

140 FERC ¶ 62,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Nuvista Light and Electric Cooperative, LLC

Project No. 14369-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(August 14, 2012)

1. On March 2, 2012, Nuvista Light and Electric Cooperative, LLC (Nuvista) 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 Chikuminuk Lake Hydro Project No. 14369 (Chikuminuk Project or project) to be located on the Allen River, 118 miles southeast of Bethel, Alaska, in the unincorporated Bethel and Dillingham Census Area, Alaska.

I. Project Proposal

2. The proposed project would consist of: (1) an approximately 1,325-foot-long, 128-foot-high concrete-faced rockfill dam; (2) a 25-foot-diameter intake structure; (3) a 775-foot-long, 25-foot-diameter tunnel bringing flows from the intake to a gate house; (4) a gate house and gate shaft to convey flows from the tunnel to the main penstock; (5) a 120-foot-long, 9- to 13-foot-diameter main penstock, which bifurcates into a 135-foot-long, 9-foot-diameter penstock leading to turbine 1 and a 115-foot-long, 9-foot-diameter penstock leading to turbine 2; (6) a 150-foot-long, 75-foot-wide powerhouse containing two vertical Francis turbine/generator units rated for 6.7 megawatts (MW) each, for a total installed capacity of 13.4 MW; (7) a 100-foot-long, 75-foot-wide tailrace returning project flows to the Allen River; (8) a 118-mile long, 138-kilovolt transmission line leading from the powerhouse to a substation in the town of Bethel; (9) project access facilities, including a float plane dock and a heliport; (10) project roads leading from the float plane dock to the dam and powerhouse; and (11) appurtenant facilities. The estimated annual generation of the Chikuminuk Project would be 88.7 gigawatt-hours. The project would be partially located on federal lands managed by the U.S. Fish and Wildlife Service in the Yukon Delta National Wildlife Refuge, and partially on Alaska state lands in the Wood-Tikchik State Park.

II. Background

¹ 16 U.S.C. § 797(f) (2006).

3. The Commission issued public notice of Nuvista's permit application on March 27, 2012 and May 10, 2012.² Comments were filed by the U.S. Department of the Interior (Interior) and the U.S. Fish and Wildlife Service (FWS). After the end of the comment period, Nuvista filed additional information regarding their request for a field study permit in the Wood-Tikchit State Park.

III. Discussion

A. Access to Site

4. Interior and the FWS stated that the project would occupy lands of the Yukon Delta National Wildlife Refuge, which, if the project goes forth, would require an application for a Transportation and Utility System right-of-way permit.

5. Nuvista provided a copy of the State of Alaska Department of Natural Resources' (Alaska DNR) denial for a Special Park Use Permit for field studies. This letter stated that since hydropower development was inconsistent with the management plan and the park's enabling legislation, they will not authorize Nuvista to conduct the requested field studies. Alaska DNR also noted that for field studies leading to a hydropower development application to occur, the park's enabling legislation must be amended.

6. A permit applicant is not required to have obtained all access rights to a project site as a condition of receiving a preliminary permit, and a preliminary permit does not grant a right of entry onto any lands. The purpose of a preliminary permit is to preserve the right of the permit holder to have first priority in applying for a license. It is not an authorization to conduct field studies. A permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

B. Issues Related to Project Construction and Operation

7. Interior expressed concern that recreation resources could be adversely affected by the project construction and operation.

8. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of

² The Commission issued a second notice for the project since some state and federal entities were not notified by the first notice.

constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

F. Consultation and Study Requirements Under the Permit

9. Interior stated that applicant should develop alternate proposals for the transmission line route, either on or off the Refuge lands. Interior also requested that the applicant conduct their pre-filing activities and consultation using the Alternative License Process instead of the Integrated License Process.

10. The Commission has not sought to place all relevant study requirements in preliminary permits.³ Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.⁴ Further, permit conditions have been framed to ensure that the permittee does not tie up a site without pursuing in good faith a study of the project's feasibility.⁵

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,⁶ 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.⁷ 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

³ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

⁴ See 18 C.F.R. § 4.38 (2011).

⁵ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁶ 16 U.S.C. § 802 (2006).

⁷ 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.”).

project and to prepare a license application, it grants no land-disturbing or other property rights.⁸

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 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.⁹ 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.¹⁰ 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

⁸ 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 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).

⁹ 18 C.F.R. §§ 5.5 and 5.6 (2011).

¹⁰ *See* 18 C.F.R. § 5.3 (2011).

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.¹¹

The Director orders:

(A) A preliminary permit is issued for the Chikuminuk Lake Hydro Project No. 14369 to Nuvista Light and Electric Cooperative, LLC, 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).

Jennifer Hill, Chief
Northwest Branch
Division of Hydropower Licensing

¹¹ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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.