

167 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Cat Creek Energy, LLC

Project No. 14655-001

ORDER ISSUING SUCCESSIVE PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued April 18, 2019)

1. On November 9, 2018, Cat Creek Energy, LLC (Cat Creek) filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Cat Creek Energy Generation Facility Pumped Storage Hydroelectric Project No. 14655 (project). The project would be located at the U.S. Bureau of Reclamation's (Reclamation) Anderson Ranch Reservoir on the South Fork of the Boise River near Mountain Home in Elmore County, Idaho.

2. For the reasons discussed below, we grant a successive preliminary permit to Cat Creek.

I. Background

3. On November 27, 2015, the Commission issued a three-year preliminary permit to Cat Creek to study the feasibility of its proposed project.² The proposed project would utilize Reclamation's existing Anderson Ranch Reservoir as a lower reservoir and would consist of the following new facilities:³ (1) a 4.3-mile-long, 80-foot-high earthen dam; (2) a 63,500-acre-foot upper reservoir; (3) six 2,500-foot-long, 14- to 16-foot-diameter

¹ 16 U.S.C. § 797(f) (2012).

² *Cat Creek Energy, LLC*, 153 FERC ¶ 62,141 (2015).

³ The Anderson Ranch dam and reservoir are part of Reclamation's Boise Project. The Commission retains jurisdiction for hydropower facilities not located at Reclamation facilities. *Id.* PP 4-5.

steel penstocks; (4) two 100-foot-diameter concrete silos; (5) twelve 60-megawatt (MW) ternary turbine/generator units, for a total capacity of 720 MW; (6) an 8.1-mile-long, 230-kilovolt transmission line interconnecting with the existing Bonneville Power Administration Dixie Substation; (7) an approximately 2-mile-long access road; and (8) appurtenant facilities. The estimated annual generation of the project would be 1,965.4 gigawatt-hours.

4. On October 29, 2018, Cat Creek filed an application for a four-year extension of its preliminary permit for the proposed project. On November 7, 2018, Commission staff rejected the request because it was untimely.⁴ In the November 7 Order rejecting the extension request, Commission staff noted that the rejection did not preclude Cat Creek from filing a successive preliminary permit application for the project.

5. Cat Creek then filed an application for a successive preliminary permit on November 9, 2018. Public notice of Cat Creek's successive permit application was published in the *Federal Register* on November 27, 2018, with interventions and comments due by March 20, 2019.⁵ The U.S. Forest Service (Forest Service), the Boise Project Board of Control, and the State of Idaho, acting through the Idaho Department of Fish and Game, the Idaho Water Resource Board, and the Idaho Department of Environmental Quality, all filed timely notices of intervention.⁶ The State of Idaho, on behalf of the Idaho Department of Parks and Recreation, filed a timely motion to intervene. S Bar Ranch, LLC (S Bar Ranch) filed a timely motion to intervene and protest, asking the Commission to deny the application.⁷ The Forest Service and John and Wendi Combs filed comments.

⁴ *Cat Creek Energy, LLC*, 165 FERC ¶ 62,083 (2018). The preliminary permit expired on October 31, 2018, and section 4.82(c) of the Commission's regulations states that "[t]he Commission will not accept extension requests that are filed less than 30 days prior to the termination of the permit." 18 C.F.R. § 4.82(c) (2018).

⁵ 83 Fed. Reg. 60,835. On February 13, 2019, the Commission extended the original January 22, 2019 comment and intervention deadline due to the funding lapse at certain federal agencies between December 22, 2018 and January 25, 2019.

⁶ Timely notices of intervention filed by state fish and wildlife agencies are granted by operation of Rule 214(a)(2). 18 C.F.R. § 385.214 (2018).

⁷ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's regulations. 18 C.F.R. § 385.214(c) (2018).

II. Discussion

A. Issuance of Successive Permit

6. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits to potential license applicants for a period of up to four years.⁸ 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 Section 5(b) of the FPA gives the Commission the authority to extend a preliminary permit term once for not more than four additional years if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.¹⁰ The Commission's policy is to review a first request for a longer permit term, whether by means of a successive permit or extension of the permit term, under the good faith and reasonable diligence standard.¹¹

7. Cat Creek requests a successive permit due to "the size and complexity of the project," which Cat Creek claims has triggered complex local permitting requirements, expanded water storage and use options, and demands additional economic feasibility considerations.¹² Cat Creek attests that it carried out activities under its original preliminary permit in good faith and with reasonable diligence, referencing its six biannual progress reports to highlight progress on stream flow analysis, irrigation demand and flood control analysis, engineering analysis, grid interconnection analysis, financial

⁸ 16 U.S.C. § 797(f) (2012). On October 23, 2018, Congress passed the America's Water Infrastructure Act of 2018 (2018 Water Infrastructure Act), which amended section 5 of the FPA. As amended, section 5(a) authorizes the Commission to issue preliminary permits for terms of not more than four years. Before it was amended, the FPA authorized the Commission to issue preliminary permits for terms of not more than three years. 2018 Water Infrastructure Act, § 3001(a)(2)(A).

