

I. Background

2. On May 5, 2009, Commission staff issued Klickitat PUD its first preliminary permit for the JD Pool Project, which expired on April 30, 2012.³ Klickitat PUD received a successive (i.e., second) preliminary permit for the project on November 16, 2012.⁴ The successive permit expired on October 31, 2015, and on November 3, 2015, Klickitat PUD applied for a second successive (i.e., third) preliminary permit.⁵ Also on November 3, 2015, Clean Power filed a preliminary permit application for its Columbia Gorge Project, which was in competition with Klickitat PUD's application for its JD Pool Project.

3. Both the JD Pool Project and the Columbia Gorge Project would be 1,200-megawatt closed-loop pumped storage hydroelectric projects located near the Army Corps of Engineers' John Day Lock and Dam within the Columbia River Basin. The lower reservoir for both projects would be at the site of the former Columbia Gorge Aluminum smelter, and would initially be filled with water from the Columbia River using an existing submerged pumping station and conveyance pipeline.

4. The site of the former aluminum smelter is now a Resource Conservation and Recovery Act (RCRA)⁶ contaminated site, and is presently undergoing a cleanup process due to decades of contamination. Smelter operations contaminated the soil and groundwater at the site with fluoride, polycyclic aromatic hydrocarbons, cyanide, and polychlorinated biphenyls.⁷ The Washington Department of Ecology (Washington DOE) is currently working with the National Smelter Company and the Lockheed Martin Corporation, which have both been deemed responsible parties, on the assessment and cleanup of the site.

³ *Public Utility Dist. No. 1 of Klickitat County*, 127 FERC ¶ 62,104 (2009).

⁴ *Public Utility Dist. No. 1 of Klickitat County, Washington*, 141 FERC ¶ 62,118 (2012).

⁵ On October 30, 2015, Klickitat PUD filed a late request for a 2-year extension of the term of its successive (second) preliminary permit, which staff rejected on November 5, 2015. See *Public Utility Dist. No. 1 of Klickitat County, Washington*, 153 FERC ¶ 62,088 (2015). Klickitat PUD did not seek rehearing of the rejection.

⁶ 42 U.S.C. §§ 6901 *et seq.* (2012).

⁷ *Columbia Gorge Aluminum*, Department of Ecology, State of Washington, <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=11797> (last visited Mar. 28, 2016).

5. On December 23, 2015, Commission staff dismissed both preliminary permit applications. Staff found that, given the speculative nature of the cleanup timeline and the uncertainty regarding the site's future suitability for development, it would not be prudent to issue a permit for the site at this time. In any event, as to Klickitat PUD's third permit application, the order also stated that Klickitat PUD had failed to demonstrate any extraordinary circumstance or factor outside of its control that would warrant staff issuing Klickitat PUD a third preliminary permit for the site.

6. On January 21, 2016, Clean Power filed a request for rehearing of the December 23 Order, arguing that there is a realistic schedule in place for cleanup at the site, and that Commission staff did not articulate a rational basis for denying Clean Power's application despite having issued two preliminary permits to Klickitat PUD for the site in the past.⁸ On January 27, 2016, Klickitat PUD also filed a request for rehearing of the December 23 Order, reiterating its earlier arguments about extraordinary circumstances and adopting the arguments made in Clean Power's rehearing request.⁹

II. Discussion

A. Ongoing Cleanup Process

7. On rehearing, Clean Power argues that there is a schedule in place for cleanup of the contaminated former smelter site, and that there may be opportunities to accelerate cleanup work in the proposed project areas. Clean Power states it is optimistic about redevelopment of the site, given that the former smelter site is a RCRA site, and not a

⁸ On March 11 and 22, 2016, Clean Power filed supplemental information addressed to the Chairman, which consisted of responses from Clean Power, the National Hydropower Association, and the Northwest Hydropower Association to a Department of Energy information request. To the extent the filings were intended to supplement Clean Power's rehearing request, we note that the Commission does not allow parties to supplement their rehearing requests after the 30-day period has run. *See Cal. Dep't of Water Res. Bd. and the City of Los Angeles*, 120 FERC ¶ 61,248 (2007). Nonetheless, we note that the supplemental information does not relate to the merits of Clean Power's arguments on rehearing, but rather includes general information about the challenges and opportunities for pumped storage hydropower development in the United States.

⁹ References in this order to Clean Power's request for rehearing include Klickitat PUD's rehearing request.

Superfund site.¹⁰ It also argues that there was no sufficient basis for denying its preliminary permit application, given that Commission staff previously issued two preliminary permits to Klickitat PUD for the same site. Clean Power alleges that staff issued the previous preliminary permits “on facts that are substantially identical to those that exist today.”¹¹ In addition, Clean Power states that holding a preliminary permit for the site will attract investors to the project, which it argues is necessary to ensure further study and development of the site.

