

138 FERC ¶ 61,189
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Lock+ Hydro Friends Fund I

Project No. 14107-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued March 15, 2012)

1. On March 4, 2011, Lock+ Hydro Friends Fund I (Lock Hydro) 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 Longhorn Dam Project No. 14107, to be located on the Lower Colorado River in the City of Austin, in Travis County, Texas.

I. Project Proposal

2. The proposed project would consist of the existing 506-foot-long, 36-foot-high Longhorn Dam;² the existing reservoir, Lady Bird Lake, with a surface area of 525 acres and a storage capacity of 6,000 acre-feet; and the following proposed facilities: (1) two prefabricated concrete walls that would be attached to the downstream side of the dam to support a power stack, also known as a frame module; (2) a frame module containing two generating units with a total combined capacity of 2.2 megawatts; (3) a switchyard; (4) a 300-foot-long, 13-kilovolt transmission line that would connect to an existing distribution line; and (5) appurtenant facilities. The estimated annual generation of the Longhorn Project would be 10,600 megawatt-hours.

¹ 16 U.S.C. § 797(f) (2006).

² Longhorn Dam is owned and operated by the City of Austin's Electric Utility Department, Austin Energy.

II. Background

3. The Commission issued public notice of Lock Hydro's permit application on May 31, 2011. The City of Austin (Austin) and the Lower Colorado River Authority (River Authority) filed timely motions to intervene opposing issuance of the permit.³ The U.S. Department of the Interior (Interior) filed a letter stating that it had no comments on the application.

III. Discussion

A. Site Banking Concerns

4. Both Austin and River Authority express concern that Lock Hydro "and apparent affiliates of Lock Hydro" hold 32 preliminary permits and have 18 additional pending permit applications on file with the Commission. Austin and River Authority argue that there is no evidence to show Lock Hydro's ability to finance and implement studies for all 50 projects. They argue that Lock Hydro's actions amount to site banking, which is contrary to Commission policy.⁴

5. Lock Hydro, a domestic corporation organized under Texas law, has only one application on file with the Commission, which is for the Longhorn Project. We note that there are other corporate entities, which have names similar to Lock Hydro's and may be affiliated in some way with Lock Hydro, that hold preliminary permits (or have filed preliminary permit applications that are pending before the Commission) for various sites. However, their ability to finance studies for their projects and their diligence under their permits is not relevant to this proceeding.

6. It is longstanding Commission policy to not base the grant of a permit on proof of an applicant's financial ability to perform studies under the permit or to pursue a project to completion.⁵ No permit applicant can be expected to certify its intent to ultimately develop the proposed project, since the feasibility of the project is the subject of the permit studies. Moreover, the Commission has procedures in place to ensure that permit holders are actively pursuing project exploration. The Commission can cancel a permit during its term if the periodic progress reports required by Article 4 of the permit do not

³ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2011).

⁴ Site banking means the reservation of potential sites without the current intent to develop a project.

⁵ *Symbiotics, LLC*, 99 FERC ¶ 61,101, at 61,419 (2002) (citations omitted).

show due diligence in studying the feasibility and potential effects of a proposed project, or if the permit holder fails to comply with any of the permit conditions.

7. There is no evidence that Lock Hydro does not intend to explore the development of the Longhorn Dam site. Therefore, we cannot conclude that Lock Hydro is engaging in site banking here.

B. Issues Related to Project Construction and Operation

8. Austin and River Authority express concern that the project may affect contractually-obligated flows downstream of Longhorn Dam, and that it may interfere with Austin's property rights as the owner and operator of the Longhorn Dam. Austin and River Authority also comment that the project could affect public recreation opportunities on Lady Bird Lake and the river below Longhorn Dam, including recreation facilities constructed by Austin using public funds. Austin comments that project operation could affect maintenance, repair, as well as emergency operations at Longhorn Dam, including the removal of trash and storm debris and operation of the facility during storm-flow events. Further, River Authority states that the project could affect its ability to manage floods in Central Texas. Austin comments that land use and aesthetics in the project vicinity could be adversely affected by project construction and operation. Austin also asserts that the project conflicts with its role as an electric service provider (Austin Energy) because the project could increase costs to ratepayers.

9. Austin and River Authority also argue that the project is financially infeasible and that there is no market for power generated by the project. River Authority argues that Lock Hydro has overstated the amount of power that will be generated by the project because it did not factor into its analysis the impact of future droughts and River Authority's changing water supply obligations. Austin states it has estimated, based on flow data for the past three years, that the energy output of the project, for several months of the year, would be less than the minimum amount of output that can be dispatched through the Electric Reliability Council of Texas grid. Hence, Austin believes that the project will not be eligible for a transmission interconnection.

10. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. Nor does the permit authorize access to the property of others. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential effects, and maintain the permittee's priority for filing a license application.⁶ The concerns raised in the comments are premature at the preliminary

⁶ Section 4.81 of the Commission's regulations requires that a permit application include a description of the proposed project, the estimated interconnection, the estimated average annual energy production, a statement of the costs and financing, and other

(continued...)

permit stage, in that they address the potential effects of constructing and operating the proposed project.⁷ Should the permittee file a license application, these issues will be addressed in the licensing process.

IV. Permit Information

11. 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 project and to prepare a license application, it grants no land-disturbing or other property rights.¹⁰

12. 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

information “*to the extent possible.*” 18 C.F.R. § 4.81 (2011). During the permit term, the permittee will investigate the technical and economic feasibility of the proposed project. More specific information on project design and a more detailed description of the proposed project, including project economics, possible interconnections, and electric generation will be provided during the preparation of any development application.

⁷ See, e.g., *Don L. Hansen*, 120 FERC ¶ 61,069 (2007).

⁸ 16 U.S.C. § 802 (2006).

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.”).

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 PP 6–7 (2003); see also *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

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.

13. 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.

14. 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.¹³

¹¹ 18 C.F.R. §§ 5.5 and 5.6 (2011).

¹² See 18 C.F.R. § 5.3 (2011).

¹³ See *City of Fayetteville Public Works Commission, et al.*, 16 FERC ¶ 61,209 (1981).

The Commission orders:

(A) A preliminary permit is issued for the Longhorn Dam Project No. 14107 to Lock+ Hydro Friends Fund I, 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 (2011).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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.