⁹ See, e.g., *Community of Elfin Cove*, 156 FERC ¶ 62,192, at P 8 (2016).

¹⁰ Prior to the 2018 Water Infrastructure Act, the Commission could extend a preliminary permit term once for no more than two additional years. 16 U.S.C. § 798(b) (2012), as amended by Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 493, 495 (2013) (to be codified at 16 U.S.C. § 798(b)).

¹¹ *Columbia Basin Hydropower*, 165 FERC ¶ 61,258, at n.19 (2018).

¹² Application at 1.

analysis, consultation with federal, state, and local agencies, local permitting, and environmental impact study development.

8. In its motion to intervene and protest, S Bar Ranch urges the Commission to deny Cat Creek's application for a successive permit, asserting that Cat Creek has failed to demonstrate good faith and reasonable diligence. Contrary to S Bar Ranch's assertions, the reports submitted by Cat Creek show progress toward the filing of a development application. Over the three-year permit term, Cat Creek has: secured conditional use permits and a Developmental Agreement with Elmore County; obtained approval for a preliminary lease of power privilege from Reclamation and entered into a Contributed Funds Act agreement contract; entered into the interconnection process with Idaho Power; executed Memorandums of Understanding with water users in the Boise River Basin; conducted outreach with state and local officials; carried out preliminary water quality and environmental evaluations; and engaged in discussions with potential investor groups.¹³ Therefore, we find that Cat Creek has met the good faith and reasonable diligence standard.

9. S Bar Ranch further maintains that Cat Creek's permit application for a successive preliminary permit is deficient for several reasons. First, S Bar Ranch claims that the application includes a defective notarization. Cat Creek's successive preliminary permit application, filed on November 9, 2018, was notarized on November 8, 2018, by a notary public for the State of Idaho, but whose commission expired on August 7, 2018. On January 7, 2019, Commission staff issued an additional information request asking Cat Creek to refile its application's verification page with a notarization and verification stamp of a commissioned notary public in good standing. On January 9, 2019 and March 20, 2019, Cat Creek filed a corrected verification page.¹⁴ In consequence, Cat Creek's application is properly notarized.

10. Second, S Bar Ranch contends that Cat Creek's permit application for a successive preliminary permit is deficient because it contains unsubstantiated conclusions and lacks sufficient detail. Specifically, S Bar Ranch alleges that the application omits information regarding financial activity, overlooks details concerning the proposed solar and wind

¹³ October 29, 2018; April 30, 2018; October 30, 2017; April 28, 2017; October 31, 2016; April 29, 2016 progress reports (attached in Cat Creek's application for a successive preliminary permit).

¹⁴ The Idaho Secretary of State's webpage confirms that Cat Creek's designated notary public, Michael Arkoosh, was appointed a notary public by the State of Idaho for a six-year commission on August 7, 2015.

energy facilities, overstates the project's benefits to water resources, and misrepresents the size of the proposed reservoir.

11. S Bar Ranch's assertions are misplaced. Our regulations contemplate that full, detailed information may not be available when a permit application is filed.¹⁵ To ensure that we have adequate information for determination of project effects and benefits, we require that detailed information regarding the proposed project be provided at such time as a license application is filed.¹⁶ Consistent with that approach, the issues raised by S Bar Ranch here can be appropriately addressed in a licensing proceeding.

12. Finally, S Bar Ranch argues that Cat Creek failed to properly request a waiver of its work plan requirements as required in § 4.81(c)(2) of the Commission's regulations. Section 4.81(c)(2) of the Commission's regulations require each application for a preliminary permit to include an Exhibit 2, which is a description of studies conducted or to be conducted with respect to the proposed project.¹⁷ For any development that would entail new dam construction, Exhibit 2 must include a work plan and schedule, describing the studies to be conducted and a schedule under which the studies are to be completed.¹⁸ Under the Commission's regulations, the Commission may waive the work plan requirements upon a showing by the applicant that the field studies, tests, and other activities to be conducted under the permit would not adversely affect cultural resources or endangered species and would cause only minor alteration or disturbance of land and waters, and that any land altered or disturbed would be adequately restored.¹⁹ S Bar Ranch avers that Cat Creek's permit application failed to make this showing.

13. In the Commission's February 21, 2019 additional information request, the Commission asked Cat Creek whether it intended to conduct geotechnical studies and, if so, to either demonstrate that the proposed studies will not affect cultural resources or endangered species and result in minimal disturbance to land and waters, or file a work plan. In its March 7, 2019 response, Cat Creek stated that it proposes to conduct geotechnical work, but that the boreholes would be confined to private property, would be located approximately 0.5 mile from the canyon rim and approximately 800 feet above the reservoir water level, and would be restricted to areas that already have been

¹⁵ *Symbiotics, LLC*, 99 FERC ¶ 61,101 (2002).

¹⁶ *See FFP Mass 1, LLC*, 133 FERC ¶ 62,230, at P 6 (2010).

¹⁷ 18 C.F.R. § 4.81(c) (2018).

¹⁸ 18 C.F.R. § 4.81(c)(2) (2018).

