

151 FERC ¶ 61,243  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Kenai Hydro, LLC

Project No. 13212-004

ORDER DENYING REHEARING

(Issued June 18, 2015)

1. On February 27, 2015, Commission staff issued an order (February 27 Order) denying Kenai Hydro LLC's (Kenai Hydro) request for a ten-month extension of its second preliminary permit for the proposed Grant Lake Project No. 13212 (Grant Lake Project).<sup>1</sup> The proposed project would be located on Grant Lake and Grant Creek, near the town of Moose Pass, in Kenai Peninsula Borough, Alaska and would occupy federal lands managed by the Chugach National Forest. On March 27, 2015, Kenai Hydro filed a timely request for rehearing of the February 27 Order. This order denies the request for rehearing.

**I. Background**

2. On October 7, 2008, Commission staff issued Kenai Hydro a preliminary permit to study the proposed Grant Lake Project.<sup>2</sup> The project would generate power using water from Grant Lake that would be diverted by a new concrete intake structure. The diverted flows would then pass through a 3,300-foot-long tunnel and penstock to a powerhouse located near the outlet of a natural rock canyon in Grant Creek. The powerhouse would contain two turbines with a combined installed capacity of 5 megawatts (MW).

3. During the permit term, Kenai Hydro initiated engineering and environmental studies, held public stakeholder meetings, and began consulting with state and federal agencies. Kenai Hydro began field studies in the summer of 2009, continuing them during the summer of 2010. On August 6, 2009, Kenai Hydro filed a Notice of Intent

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<sup>1</sup> *Kenai Hydro, LLC*, 150 FERC ¶ 62,115 (2015).

<sup>2</sup> *Kenai Hydro, LLC*, 125 FERC ¶ 62,018 (2008).

(NOI) to file a license application, a Pre-Application Document (PAD), and a request to use the Traditional Licensing Process to prepare its final license application for the proposed project.<sup>3</sup> Field studies were suspended in August of 2010 pending the resolution of issues raised in comments received on Kenai Hydro's proposed revisions to its study plans.<sup>4</sup> The permit expired on September 30, 2011, and on October 3, 2011, Kenai Hydro filed an application for a successive permit.

4. On March 23, 2012, Commission staff, finding that the Kenai Hydro had pursued development of the project with due diligence during its permit term, issued a successive preliminary permit to Kenai Hydro.<sup>5</sup> During the second permit term, Kenai Hydro continued consultation with state and federal agencies, finalized its study plans, and secured certain permits required for the 2013 field season. Through the spring, summer, and fall of 2013, Kenai Hydro conducted on-site biological studies on aquatics, water quality/quantity, terrestrial resources, recreation, visual resources, and cultural resources. Kenai Hydro then evaluated the study data and compiled study reports.<sup>6</sup>

5. On January 27, 2015, Kenai Hydro filed a timely request for a ten-month extension of its successive preliminary permit.<sup>7</sup>

6. On February 27, 2015, Commission staff denied Kenai Hydro's requested extension, stating that the Commission will not authorize the reservation of a site under a preliminary permit for a period longer than six years (two preliminary permit terms) to the same applicant, for the same site, unless some extraordinary circumstance or factor outside the control of the permittee is present.<sup>8</sup> The order stated that Kenai Hydro had failed to demonstrate any extraordinary circumstance or factor outside its control during

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<sup>3</sup> The Commission's regulations for hydropower development applications establish three separate application processes: the integrated licensing process, the alternative licensing process, and the traditional licensing process. *See generally*, 18 C.F.R. Part 4, Subpart D (traditional process), 18 C.F.R. § 4.34(i) (alternative process), and 18 C.F.R. Part 5 (integrated process) (2014).

<sup>4</sup> Kenai Hydro's March 31, 2011 Progress Report at 1.

<sup>5</sup> *Kenai Hydro*, 138 FERC ¶ 62,297 (2012).

<sup>6</sup> Kenai Hydro's February 26, 2014 Progress Report at 1-4.

<sup>7</sup> Section 4.82(c) of the regulations, 18 C.F.R. § 4.82(c) (2014) (requests to extend permit term must be filed with the Commission at least 30 days before permit expires).

<sup>8</sup> *Kenai Hydro*, 150 FERC ¶ 62,115 at P 5.

its second permit term that prevented it from filing a license application, and explained that allowing Kenai Hydro to reserve the project site for more than six years would constitute site banking.<sup>9</sup>

7. Kenai Hydro's second permit expired on February 28, 2015.

8. On March 27, 2015, Kenai Hydro filed a request for rehearing of the February 27 Order, and, separately, a draft license application for the Grant Lake Project. In its request for rehearing, Kenai Hydro alleges that Commission staff applied the wrong legal standard and erred in its finding that extending the permit term for ten months would contribute to site banking. Kenai Hydro also contends extraordinary circumstances outside its control prevented it from filing a license application.

