

UNITED STATES OF AMERICA 134 FERC ¶ 62,197
FEDERAL ENERGY REGULATORY COMMISSION

Clean River Power 15, LLC

Project No. 13874-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(March 2, 2011)

1. On October 22, 2010, Clean River Power 15, LLC 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 Wailua River Hydroelectric Project (Wailua project) to be located in Kauai County, Hawaii. A portion of the proposed project is located in Wailua River State Park and the Kalepa Mountain Forest Reserve.

I. Project Proposal

2. The proposed Wailua project would consist of: (1) a 503-foot-long, 23-foot-high earth-filled, roller-compacted-concrete dam creating a 35-acre reservoir with a storage capacity of approximately 430 acre-feet; (2) a 40-foot-wide, 20-foot-high intake structure constructed on the left side of the dam, with a trash rack, fish screens, and a closure gate; (3) a 4,800-foot-long, 7-foot-diameter steel penstock; (4) a 60-foot-long, 50-foot-wide powerhouse containing one 1.8-megawatt (MW) and one 4.8-MW Francis-type turbine, for a total installed capacity of 6.6 MW; (5) a 50-foot-long, concrete and rip rap-lined tailrace channel to return flows from the powerhouse to the Wailua River; (6) a switchyard containing a three-phase step-up transformer; (7) an approximately 1.92-mile-long, 25-kilovolt transmission line extending from the switchyard to the Lydgate substation; and (8) appurtenant facilities. The annual energy production would be 20.7 gigawatt-hours.

II. Background

3. The Commission issued a public notice for the Wailua project on November 16, 2011. Timely motions to intervene were filed by the County of Kauai, Hawaii, and Likookalani Martin on behalf of the lineal descendants of King Kamehameha III.² Comments were filed by the U.S. Department of the Interior

¹ 16 U.S.C. § 797(f) (2006).

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of
(continued)

(Interior), the State of Hawaii Office of Hawaiian Affairs (Office of Hawaiian Affairs), the State of Hawaii Department of Land and Natural Resources (Hawaii DLNR), the Kauai Group of the Hawaii Chapter of the Sierra Club (Sierra Club), and 25 individuals.

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

5. The Sierra Club has requested that an Environmental Impact Statement and a Water Quality Certification Analysis be conducted as part of the preliminary permit approval process. As noted, the issuance of a preliminary permit grants no land-disturbing or other property rights; therefore, an analysis of the scope proposed by the Sierra Club is premature at the permit stage, but can properly be addressed in the licensing process.

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).

6. The Office of Hawaiian Affairs commented that the construction of a new diversion on the Wailua River would alter water and nutrient flows, and would likely impact the legal rights of Native Hawaiians under state law. Jacqueline Robson commented that the Hawaii DLNR is opposed to the project. The Sierra Club commented that the project may have negative impacts to agriculture, native ecosystems, recreational activities, cultural resources, aesthetics, economic resources, transportation, and flood control. Twenty-three of the individuals filed comments expressing concern that project construction may adversely affect water quality, fish and wildlife, aesthetic, recreational, socioeconomic, and/or cultural resources of the Wailua River. Some commenters also requested that the permittee modify the design to remove the dam and reservoir. Two comments were filed by individuals in support of the project. 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.

7. Interior states that the permittee should request and secure from the Fish and Wildlife Service (FWS) permits and authorizations that may be necessary to avoid violating take provisions of Section 9 of the Endangered Species Act during performance of required studies. Interior stated that they will be seeking information on the chemical, physical, and biological relationships, processes, and linkages necessary to enhance and maintain a healthy, biologically diverse ecosystem. Interior also commented that the permittee work collaboratively with the FWS to develop technical studies of sufficient detail to assess the anticipated effects of project construction, alternative methods of mitigation, and post-construction restoration of fish and wildlife resources. Interior recommended several studies in the areas of aquatic resources, endangered and threatened species, and terrestrial resources; as well as made recommendations regarding plans to avoid, minimize, or compensate for adverse impacts to fish and wildlife, and to examine cumulative effects on the Wailua River ecosystem.

8. Interior commented that the permittee needs to consult with the FWS prior to undertaking any preliminary feasibility studies to develop measures to avoid, minimize, and mitigate study impacts on federally-listed threatened and endangered species. Interior commented that the permittee should consult with the FWS, the National Oceanic Atmospheric Administration's National Marine Fisheries Service, Hawaii DLNR, and the Office of Hawaiian Affairs for guidance in developing the project in a manner that seeks to preserve, protect, and enhance fish and wildlife resources and other environmental values in the area. Ms. Robson commented that the applicant should consult with Hawaii DLNR prior to application for a permit. The Office of Hawaiian Affairs also requests to be part of consultation meetings should a license application be filed.

9. It is the responsibility of the permittee to undertake the appropriate consultations and obtain the necessary authorizations to conduct permit studies in a manner consistent

with applicable laws and regulations. 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

10. 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 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.

11. 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 permittee, 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 permittees in any application for license filed. In such an instance, where parties other than the permittee are added as joint

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).

permittees 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 Wailua River Hydroelectric Project No. 13874 to Clean River Power 15, 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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