

135 FERC ¶ 62,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Kahawai Power 1, LLC

Project No. 13878-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(April 8, 2011)

1. On November 12, 2010, Kahawai Power 1, LLC filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Hanalei River Hydroelectric Project to be located near the town of Hanalei in Kauai County, Hawaii.

I. Project Proposal

2. The proposed project will consist of the following: (1) a 80-foot-long, 15-foot-high concrete diversion weir and intake structure on the Hanalei River creating a reservoir with a storage capacity of 7.7-acre-feet; (2) a 23,500-foot-long, 3.5-foot-diameter main steel penstock running from the Hanalei diversion weir to the powerhouse; (3) a 35-foot long, 5-foot-high concrete diversion weir with intake located on the Kaiwa Stream creating a reservoir with a storage capacity of less than 0.25 acre-feet; (4) a 1,100-foot-long, 2-foot-diameter steel feeder penstock from the intake on the Kaiwa Stream to the main penstock; (5) a 35-foot long, 5-foot-high concrete diversion weir with intake located on the Kaapahu Stream creating a reservoir with a storage capacity of less than 0.25 acre-feet; (6) a 2,800-foot-long, 2-foot-diameter steel feeder penstock from the intake on the Kaapahu Stream to the main penstock; (7) a 35-foot long, 5-foot-high concrete diversion weir with intake located on the Pekoa Stream creating a reservoir with a storage capacity of less than 0.25 acre-feet; (8) a 1,700-foot-long, 2-foot-diameter steel feeder penstock from the intake on the Pekoa Stream to the main penstock; (9) a 60-foot-long, 40-foot-wide reinforced concrete powerhouse containing one 3.5-megawatt two-jet turgo turbine; (10) a one-mile-long, 25-kilovolt transmission line; and (11) appurtenant facilities. The estimated annual generation of the project would be 12.25 gigawatt-hours.

¹ 16 U.S.C. § 797(f) (2006).

II. Background

3. The Commission issued a public notice for the project on December 3, 2010. Timely motions to intervene and comments were filed by the County of Kauai, the Limu Coalition, the Hanalei-to-Ha'ena Community Association (HHCA), and the Hui Ho'omalua i ka 'Aina.² Comments were filed by the U.S. Department of the Interior (Interior), the State of Hawaii Office of Hawaiian Affairs, the State of Hawaii Department of Land and Natural Resources Division of Forestry and Wildlife (Hawaii DLNR), the Hanalei Watershed Hui, 1000 Friends of Kauai, and the Kaua'i Group of the Hawaii Chapter of the Sierra Club (Sierra Club).

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,³ 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.⁴ 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.⁵

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2010).

³ 16 U.S.C. § 802 (2006).

⁴ 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.").

⁵ 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).

5. Some of the comments filed expressed concern that project construction may adversely affect fish and wildlife, aesthetic, recreational interest, cultural, and natural resources of the Hanalei River and its tributaries. The Hui Ho'omalua i ka 'Aina expresses concerns that the project would affect resources that they depend on for subsistence, as well as cultural and ecological impacts. The Hanalei Watershed Hui mentioned several sensitive fish and wildlife species and habitats as well as other natural resources that would potentially be affected by the project.

6. The Limu Coalition commented on the applicant's failure to disclose which Census Block Groups could be affected by the project, and its incomplete list of affected tribes. The Limu Coalition and the Hanalei Watershed Hui also note the designation of the Hanalei River as a U.S. Environmental Protection Agency American Heritage River. We do not find this designation to be a bar for issuing a preliminary permit. Cultural and socioeconomic issues can be addressed in the licensing process.

7. The HHCA, 1000 Friends of Kauai, and the Sierra Club also expressed concern for the potential impacts the project would have on water quality, instream flows, aquatic and terrestrial resources and their habitats, water quality, sedimentation, visual impacts, sensitive species and habitats, fisheries resources, and physical affects to the watershed and water supply. As noted, a preliminary permit does not authorize a permittee to undertake any construction. Furthermore, the purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The issues raised in the comments are premature at the permit stage, but can properly be addressed in the licensing process.

8. Hawaii DLNR requests that they be consulted on this and other preliminary permits and permit applications. The State of Hawaii's Office of Hawaiian Affairs states that the applicant should consider developing studies as to potential project effects on instream uses, wildlife and fish habitat, ecosystems, water quality, recreation, and protection of traditional and customary Hawaiian rights over the course of the permit and to develop and review alternatives. In addition, the Office of Hawaiian Affairs has requested that, should a license application be filed for this project, that the Office be part of consultation meetings pursuant to 18 C.F.R. §5.7. The County of Kauai requests that its relevant resource agencies, including the Planning, Water, Fire, and Public Works departments; the Office of Economic Development; and Civil Defense Agency be consulted for this permit.

9. Interior requests that if a preliminary permit is issued that the permittee conduct field studies to determine what impacts the proposed project would have on terrestrial and aquatic resources, including threatened and endangered species. These impacts need to be considered during the study, planning, environmental review, and implementation of the project. Interior requests that the permittee consult with the U.S. Fish and Wildlife Service prior to undertaking any scientific study, investigation, or other work under the

preliminary permit. Interior is also interested in impacts to trust resources, which includes federally listed species, migratory birds, and their supporting ecosystems. To that end, Interior will be reviewing the project from an ecosystem perspective, meaning that they will be seeking information regarding the chemical, physical, and biological relationships, processes, and linkages necessary to enhance and maintain a healthy, biologically diverse ecosystem in concert with project construction, operation, and maintenance.

10. Interior made specific recommendations for aquatic and terrestrial resources, threatened and endangered species, and cumulative effects. Interior states that during the term of the permit, the permittee should examine: existing aquatic species; time and duration of diadromous species migration; population age structure; recruitment; water quality; sedimentation; flow regime; geomorphology; reservoir storage; downstream flows; nutrient cycling; potential effects on the Hanalei River estuary; and fish passage. Interior included a list of threatened and endangered species that occur or have the potential to occur within the project area. The Commission has not sought to place all relevant study requirements in preliminary permits.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ Should the permittee

⁶ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

⁷ See 18 C.F.R. § 4.38 (2010).

⁸ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁹ 18 C.F.R. §§ 5.5 and 5.6 (2010).

¹⁰ See 18 C.F.R. § 5.3 (2010).

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 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.¹¹

The Director orders:

(A) A preliminary permit is issued for the Hanalei River Hydroelectric Project 13878 to Kahawai Power 1, 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.

(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 (2010).

Jennifer Hill, Chief
Northwest Branch
Division of Hydropower Licensing

¹¹ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

Form P-1 (Revised December 2009)**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. At the close of each six-month period from the effective date of this permit, the permittee shall file a progress report electronically via the Internet; and shall serve a copy on the intervenors in this proceeding. 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. The report shall describe, for that report 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.

Document Content(s)

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