9. On April 20, 2015, the Kenai River Watershed Foundation submitted comments recommending denial of rehearing due to its concerns about the competency of Kenai Hydro to study and develop a hydroelectric facility.<sup>10</sup>

## II. Discussion

10. Section 4(f) of the Federal Power Act (FPA) authorizes the Commission to issue preliminary permits to potential license applicants.<sup>11</sup> Section 5(a) explains that such permits "shall be for the sole purpose of maintaining priority of application for a license ... for such period or periods, not exceeding a total of three years."<sup>12</sup> In 2013, Congress amended the FPA to provide that "[t]he Commission may extend the period of a preliminary permit once for not more than 2 additional years beyond the 3 years permitted by [section 5(a)] if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence."<sup>13</sup>

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<sup>9</sup> *Id.* P 7, n.4 (citing *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012)).

<sup>10</sup> Commission regulations provide that an answer may not be made to a request for rehearing, unless the decisional authority orders otherwise. 18 C.F.R. §§ 385.213(a)(2), 385.713(d) (2014). The Foundation did not ask for waiver of the regulations, and we see no reason to allow the answer.

<sup>11</sup> 16 U.S.C. § 797(f) (2012).

<sup>12</sup> *Id.* § 798 .

<sup>13</sup> The Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 493, 495 (2013) (codified as amended at 16 U.S.C. § 798(b)).

11. The FPA does not specify how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive (second) permit only if it concludes that the applicant has pursued the requirements of its prior permit in good faith and with due diligence.<sup>14</sup> The Commission's policy is to grant a third preliminary permit (i.e., a second successive permit) only when the permittee has demonstrated that extraordinary circumstances or factors outside of its control prevented it from filing a license application during the second permit term.<sup>15</sup>

12. In most cases, one preliminary permit term of three years should be enough time to consult with resource agencies and conduct any studies necessary to prepare a development application, and six years should be more than enough time. In the absence of extraordinary circumstances, allowing a site to be reserved for more than six years would violate the Commission's longstanding policy against site banking.<sup>16</sup>

**A. Extensions of Successive Permits**

13. On rehearing, Kenai Hydro argues that Commission staff erred in its February 27 Order by using an incorrect legal standard to evaluate Kenai Hydro's request for a ten-month extension. Kenai Hydro claims that instead of the extraordinary circumstances standard, Commission staff should have used the "good faith and reasonable diligence" standard articulated in the 2013 Act.

14. We disagree. The Commission reviews applications for a second permit under a good faith and reasonable diligence standard and applies an extraordinary circumstances

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<sup>14</sup> See, e.g., *Greybull Valley Irrigation Dist.*, 143 FERC ¶ 61,131, at P 8 (2013) (citing *City of Redding, Cal.*, 33 FERC ¶ 61,019 (1985) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports)); *Cascade Creek, LLC*, 140 FERC ¶ 61,221 at P 24.

<sup>15</sup> See, e.g., *Pine Creek Mine, LLC*, 148 FERC ¶ 61,027, at P 14 (2014); *Sutton Hydroelectric Company LLC*, 147 FERC ¶ 61,039, at P 17 (2014); *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131 at PP 14-15.

<sup>16</sup> The essence of the Commission's policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. See *Cascade Creek, LLC*, 140 FERC ¶ 61,221 at P 27; See also *Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (finding that the Commission's conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA).

test in evaluating applications for third permits.<sup>17</sup> As the Commission recently explained, in enacting section 5(b)'s good faith standard, "Congress was only contemplating extensions to initial permits, and adopted the test that the Commission had already established for second permits."<sup>18</sup> Nothing in the 2013 Act suggests that Congress intended the Commission to apply a lower standard to other extensions, regardless of how long an entity had previously held a permit. Indeed, such a reading would lead to the anomalous result that the Commission would apply an extraordinary circumstances test in issuing a third permit and then be required to revert to a lower standard in reviewing a request to extend that permit.<sup>19</sup> Put another way, Kenai Hydro would have the Commission's standard of review turn on whether a party seeks to extend its exclusive development rights beyond six years through a permit extension or via a second successive permit. Nothing in section 5 – which provides that the Commission may extend permit terms "once for not more than 2 additional years beyond the 3 year[]" preliminary permit term – supports this result. Accordingly, we conclude that staff was correct in applying an extraordinary circumstances standard in reviewing Kenai Hydro's application to extend its successive (second) permit.

**B. No Extraordinary Circumstances**

15. Kenai Hydro contends that the February 27 Order failed to recognize that Kenai Hydro's progress in developing the project was delayed by extraordinary circumstances. Kenai Hydro explains that the remote section of Alaska where its proposed project would be located is "fraught with extraordinary circumstances" outside of a permittee's control.<sup>20</sup> It states that the project study area is generally only accessible by plane or boat, and then only between the months of May and October, when ice on nearby lakes has melted. Kenai Hydro explained that, while some winter access to the site is possible via snowshoe and wading, the majority of fieldwork must occur during those months.<sup>21</sup> For these reasons, Kenai Hydro maintains that it only had access to the proposed project site during half of the term of its second preliminary permit.

