

120 FERC ¶ 61,069  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Don L. Hansen

Project No. 12685-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued July 19, 2007)

1. This order grants the application of Don L. Hansen for a three-year preliminary permit under section 4(f) of the Federal Power Act (FPA)<sup>1</sup> to study the proposed 70-megawatt (MW) Tapps Lake Dam Hydroelectric Project No. 12685, located at Puget Sound Energy, Inc.'s (Puget) Lake Tapps Dam. As discussed below, because a preliminary permit gives the permit holder no property rights or construction authority, it is premature for us to consider here arguments that the proposed project would interfere with other possible uses of the project site, but such issues can properly be raised at such time that a license application for the project is ultimately filed.

**Background**

2. Mr. Hansen proposes to study the resumption of power generation at Puget's formerly-licensed Project No. 2494, located on the White River in Sumner, Pierce County, Washington. Puget's project was built in 1911. In 1977, the Commission found that the project was required to be licensed, based upon the navigability of the White River, and required Puget to file a license application.<sup>2</sup> Following a long and contentious licensing proceeding, the Commission granted Puget a license in 1997.<sup>3</sup> In order to promote a settlement of issues raised on rehearing of the license, including the financial viability of the project as licensed and project impacts on endangered species, the

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<sup>1</sup> 16 U.S.C. § 797(f) (2000). Three years is the maximum term for a preliminary permit. *See* FPA Section 5, 16 U.S.C. § 798 (2002).

<sup>2</sup> *See Puget Sound Power and Light Company*, 1 FERC ¶ 61,059 (1977), *reh'g denied*, 4 FERC ¶ 61,144 (1978), *aff'd*, *Puget Sound Power & Light Company v. FERC*, 644 F.2d 785 (9th Cir. 1981).

<sup>3</sup> *See Puget Sound Energy, Inc.*, 81 FERC ¶ 61,354 (1997).

Commission stayed the requirements of the license in 1999 and in 2001 and 2003 extended the stay, ultimately through January 15, 2004.<sup>4</sup> No viable operating plan materialized and, on December 23, 2003, Puget filed notice of its decision to reject the license and to cease hydropower operations (thereby obviating the need for a Commission license) by January 15, 2004, the expiration date of the stay. The Commission rescinded the license on January 16, 2004, and dismissed the license application.<sup>5</sup>

3. On June 13, 2006, Mr. Hansen filed his preliminary permit application. The proposed project would include: Puget's existing 352-foot-long, 11-foot-high White River Diversion Dam; the dam's impoundment, with a surface area of 2,880 acres and a storage capacity of 67,000 acre-feet at normal maximum pool elevation of 453 feet mean sea level; two existing intake structures; the existing powerhouse containing four generating units with a combined installed capacity of 70 MW; and the existing 4,181-foot-long, 480-kilovolt transmission line.

4. On August 10, 2006, Commission staff issued a letter accepting the application for filing, and issued public notice of the application, setting October 10, 2006, as the deadline for filing comments, protests, motions to intervene, and notices of intent to file competing applications.<sup>6</sup> Motions to intervene were filed by Puget, the Cascade Water Alliance (the Water Alliance), the Puyallup Indian Tribe, the Washington Department of Fish and Wildlife (Washington Wildlife), the Lake Tapps Community Council (the Community Council), the Muckleshoot Tribe, and the City of Auburn, Washington.<sup>7</sup>

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<sup>4</sup> 88 FERC ¶ 61,143 (1999); 95 FERC ¶ 61,453 (2001); and 103 FERC ¶ 61,357 (2003).

<sup>5</sup> 106 FERC ¶ 62,038 (2004).

<sup>6</sup> On October 10, 2006, Rainier Engineering and Environmental, LLC (Rainier) filed a timely notice of intent to file a competing application, and on November 13, 2006, Rainier filed a timely competing application in Project No. 12767. Commission staff found the application deficient (even after offering Rainier the opportunity to supply additional information to cure the deficiencies) and rejected the application by letter issued March 20, 2007. Rainier filed a request for rehearing, which was rejected as deficient (and, in any event, unmeritorious) in a notice issued by the Secretary on May 11, 2007 (119 FERC ¶ 61,131 (2007)).

<sup>7</sup> Because the motions to intervene were unopposed and timely, they were granted automatically. *See* 18 C.F.R. § 385.214(c)(1) (2006).

Puget, the Water Alliance, and the Puyallup Indian Tribe request that the Commission deny the application.<sup>8</sup>

5. By letter issued May 4, 2007, and upon further review of Mr. Hansen's application, Commission staff required Mr. Hansen to file a revised map showing a project boundary that encloses all proposed project facilities, as required by section 4.81(d) of the preliminary permit application content regulations.<sup>9</sup> Mr. Hansen filed the revised map on June 11, 2007.

