

142 FERC ¶ 62,009
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Archon Energy 1, Inc.

Project No. 14432-001

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(January 7, 2013)

1. On July 18, 2012, Archon Energy 1, Inc. (Archon or applicant), filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ proposing to study the feasibility of the Yuba River DaGuerre Point Dam 3 MW Hydropower Project (DaGuerre Point Dam Project or project) to be located at the U.S. Army Corps of Engineers' DaGuerre Point Dam, on the Yuba River, near the City of Marysville, Yuba County, California.

I. Project Proposal

2. The proposed project would consist of the following: (1) a diversion structure and intake canal; (2) a powerhouse containing eight 375-kilowatt Archimedean screw turbine/generating units with a total capacity of 3 megawatts; (3) a tailrace channel; and (4) a 3,500-foot-long, 12-kilovolt transmission line. The proposed project would have an average annual generation of 21,000 megawatt-hours.

II. Background

3. The Commission issued public notice of Archon's permit application on August 3, 2012. The California Department of Fish and Game and the U.S. Department of the Interior (Interior) each filed a timely notice of intervention on September 27, 2012. The National Marine Fisheries Service (NMFS) filed a timely notice of intervention on October 2, 2012.² Timely motions to intervene were filed jointly by the South Yuba River Citizen's League, California Sport Fishing Protection Alliance, Trout Unlimited, American Rivers, and American Whitewater on October 1, 2012. The Yuba County

¹ 16 U.S.C § 797(f) (2006).

² Timely notices of intervention filed by a state fish and wildlife agency or the Departments of the Interior or Commerce (NMFS) are granted by operation of Rule 214(a)(2).

Water Agency (YCWA) filed a timely motion to intervene on October 2, 2012.³ Interior and NMFS also filed comments with their interventions, and joint comments were filed by the Brophy Water District, Dry Creek Mutual Water Company, Hall Irrigation Company, South Yuba Water District, and the Wheatland Water District (collectively the Contractors) on November 19, 2012.

III. Discussion

A. Notification of Irrigation Districts

4. Section 4.32 of the Commission's regulations requires that each application for a preliminary permit identify every irrigation district, drainage district, or similar special purpose political subdivision. NMFS noted that the permit application did not list all the water diverters or water agencies in vicinity of the dam and that water diversions in the vicinity of the dam serve the nearby water districts such as YCWA,⁴ and the Contractors. As a result of Archon's incomplete permit application, proper notice of the application was not served on all of the appropriate entities. Therefore, on November 16, 2012, the Commission issued a letter to Contractors providing them with notification of the preliminary permit application, seeking their comments and providing an opportunity to intervene in the proceeding. As mentioned above, on November 19, 2012, the Contractors filed comments on the permit application.

B. Issues Related to Project Construction and Operation

5. Interior and NMFS expressed concern that aquatic and/or terrestrial resources, including federally threatened and endangered species, could be adversely affected by the project construction and operation, and as a result, Endangered Species Act consultation should be concluded prior to the issuance of a license for the proposed project.

6. NMFS also commented that with the maximum diversion rate of the proposed project (2,120 cubic-feet/second), project operations may affect three consumptive water diversions associated with DaGuerre Point dam, including the effectiveness of fish screens at those diversions and water available for diversion.

³ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2012).

⁴ The preliminary permit application correctly identified the Yuba County Water Agency and notice of the permit application was provided to YCWA, via the Commission's August 3, 2012 public notice.

7. The Contractors raised concerns associated with how the proposed project may influence agricultural water supplies and effectiveness of the nearby diversion facilities and the fishery resources of the Yuba River.

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 identified by Interior, NMFS, and the Contractors in their comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

C. Sufficiency of Application

9. The NMFS states that Archon's application is deficient because the description of the proposed project's diversion and intake structures are too vague. The NMFS states that this information is not sufficient to demonstrate how Archon proposes to control river flow with a degree of regular control.

10. The Commission's regulations do not specifically require a permit applicant to demonstrate how it will control river flow. Section 4.81(b) of the Commission's regulations requires that a permit applicant specify, to the extent possible, the general configuration of project facilities that will be part of the project.⁵ Here, Archon states that its proposed project will include a simple concrete diversion located adjacent to the DaGuerre Point Dam and existing fish ladder on the south bank of Yuba River. Archon's description of its diversion and intake structures thus meet the Commission's requirements.

D. Additional Studies

11. The NMFS and the Contractors state that study and analysis should be done to determine how the proposed project would affect the movement of sediment and the flow of water, fish passage at DaGuerre Point dam, and the fishery resources of the Yuba River in the vicinity of the proposed project. In addition to these information needs, Interior states that species composition of listed vernal pool crustaceans in the upland habitat may be affected by the project, and therefore should be studied.

12. The Commission has not sought to place all relevant study requirements in preliminary permits.⁶ Rather, the studies to be undertaken by a permittee are shaped by

⁵ 18 C.F.R. § 4.81(b) (2012).

⁶ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

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.⁷ 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.⁸

IV. Permit Information

13. 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,⁹ 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.¹⁰ 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.¹¹

14. 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

⁷ See 18 C.F.R. § 4.38 (2012).

⁸ See *City of Richmond, Va.*, 53 FERC ¶ 61,342, at 62,247 (1990).

⁹ 16 U.S.C. § 802 (2006).

¹⁰ 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.”).

¹¹ 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).

Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.¹² 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.¹³ On July 9, 2012, Archon filed an NOI and PAD and a request to use the Commission's Traditional Licensing Process (TLP). The Commission approved Archon's request to use the TLP on August 21, 2012. 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.

15. 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.

16. 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 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.¹⁴

¹² 18 C.F.R. §§ 5.5 and 5.6 (2012).

¹³ See 18 C.F.R. § 5.3 (2012).

¹⁴ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

The Director orders:

(A) A preliminary permit is issued for the DaGuerre Point Dam Hydropower Project (P-14432) to Archon Energy 1, Inc. 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) The Permittee shall coordinate the studies and its plans for access to the site during the term of this permit with the Corps District Engineer to ensure that the feasibility studies will result in a plan of development consistent with the authorized purposes of the federal project.

(D) 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 (2012).

Timothy J. Welch, Chief
West Branch
Division of Hydropower Licensing

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.