

137 FERC ¶ 62,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Canyon Hydro, LLC

Project No. 14110-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(October 14, 2011)

1. On March 14, 2011, Black Canyon Hydro, LLC (Black Canyon) 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 Black Canyon Hydroelectric Project No. 14110 (Black Canyon Project or project) to be located on the North Fork of the Snoqualmie River near the city of North Bend in King County, Washington. The project would not occupy federal lands.

I. Project Proposal

2. The proposed project would consist of the following new features: (1) an approximately 35-foot-wide, 7-foot-tall inflatable dam; (2) a 90-foot-wide, 7-foot-tall diversion intake structure; (3) a 9-foot-wide, 7-foot-tall fish ladder; (4) a 7,300-foot-long, 12-foot-diameter penstock; (5) a 60-foot-long, 100-foot-wide metal powerhouse with two Francis turbine units, one rated at 16 megawatts (MW) and the other rated at 9 MW; (6) a 150-foot-long, 40-foot-wide tailrace; (7) a 0.75-mile extension of the existing logging road; (8) a 4.2-mile-long, 115-kilovolt transmission line; and (9) appurtenant facilities. The estimated annual generation of the project would be 90,000 megawatt-hours.

II. Background

3. The Commission issued public notice of Black Canyon's permit application on May 11, 2011. Timely motions to intervene were filed by Washington Department of Ecology (Washington DOE); Washington Department of Fish and Wildlife (Washington DFW); Washington Department of Natural Resources (Washington DNR); King County, Washington; the City of Snoqualmie, Washington; the Tulalip Tribes of Washington (Tulalip Tribes); the Snoqualmie Indian Tribe; Hancock Forest Management; THR, LLC;

¹ 16 U.S.C. § 797(f) (2006).

and American Whitewater, American Rivers, North Cascades Conservation Council, and Alpine Lakes Protection Society, filing jointly (American Whitewater).²

4. Comments were filed by a number of agencies, communities, organizations, and individuals.

III. Discussion

A. Opposition to Proposed Project Construction and Operation

5. The U.S. Department of Interior (Interior) filed comments expressing concern that fish and wildlife resources and some federally threatened and endangered species could be adversely affected by project construction and operation. Interior also stated that the proposed project site may be prone to subsidence (i.e., sinking and settling) due to past underground mining activity.

6. King County, Washington commented that it has planning authority for flood control management and as such, expressed concern for the proposed project's impact to its Flood Hazard Plan, which did not account for new hydroelectric developments on the North Fork of the Snoqualmie River. King County is also concerned about the potential effects that the project would have on natural resources, including fish and wildlife, forest cover, wetlands, riparian areas, rivers, and streams.

7. The City of Snoqualmie and THR, LLC filed comments expressing concern that the proposed project would impact the City of Snoqualmie's Canyon Springs municipal water supply system. The City of North Bend (North Bend) is concerned about the potential effects the proposed project would have on its water rights permit, including the effects of flows in the gages that would require it to purchase "mitigation water" and thus increase its ratepayers' costs.

8. The Snoqualmie Indian Tribe and Tulalip Tribes filed comments expressing concern about the proposed project's impacts on cultural and natural resources. Specifically, the Snoqualmie Indian Tribe states that the alteration of flows could adversely affect riparian and aquatic resources upstream and downstream of the project. Likewise, the Tulalip Tribes are concerned about sedimentation and turbidity, alteration of flows, water quality and temperature, fisheries resources and habitat impacts, downstream migration of debris, and downstream migration of resident fish.

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2011).

9. The majority of comments filed with the Commission oppose the proposed project because it would dewater the North Fork of the Snoqualmie and may adversely effect recreation, particularly whitewater kayaking and fishing. Other comments stated that the proposed project would have adverse effects on aesthetic, fish, and wildlife resources. Comments also indicated that the proposed project would cause a flooding risk to downstream communities. Conservation Groups commented that licensing of the proposed project is not consistent with relevant comprehensive plans.

10. All of these comments raise concerns for the potential impacts of the proposed project's construction and operation. However, 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 the potential impacts identified by commenters. Thus, the concerns raised in the comments are premature at the preliminary permit stage because 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.

