

149 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego County Water Authority

Project No. 12747-004

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued October 16, 2014)

1. On June 24, 2014, Commission staff issued an order denying the San Diego County Water Authority's (Water Authority) application for a third preliminary permit to study the feasibility of the proposed San Vicente Pumped Storage Project No. 12747 (San Vicente Project).¹ The proposed project would be located at the existing San Vicente dam and reservoir on San Vicente Creek in San Diego County, California. On July 24, 2014, the Water Authority filed a timely request for rehearing or, in the alternative, clarification of the June 24 Order. This order denies the Water Authority's request for rehearing, and grants its request for clarification.

I. Background

2. On March 8, 2007, Commission staff issued an initial three-year preliminary permit to the Water Authority to study the feasibility of the proposed San Vicente Project.² The proposed project would consist of: (1) the existing 337-foot-high San Vicente dam and 242,000 acre-feet (AF) San Vicente reservoir, which would serve as the lower reservoir for the pumped storage project; and (2) one of four alternative sites for the upper reservoir.³ Depending on the alternative selected, the potential power from the project would range from 240 to 500 megawatts (MW).

¹ *San Diego County Water Authority*, 147 FERC ¶ 62,225 (2014) (June 24 Order).

² *San Diego County Water Authority*, 118 FERC ¶ 62,179 (2007); 132 FERC ¶ 62,007 (2010).

³ Alternative sites A and B would be located approximately 3 and 0.5 miles
(continued ...)

3. In late 2007, the City of San Diego, which owns and operates the San Vicente dam, initiated the planning stages for its Implementation of Potable Reuse Project which would pipe approximately 15 million gallons per day of treated wastewater through a pipeline to the San Vicente reservoir, where it would blend with reservoir water, before being piped to the City's wastewater treatment plants and, eventually, the City's domestic water supply distribution system.
4. In 2009, the Water Authority determined that additional emergency and carryover storage was needed to ensure reliability during droughts and other water shortages and ultimately selected the San Vicente dam as the preferred site for additional storage (Dam Raise Project).⁴ As a result of the Dam Raise Project, the San Vicente dam was raised 117 feet, and the total capacity of the San Vicente reservoir was increased to 242,000 AF.
5. The Water Authority's initial permit expired on February 28, 2010. On March 1, 2010, the Water Authority applied for a successive preliminary permit, which Commission staff issued on July 2, 2010, noting that the Commission will grant successive permits if it concludes that the applicant has diligently pursued the requirements of its prior permits in good faith.⁵ On June 30, 2013, the successive permit expired, and on July 1, 2013, the Water Authority filed an application for a third (i.e., second successive) preliminary permit for the same project at the same location.
6. On December 19, 2013, the Commission issued public notice of the Water Authority's July 2013 permit application.⁶ The U.S. Department of the Interior filed a letter stating it had no comments on the application.
7. On June 24, 2014, Commission staff issued an order denying the Water Authority a third preliminary permit for the San Vicente project. The order explained that the

northwest of the San Vicente reservoir, respectively. Alternative sites C and D would be located approximately 0.8 miles northeast and approximately 1.8 miles southeast of the San Vicente reservoir, respectively.

⁴ The Dam Raise Project was a component of the Water Authority's Emergency Storage Project (a system of reservoirs, interconnected pipelines and pumping stations designed to make water available to the San Diego region in the event of an interruption in imported water deliveries) and its Carryover Storage Project (an initiative aimed at storing water accumulated during wet seasons for use in subsequent dry seasons or in times of drought).

⁵ See *San Diego County Water Authority*, 132 FERC ¶ 62,007 (2010).

⁶ 78 Fed. Reg. 78,355 (2013).

Commission rarely issues a third consecutive permit to the same applicant, for the same site, unless some extraordinary circumstance or factor outside the control of the permittee is present.⁷ The June 24 Order noted that each of the Water Authority's progress reports filed under its successive (second) preliminary permit were general in nature and often detailed activities un-related to the Water Authority's San Vicente Project. With the exception of cultural resources and endangered species surveys required by the U.S. Army Corps of Engineers' Section 404 permit authorizing the Dam Raise Project, there was no evidence of studies performed or agency consultation aimed at advancing the project's development. The June 24 Order concluded that the Water Authority had failed to identify an extraordinary circumstance that prevented it from moving forward with a development application under its prior permit.

8. On July 24, 2014, the Water Authority filed a request for rehearing or, in the alternative, clarification that it may file a new preliminary permit application that would not be treated as a successive application.

II. Discussion

9. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits to potential development applicants for a period of up to three years.⁸ The FPA does not address the issue of how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive permit only if it concludes that the applicant has pursued the requirements of

its prior permit in good faith and with due diligence.⁹ When a permittee applies for a second successive permit (i.e., a third permit), it is Commission policy to grant one only

⁷ June 24 Order at P 7 (citing *Mokelumne River Water and Power Authority*, 89 FERC ¶ 61,001 (1999); *Burke Dam Hydro Associates*, 47 FERC ¶ 61,449 (1989); *City of Redding, California*, 33 FERC ¶ 61,019 (1985)).

⁸ 16 U.S.C. §§ 797(f), 798 (2012).