¹⁹ 18 C.F.R. § 4.81(c)(3) (2018).

disturbed by cattle ranching activities such as grazing, herding, and fence repair. Cat Creek stated that the total disturbance acreage from the geotechnical studies would be less than one acre, and that the sites will be reseeded afterwards, taking into consideration the existing vegetation and the growing conditions for plantings.

14. Given that Cat Creek proposes to conduct studies primarily on private property and on land that has already been disturbed, we find that waiver of section 4.81(c)(2)'s requirements in this instance is appropriate. However, although we are waiving the requirement for a detailed work plan, and while a preliminary permit does not authorize land disturbing activities,²⁰ so that a permittee must obtain any necessary authorizations from federal, state, and local agencies Indian tribes, and affected landowners, we nonetheless believe an additional protective measure is necessary here due to the potential presence of endangered species in the project area,²¹ and to ensure that if study plans should change during the course of developing the license application, any studies undertaken will be conducted in a manner that will protect the environmental integrity of the area. Therefore, we include Article 5, which requires the permittee to conduct studies in a manner that protects environmental resources by consulting with the appropriate resource agencies.²²

B. Issues Related to Project Construction and Operation

15. In their comments, John and Wendi Combs express concern that the proposed project's construction and operation might cause adverse impacts to water quantity and quality, recreational activities, property values, the local economy, federally listed species (i.e., threatened bull trout), as well as other fish and wildlife species. S Bar Ranch also expresses concern that the proposed project, and its associated wind and solar facilities, would pose significant impacts to the surrounding environment, including S Bar Ranch's property, and to human and other species' health and well-being.

16. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project.²³ A preliminary permit does not authorize a permittee to undertake construction of the proposed project. As discussed further below, the purpose of a preliminary permit

²⁰ See Article 1 of the attached permit.

²¹ The federally listed bull trout and its critical habitat are within the proposed project boundary at the Anderson Ranch reservoir.

²² Commission staff monitors the progress of the permittee's activities through annual progress reports, as discussed below.

²³ See, e.g., *New Summit Hydro, LLC*, 149 FERC ¶ 61,033, at PP 22-24 (2014).

is to study the feasibility of the project, including studying potential impacts, such as those raised by the commenters. Should the permittee file a license application, these issues can be addressed in the licensing process.

C. Consultation and Study Requirements under the Permit

17. In a letter dated March 20, 2019, the Forest Service states that any project activities, including preliminary studies, on Forest Service land would require compliance with the Forest Service's special use authorization regulations and the Boise National Forest Land and Resource Management Plan. Furthermore, the Forest Service states that the applicant must submit a proposal and obtain a special use authorization from the Forest Service before undertaking any studies. It also notes that the U.S. Fish and Wildlife Service should be consulted on potential impacts to threatened and endangered species.

18. As discussed above, the permittee here is required to consult with the appropriate federal agencies in their fields of responsibility and expertise. In addition, a permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

III. Permit Information

19. 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,²⁴ 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.²⁵ 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.²⁶

²⁴ 16 U.S.C. § 802 (2012).

²⁵ 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.”).

²⁶ 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

20. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each 12-month period from the effective date of this permit.²⁷ 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.

21. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the filing of a license application pursuant to sections 4.38 and 4.41 of the Commission's regulations. 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.²⁸ 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.²⁹ 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.

22. 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

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).

²⁷ Commission staff recently revised Form P-1, which provides the standard terms and conditions for preliminary permits. *See Go With The Flow Hydropower LLC*, 165 FERC ¶ 62,046, at P 8 (2018). Article 4 of revised Form P-1 requires permittees to submit progress reports annually, as opposed to every 6 months.

²⁸ 18 C.F.R. §§ 5.5 and 5.6 (2018).

²⁹ *See* 18 C.F.R. § 5.3 (2018).

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.³⁰

The Commission orders:

(A) A preliminary permit is issued for the Cat Creek Energy Generation Facility Pumped Storage Hydroelectric Project No. 14655 to Cat Creek Energy, LLC for a period effective the first day of the month in which this permit is issued, and ending either 48 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 and to the following special conditions set forth in Article 5:

Article 5. In the interest of protecting the natural resources and other environmental values of the project area, the Permittee must conduct project studies in a manner that preserves the environmental integrity of the area, and must consult with the appropriate federal, regional, state, and local agencies and Indian tribes in their fields of responsibility and expertise. These resources and values include, but are not limited to: forests, land management and treatment, fish, wildlife, recreation and public use, flood regulation, water and air quality (including water supply, ground-water studies, waste treatment and disposal), public health and safety, archeological, historic and cultural sites, threatened or endangered species of flora and fauna, and scenic and aesthetic values. In conducting any necessary studies to determine the feasibility of the proposed project, the Permittee must use all reasonable means to protect these natural resources or to provide for their mitigation or replacement, including alternative designs and operational measures. In connection with studies pertaining to archeological and historic and cultural sites, the Permittee must consult with the State Historic Preservation Officer for each state in which any part of the project would be located.

³⁰ See *City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981).

(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. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2018).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Form P-1 (Revised October 2018)

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 12-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, NE, Washington, DC 20426.