8. We find, as a matter of policy, it is not prudent to issue a preliminary permit for a contaminated site that is still undergoing a cleanup process, regardless of whether that site is a RCRA site or a Superfund site.¹² The Commission will only consider applications for such sites once the relevant state or federal agency, in this case Washington DOE, certifies that cleanup is complete. The information provided by Clean Power indicates that a draft cleanup action plan is not due to the state until August 2018, and that subsequent steps in the process will take 2 to 3 years.¹³ Accordingly, it would not be appropriate to file an application until, at the earliest, August 2020.

9. We also disagree that the facts upon which previous permits for the site were issued are “substantially identical to those that exist today.” In 2009 and 2012, when Commission staff issued Klickitat PUD its previous preliminary permits, staff was not aware of the contamination and ongoing cleanup occurring within part of the project

¹⁰ Superfund sites are regulated under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *see* 42 U.S.C. §§ 9601-9675 (2012), under the authority of the Environmental Protection Agency. Clean Power asserts, but provides no explanation as to why, it believes the RCRA process would be more successful at “putting this contaminated property back to productive use” than the Superfund process. Clean Power’s Request for Rehearing at 2.

¹¹ Clean Power’s Request for Rehearing at 5.

¹² The Commission on rehearing has rescinded a preliminary permit for a pumped storage project at a Superfund site because that site was undergoing an “indefinite cleanup process.” *Green Energy Storage Corp.*, 150 FERC ¶ 61,042, at P 8 (2015).

¹³ *See* Clean Power’s Request for Rehearing at Exhibit A.

area.¹⁴ Given the information that is now before us about the contamination and cleanup process at the proposed project site, we do not find it prudent to issue any preliminary permits for the site until such cleanup is complete. We therefore deny rehearing on this issue.

B. Extraordinary Circumstances

10. Sections 4(f) and 5 of the Federal Power Act (FPA)¹⁵ authorize the Commission to issue preliminary permits to potential development applicants for a period up to 3 years. In 2013, Congress amended the FPA to provide that a preliminary permit can be extended once for not more than 2 additional years beyond the 3-year term allowed, if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.¹⁶

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 preliminary permit only if it concludes that the applicant has pursued the requirements of its prior permit in good faith and with due diligence.¹⁷ The Commission's policy is to grant a third preliminary permit only when the permittee has demonstrated that extraordinary

¹⁴ There is no evidence in the record of those two proceedings that indicates the JD Pool Project would be at a RCRA site still undergoing cleanup. While there is some discussion of the aluminum smelter and proceedings with Washington DOE regarding the smelter and Klickitat PUD's water rights, none of that discussion mentioned the contamination or cleanup process at the site.

¹⁵ 16 U.S.C. §§ 797(f) and 798 (2012).

¹⁶ Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. § 798(b)).

¹⁷ 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 6-month progress reports)); *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 24 (2012).

circumstances or factors outside its control prevented it from filing a license application during the second term.¹⁸

12. The Commission has held that, in most cases, 3 years should be enough time to consult with resource agencies and conduct any studies necessary to prepare a development application, and 6 years should certainly be more than enough time. In the absence of extraordinary circumstances, allowing a site to be reserved for three preliminary permit terms would violate the Commission's longstanding policy against site banking.¹⁹

13. In its request for rehearing, Klickitat PUD maintains that its receipt of information from the Washington Department of Fish and Wildlife regarding an active golden eagle nest in the project area constitutes an extraordinary circumstance, as it required Klickitat PUD to relocate and redesign its lower reservoir.²⁰ However, as staff noted in the December 23 Order, the issue could have been addressed previously if Klickitat PUD had not waited until the sixth year of holding a preliminary permit for the site to undertake much of its agency consultation. In its rehearing request, Klickitat PUD provides no additional information or explanation as to why it did not learn of the golden eagle nest earlier in its permit term or why it waited nearly 6 years to begin agency consultation. Moreover, Klickitat PUD does not explain why the presence of the nest constitutes an extraordinary circumstance. Planning to avoid harm to species of concern is a typical part of developing a hydropower project, not an unusual occurrence. Accordingly, we deny rehearing on this issue.

¹⁸ See, e.g., *Pine Creek Mine, LLC*, 148 FERC ¶ 61,027, at P 14 (2014); *Sutton Hydroelectric Co. LLC*, 147 FERC ¶ 61,039, at P 17; *Greybull Valley Irrigation Dist.*, 143 FERC ¶ 61,131 at PP 14-15.

¹⁹ 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).

²⁰ The golden eagle is not federally listed or state listed as either threatened or endangered, but is a State Candidate Species in Washington and retains protection under the Migratory Bird Treaty Act and the Bald and Golden Eagle Act.

The Commission orders:

The requests for rehearing of the December 23, 2015 order, filed by Public Utility District No. 1 of Klickitat County, Washington, and Clean Power Development, LLC, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.