⁹ See, e.g., *Greybull*, 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*, 140 FERC ¶ 61,221 (2012).

when the permittee has demonstrated that it suffered some extraordinary circumstance or factor outside of its control that prevented it from filing a final license application.¹⁰

10. The Commission has held that, in most cases, three years should be enough time to consult with resource agencies and conduct the studies necessary to prepare a license application, and six years should be more than enough time.¹¹ Allowing a site to be reserved for nine years (i.e., three permit terms), absent some showing of extraordinary circumstances, would be to allow site banking.¹²

A. Extraordinary Circumstances

11. The Water Authority contends that the Dam Raise Project and Potable Reuse Project constitute extraordinary circumstances and factors outside of its control that prevented it from filing a license application during its prior permit term. The Water Authority maintains that the facility description and any studies in connection with the lower reservoir conducted during the first permit term would have been rendered obsolete or, at the least, would need to be supplemented due to the Dam Raise Project. Further, the Water Authority states that because the amount of water available for generation would be significantly different under the project proposed in the second permit, earlier studies of several aspects of the upper reservoir sites, particularly power generation and changes in water quality caused by mixing would have been rendered obsolete. In addition, the Water Authority states that proceeding with final design work during the term of the second permit before the Potable Reuse Project was finalized would have caused needless study expenses and inconveniences, but it fails to explain how the Potable Reuse Project would impact its ability to pursue development of the San Vicente Project.

¹⁰ See *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131 at PP 14-15; *Mokelumne River Water and Power Authority*, 89 FERC ¶ 61,001 (1999); *Sutton Hydroelectric Company, LLC*, 147 FERC ¶ 61,039, at P 17 (2014).

¹¹ See, e.g., *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012).

¹² 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 *Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008). 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); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (2006) (affirming application of policy against site banking in permit cases).

12. While we are sympathetic to the challenges of finalizing a development application amid the uncertainty associated with the Dam Raise and Potable Reuse projects, we do not find that these projects amount to extraordinary circumstances outside the Water Authority's control that prevented it from pursuing a license application during its prior permit terms. As the Water Authority itself stated in its request for rehearing, it is responsible to "continuously plan for and meet the region's evolving water supply needs."¹³ In this capacity, it is neither extraordinary nor outside of the Water Authority's control to be faced with navigating multiple large-scale water quality and supply projects simultaneously.

13. Accordingly, we deny rehearing and affirm our denial of the Water Authority's third preliminary permit application. As noted above, our preliminary permit policy focuses on the Commission's concerns regarding site banking, and we do not find sufficient evidence in the record to issue a third preliminary permit. We note, however, that our denial does not constitute a judgment on the merits of the Water Authority's proposed project, or prejudice in any way whether the Commission would ultimately issue a license for the project. Furthermore, as discussed below, we grant the Water Authority's request for clarification and will allow the Water Authority to file for a new preliminary permit.

B. Request for Clarification

14. In the alternative, if the Commission denies its request for rehearing, the Water Authority seeks clarification that it will not be barred from filing a new, non-successive preliminary permit application.

15. In support of its request, the Water Authority refers to *Mt. Hope Waterpower Project*,¹⁴ in which the same entity held preliminary permits for six years and a license for 13 years on the same site, but was unable to commence construction during that time. The Commission terminated Mt. Hope's license for failure to commence construction within the time specified by the FPA. One month later, Mt. Hope filed an application for a new preliminary permit for the same project on the same site. In response, the Commission denied the application and imposed a six month "cooling off period," during which it stated that it would bar any further applications from the applicant in order to

¹³ Rehearing request at 8.

¹⁴ *Mt. Hope Waterpower Project LLP*, 115 FERC ¶ 61,315 (2006), *reh'g denied*, 116 FERC ¶ 61,232 (2006).

allow other potentially interested entities to file preliminary permit applications for the site.¹⁵

16. The Water Authority now urges the Commission to find that a sufficient amount of time has passed for the Commission to accept a new, non-successive preliminary permit application for the proposed San Vicente Project. The Water Authority indicates that, because its successive permit application was filed over a year ago (on July 1, 2013), and publicly noticed over nine months ago (on December 19, 2013), other entities have had ample time to file competing applications for the site, and none did so.

17. The Water Authority also outlines specific tasks it plans to complete during a permit term, including selecting the location of the upper reservoir from the four alternatives discussed above, and beginning consultation with agencies, tribes, and the public in December 2014. Additionally, the Water Authority states that it met with representatives from the California Independent System Operator to begin preparing an interconnection application, which requires detailed information about the proposed generating facilities in order to conduct studies of potential impacts to the grid, and intends to submit that application in April 2015. The Water Authority maintains that the culmination of these activities will be the preparation and filing of a Pre-Application Document (PAD) and Notice of Intent to prepare a license application (NOI) by July 2015.

18. We have considered the Water Authority's request for clarification, and agree that a sufficient amount of time has passed for any other entities interested in pursuing a project at the site to have had an opportunity to file preliminary permit or license applications for the San Vicente Project site. For this reason, and because the Water Authority outlined specific steps it would take under an additional preliminary permit, we will allow the Water Authority to re-apply for a new preliminary permit for the San Vicente Project site.

19. If the Water Authority receives a new preliminary permit, we expect that it will act in good faith and with due diligence in order to file a development application during that permit term. Specifically, we would expect the Water Authority to identify the location of its proposed upper reservoir, initiate consultation with agencies, tribes, and other interested parties, and file a PAD and NOI not later than July 2015, as discussed above.

III. Conclusion

20. For the reasons described above, we deny the Water Authority's request for rehearing, and grant its alternative request for clarification.

¹⁵ *Id.*

The Commission orders:

- (A) The Water Authority's July 24, 2014 rehearing request is denied.
- (B) The Water Authority's July 24, 2014 request for clarification is granted, as discussed herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.