B. Access to Site

11. One commenter, THR, LLC, stated that it owns many of the lands within the proposed project boundary and that Black Canyon does not have the necessary access rights with which to conduct all of its proposed studies. A permit applicant is not required to obtain all access rights to a proposed project site as a condition of receiving a preliminary permit, and a preliminary permit does not grant a right of entry onto any lands. A permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

C. Conservation Groups' Additional Comments

12. Conservation Groups filed comments indicating that they oppose issuance of a preliminary permit for a number of reasons. They stated that it is not in the public interest to issue a permit for a proposed site that has previously been deemed unsuitable for development, is located on a potential but not yet congressionally designated Wild and Scenic River section, and that lies within an area designated as protected by the Northwest Power and Conservation Council (Council). If a permit is issued to Black Canyon, Conservation Groups request that a strict scrutiny standard be adopted.

13. Conservation Groups argue that the site of Black Canyon's proposed project has been deemed unsuitable for hydropower development by the Commission because a previous license application filed in 1985 by the City of Bellevue for Project No. 5926 was rejected. Conservation Groups mischaracterize the meaning of the rejection in that proceeding. The City of Bellevue had repeatedly failed to respond to staff's requests for additional information. As a result, the license application was rejected. Such a rejection

is a reflection of the adequacy of the filing, not the merits of the proposed project at a particular site.

14. Conservation Groups' next contention is also misplaced. Conservation Groups argue that it is not in the public interest to issue a permit for a proposed project on a river that is potentially eligible for designation as a Wild and Scenic River. The Wild and Scenic Rivers Act prohibits the Commission from licensing a project "on or directly affecting" any river designated as a component of the Wild and Scenic Rivers System or designated for potential addition to the System during such periods as the statute allows for consideration of the study river's inclusion in the system (i.e., a study river).³ The Snoqualmie River is not a designated component of the Wild and Scenic Rivers System, nor is it a river designated for study for possible inclusion as a component of the Wild and Scenic Rivers System. Therefore, the Commission is not barred by the Wild and Scenic Rivers Act from issuing a license or a permit on the Snoqualmie River.

15. Conservation Groups also mischaracterized the role of the Northwest Power and Conservation Council in the permitting process. Conservation Groups argue that Black Canyon's proposed project is located in an area designated as protected from hydropower development by the Council. They stated that the Commission typically recommends that permit applicants contact the Council when they seek to obtain a preliminary permit for a proposed project within or adjacent to Council-protected areas, and that Black Canyon has not done so. Conservation Groups stated that it is the practice of the Commission to deny a license for a project in a protected area, and, therefore, a permit should not issued for this site.

16. The Pacific Northwest Electric Power Planning and Conservation Act of 1980 created the Northwest Power Planning Council, which implements the Columbia River Basin Fish and Wildlife Program (the Program).⁴ The Council has sought to have the Commission require its permit applicants to demonstrate in their applications how their proposed project would take the Program into account to the fullest extent practicable. However, the Program is not binding on the Commission. The Commission does not require permit applicants to provide a demonstration that their proposed project would take the Program into account since the purpose of a permit is to preserve the permittee's priority of application while it undertakes the studies needed to answer most of the questions that will apply to any eventual license application, including how the proposed

³ 16 U.S.C. § 1278(a), (b) (2006).

⁴ 16 U.S.C. § 839 (2006).

project would take the Program into account.⁵ Therefore, a permit applicant is not prohibited from pursuing a proposed project in a Council-designated protected area.

17. Finally, it is inappropriate to apply the Commission's strict scrutiny policy to Black Canyon's permit, as requested by Conservation Groups. The Commission has declined to expand its strict scrutiny policy to conventional hydroelectric permits because the policy was designed to address the unique circumstances of the hydrokinetic industry.⁶ Those circumstances do not present themselves here.

IV. Permit Information

18. 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,⁷ 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.⁸ 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.⁹

⁵ *Cowlitz Basin*, 62 FERC ¶ 61,165, at 62,134 (1993).

⁶ *Renaissance Ketchikan Group LLC*, 127 FERC ¶ 61,151 (2009).

⁷ 16 U.S.C. § 802 (2006).

⁸ *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.”).

⁹ 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).

19. 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 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.

20. 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.¹⁰

The Director orders:

(A) A preliminary permit is issued for the Black Canyon Hydroelectric Project No. 14110 to Black Canyon Hydro, 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.

¹⁰ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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(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 (2011).

Jennifer Hill, Chief
Northwest Branch
Division of Hydropower Licensing

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.

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