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<sup>17</sup> *Pine Creek Mine, LLC*, 148 FERC ¶ 61,027 at P 17; *Sutton Hydroelectric Company, LLC*, 147 FERC ¶ 61,039 at P 17.

<sup>18</sup> *Pine Creek Mine*, 148 FERC ¶ 61,027 at P 17.

<sup>19</sup> *Pine Creek Mine, LLC*, *supra* note 15, at P 17.

<sup>20</sup> Kenai Hydro's March 27 Rehearing Request at 13.

<sup>21</sup> *Id.*

16. Kenai Hydro raises the issue of limited site access for the first time in its March 27 rehearing request. Its progress reports and extension request fail to mention any difficulty gaining access to the project site during the terms of its permits. Rather, Kenai Hydro's progress reports indicate that it suspended field studies in August 2010 (more than a year before its first permit expired on September 30, 2011), in order to review comments received on the proposed study plans and revise its study program. During its second permit term, Kenai Hydro explained that bids for the summer 2012 study season were unexpectedly high and lacking the detail required to adequately develop a contract. As a result, Kenai Hydro re-issued its request for proposals in May 2012 and adjusted its schedule to resume resource studies in March 2013.<sup>22</sup> Kenai Hydro's progress reports indicate that it performed no fieldwork between August 2010 and March 2013.

17. Even if Kenai Hydro had alleged in its progress reports or request for extension that it was unable to develop a license application because of its inability to access the project site during portions of its second permit term, we would still find this argument unpersuasive in evaluating its request for a permit extension. While the Commission is sympathetic to the challenges associated with developing a project in a remote location with harsh conditions, we do not believe that these circumstances rise to the level of extraordinary. We have previously stated that the issue of obtaining access to the site for the performance of studies is one for the permittee to address.<sup>23</sup> We also note that the company does not allege that conditions during the six years it held a permit were in any way out of the ordinary. As discussed above, Kenai Hydro has held preliminary permits for this proposed project for more than six years, and should have been well aware of, and able to adequately prepare for, the challenges posed by developing a project in a remote area that is frozen much of the year.

### **III. Conclusion**

18. For the reasons discussed above, we deny rehearing and affirm our denial of Kenai Hydro's request for an extension of its successive preliminary permit. We note, however, that our denial does not constitute a judgment on the merits of Kenai Hydro's proposed project, or prejudice in any way whether the Commission would ultimately issue a license for the project. Furthermore, we note that holding a preliminary permit is not a prerequisite to pursuing a development application, so that Kenai Hydro remains free to pursue development of the Grant Lake Project and to file a final license application.

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<sup>22</sup> Kenai Hydro's August 27, 2013 Progress Report at 1.

<sup>23</sup> *Carex Hydro*, 36 FERC ¶ 61,031, at 61,069 (1986). See also *Green Energy Storage Corp.*, 148 FERC ¶ 62,105, at P 5 (2014), 150 FERC ¶ 61,042, at P 12 (2015) (order rescinding preliminary permit).

Indeed, Commission staff is currently reviewing Kenai Hydro's draft license application, and the licensing process can continue regardless of our finding here.

The Commission orders:

Kenai Hydro LLC's March 27, 2015 rehearing request is denied.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Kenai Hydro, LLC

Project No. 13212-004

(Issued June 18, 2015)

LaFLEUR, Commissioner, *dissenting*:

In today's order, the Commission denies Kenai Hydro's request to maintain, for only approximately six more months from the date of this order, development priority for the site of its proposed Grant Lake Project while Kenai Hydro finalizes work on its license application. The Commission concludes that granting Kenai Hydro's request would violate the Commission's policy against site banking, which seeks to prevent entities that are unwilling or unable to develop a site from maintaining the exclusive right to develop it. I do not agree that this policy requires the denial of Kenai Hydro's request, as I believe that the Commission has the discretion and authority under the Federal Power Act to grant Kenai Hydro's extension, and that Kenai Hydro has amply demonstrated both its willingness and ability to develop the site. Over the course of its second preliminary permit, and despite being able to meaningfully access the site only a few months each year, Kenai Hydro conducted on-site biological studies on aquatics, water quality/quantity, terrestrial resources, recreation, visual resources, and cultural resources. Kenai Hydro then evaluated the study data and compiled study reports which were submitted to the Commission over the summer of 2014. Kenai Hydro offered opportunities for public comment on these surveys in November 2014, before the end of its secondary preliminary permit. That work culminated in Kenai Hydro filing its draft license application with the Commission on March 27, 2015, in anticipation of submitting a license application by the end of 2015.

The Commission's action today – which unnecessarily exposes Kenai Hydro to the potential loss of license application priority for the Grant Lake Project site – will not encourage the development of new hydroelectric facilities, nor will it further the Commission's policy against site banking, given the limited duration of Kenai Hydro's request and its significant progress towards the filing of a license application mere months from now.

Accordingly, I respectfully dissent.

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Cheryl A. LaFleur