that “in the subsequent six-month period Rye plans to make a determination as to whether or not the project is economically viable at the time”. While this information is important in establishing the economic viability of the project, it is expected that the permittee will gather this information early in the permit term so that there will be sufficient time, if the project is determined to be feasible, to engage in agency consultation, conduct necessary studies, prepare an NOI and PAD, and proceed toward developing a license application.

10. The essence of the Commission’s policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it.⁹ Because Rye has failed to demonstrate that it carried out the required activities under its permit with reasonable diligence, an extension of the term of its preliminary permit is not warranted and would contribute to site banking. Therefore, Rye’s requests to extend the term of its preliminary permits for the Kentucky River #4 Project No. 14486, the Kentucky River #3 Project No. 14487, the Kentucky River #2 Project No. 14488, the Green River #2 Project No. 14489, and the Green River #1 Project No. 14490 are denied.

The Director Orders:

(A) Rye Development’s requests to extend by two years the terms of its preliminary permits for the Kentucky River Lock and Dam #4 Water Power Project No.

⁹ See *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at PP 26-27 (2012) citing to section 4(f) of the FPA, 16 U.S.C. § 797(f) (2012), which states that the purpose of a preliminary permit is to enable applicants for a license to secure the data and to perform the acts required by section 9 of the FPA, 16 U.S.C. § 802 (2012). Section 9 requires license applicants to submit to the Commission such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project (i.e., an acceptable license application). In order for an applicant to submit an acceptable license application, it must have consulted with relevant resource agencies regarding the information the agencies will need in the environmental document, and therefore what studies the applicant must conduct to obtain that information prior to the filing of a license application. 18 C.F.R. § 4.38 (2015).

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14486, the Kentucky River Lock and Dam #3 Water Power Project No. 14487, the Kentucky River Lock and Dam #2 Water Power Project No. 14488, the Green River Lock and Dam #2 Water Power Project No. 14489, and the Green River Lock and Dam #1 Water Power Project No. 14490 are denied.

(B) This order is issued under authority delegated to the Director and 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 FPA, 16 U.S.C. § 8251 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

Vince Yearick
Director
Division of Hydropower Licensing

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