

147 FERC ¶ 62,078
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ECOspensible, Inc.

Project No. 14559-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(May 1, 2014)

1. On October 24, 2013, and revised on January 14, 2014, ECOspensible, Inc. (ECOspensible) 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 Setting Pole Rapids Dam Hydro Project (project)² to be located on the Raquette River, in Franklin County, New York, near the Town of Tupper Lake, New York.

I. Project Proposal

2. The proposed project would consist of: (1) three RivGen turbine generator units with a total installed capacity of 1,487 kilowatts to be installed downstream of the existing Setting Pole Rapids dam³ on the Raquette River; (2) a shore power station housing two inverters to convert direct current to alternating current; (3) an overhead 1,450-foot-long, 46.1-kilovolt (kV) transmission line extending from the project to the interconnection with National Grid; and (4) appurtenant facilities. The estimated annual generation of the Setting Pole Rapids Dam Hydro Project would be 10,420 megawatt-hours. There are no federal lands or state lands associated with the project.

II. Background

3. The Commission issued public notice of ECOspensible's permit application on January 23, 2014. On January 31, 2014, New York State Department of Environmental Conservation (New York DEC) filed a timely notice of intervention and the New York

¹ 16 U.S.C. § 797(f) (2012).

² The Setting Pole Rapids Dam Hydro Project uses hydrokinetic energy to generate power and would be located below the Setting Pole Rapids dam.

³ Setting Pole Rapids dam is owned and operated by the Town of Tupper Lake, New York.

State Council of Trout Unlimited filed a timely motion to intervene.⁴ Comments were filed by the U.S. Department of the Interior (Interior).

III. Discussion

A. Issues Related to Project Construction and Operation

4. On March 14, 2014, Interior provided comments pursuant to the Fish and Wildlife Coordination Act to ensure protection of fish and wildlife resources, the Endangered Species Act of 1973 to ensure the protection of federally listed endangered and threatened species, the Migratory Bird Treaty Act to ensure protection of migratory bird species, and the Bald and Golden Eagle Protection Act to ensure the protection of bald eagles. Interior also stated that applicants for hydropower licenses are required to consult with the National Park Service about recreational resources, historic and archaeological values, and land management and aesthetic issues.

5. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of the preliminary permit is to study the feasibility of the project, including studying potential impacts. The issues raised in Interior's comments are premature at the preliminary permit stage because they relate to impacts resulting from or associated with the construction and operation of the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

B. Accuracy of Application

6. Interior also provided comments on the preliminary permit application regarding inaccurate information and inconsistencies. Interior identified a clerical error where ECOsponsible referred to the Raquette River as the Genesee River in one part of the application. Also, ECOsponsible indicated that the U.S. Army Corps of Engineers operates Setting Pole Rapids dam. As stated earlier in this order, Setting Pole Rapids dam is located on the Raquette River and is owned and operated by the Town of Tupper Lake. Interior also mentioned that all the interested tribes have not been identified. The Seneca Nation of Indians, Tonawanda Band of Senecas, and the Saint Regis Mohawk Tribe have been added to the mailing list for the project.

⁴ A timely notice of intervention filed by a state fish and wildlife agency is granted by operation of Rule 214(a)(2) of the Commission's regulations and a timely, unopposed motion to intervene is granted by operation of Rule 214(c). *See* 18 C.F.R. §§ 385.214(a)(2) and 385.214(c) (2013).

C. Consultation and Study Requirements under the Permit

7. Interior recommends that preparatory studies be conducted after issuance of the preliminary permit in cooperation with the New York DEC, U.S. Fish and Wildlife Service, and National Park Service. The studies would address the effects of project construction and operation on movements of fish and other aquatic organisms, the reproduction and survival of aquatic and semi-aquatic fish and wildlife resources, recreational fishing and navigation, wetland and riparian wildlife, vegetative species, and historical and archaeological resources.

8. The Commission has not sought to place all relevant study requirements in preliminary permits.⁵ Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.⁶ Further, permit conditions have been framed to ensure that the permittee does not tie up a site without pursuing in good faith a study of the project's feasibility.⁷

IV. Permit Information

9. 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,⁸ 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.⁹ 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

⁵ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

⁶ See 18 C.F.R. § 4.38 (2013).

⁷ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁸ 16 U.S.C. § 802 (2012).

⁹ 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.¹⁰

10. This permit includes conditions to closely monitor the progress of the permittee's activities. 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. 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. The Commission may cancel the permit if the permittee fails to timely file periodic progress reports, fails to show significant progress in the progress reports, or fails to timely comply with any of the other conditions of this permit for financial reasons or otherwise.

11. 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 pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.¹¹ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹² Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

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

¹⁰ 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).

¹¹ 18 C.F.R. §§ 5.5 and 5.6 (2013).

¹² *See id.* § 5.3.

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.¹³

The Director orders:

(A) A preliminary permit is issued for the Setting Pole Rapids Dam Hydro Project No. 14559 to ECOsponsible, Inc. 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.

(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 (2013).

John B. Smith, Chief
Mid-Atlantic Branch
Division of Hydropower Licensing

¹³ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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.

Document Content(s)

P-14559-000Order.DOC.....1-6