### **Discussion**

6. Several intervenors express concerns directed at the development of the proposed project. For example, the Community Council asks that a reservoir management agreement between its members and Puget be incorporated into any license issued for the proposed project. The Muckleshoot Tribe contends that operation of the proposed project poses a serious threat to environmental resources within and without its reservation in King and Pierce Counties. The City of Auburn states that its water supply is in part fed by leakage from Lake Tapps dam, and any modifications to the dam or its operations would affect the city and its water customers.

7. Puget, the Water Alliance (an organization of eight municipal corporations interested in developing Lake Tapps as a water supply source),<sup>10</sup> and the Puyallup Indian Tribe contend that it is not in the public interest to grant the application, because it poses a risk of upsetting their substantial individual and collaborative efforts to utilize Puget's project facilities for public purposes. Puget states that, since it ceased power operations at the project's site in 2004, it has been working with various state, federal, and non-governmental agencies to facilitate an orderly transition to non-power operations to meet various public interest concerns.<sup>11</sup> The Water Alliance contends that granting the

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<sup>8</sup> Washington Wildlife had no comments on the application. In addition, the U.S. Department of the Interior, by filing of October 10, 2006, stated that it had no comments.

<sup>9</sup> 18 C.F.R. § 4.81(d) (2006).

<sup>10</sup> The Alliance states that it has entered into a memorandum of understanding with Puget, giving the Alliance exclusive rights to negotiate the purchase of the project.

<sup>11</sup> Puget states (motion to intervene at 8-10) that it has been helping to secure potable-water rights in the reservoir for King and Pierce Counties; operating the dam (and possibly transferring the dam to the U.S. Army Corps of Engineers) for the purpose of providing fish passage; negotiating an agreement with Cascade Land Conservancy to set aside 2,500 acres of former project lands as natural and open-space lands; negotiating  
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application is not in the public interest, because applicant has no legal right to enter project property, Puget has entered into an agreement with the Water Alliance to negotiate a sale of project property, and it is highly unlikely that the state would issue water rights to Mr. Hansen for the project. The Puyallup Indian Tribe argues that “the spectre of a future hydro license” could disrupt Puget’s water rights proceedings at the state level.

8. Because a preliminary permit neither authorizes construction or operation nor gives the permit holder any property rights, the issuance of a permit in this proceeding will not have any environmental impacts or in any way interfere with or preclude the intervenors’ ability to pursue whatever disposition of project facilities they deem appropriate. The question of whether it would be in the public interest to authorize a project at the site is premature at the preliminary permit stage, and would be considered by the Commission at such time as a development application is filed.<sup>12</sup> In such a proceeding, the intervenors may raise any issues they choose. Moreover, the FPA does not condition issuance of permits on a public interest finding. To do so would be to require the information and conclusions that are the object of the permit studies themselves,<sup>13</sup> and would in effect make our permit process subject to a veto right by parties with economic or other interests in the vicinity of the project site.<sup>14</sup>

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a sale of project works with the Water Alliance aimed at securing water rights for the Water Alliance; and working with the Lake Tapps community under an agreement aimed at providing recreational measures and allowing for purchase of project works, should the negotiations with the Water Alliance prove unsuccessful.

<sup>12</sup> See, e.g., *Symbiotics, LLC*, 99 FERC ¶ 61,101 at 61,418 (2002).

<sup>13</sup> See, e.g., *Wind River Hydro, LLC*, 115 FERC ¶ 61,009 at P 10 (2006). Nor are permit applicants required to possess property or water rights for their proposed projects. See, e.g., *County of Arapahoe and Town of Parker, Colorado*, 66 FERC ¶ 61,342 at 62,149 (1994).

<sup>14</sup> See *Mid-Atlantic Energy Engineers, Ltd.*, 53 FERC ¶ 61,155 at 61,548 (1990), and the orders cited there. Moreover, Puget itself does not rule out the resumption, much less the study of the resumption, of hydropower operations at the Lake Tapps Dam. Puget states (motion to intervene at 10) that: “At some point in the future, [the] Water Alliance (or some other water purveyor) may seek a license from FERC to resume hydropower operations within the parameters of this new paradigm for the White River and the Lake Tapps reservoir, but such a proposal is premature.”

9. Citing the Commission's denial of a preliminary permit in *Georgia Power Company*,<sup>15</sup> the Water Alliance and Puget argue that the application should be denied because granting a permit is unjustified where, as here, significant licensing studies have already been performed and they are publicly available. They note the substantial information on project operations that Puget gathered in seeking and obtaining its license for Project No. 2494.

10. However, *Georgia Power Company* does not support the Water Alliance's and Puget's contention. There, the applicant applied for a preliminary permit to study the feasibility of developing a 40-mile reach of the Flint River for hydroelectric generating purposes. Pursuant to a congressional resolution, the U.S. Army Corps of Engineers had recently completed studies and a comprehensive plan included in a report recommending federal development of three projects on the waterway in question. The Commission denied the permit application, finding:

The studies which a preliminary permit are designed to encourage have thus already been made at public expense and should therefore be available on an equal basis to any party which may wish to develop these water resources in the event Federal development is not authorized.[<sup>16</sup>]

In contrast to the *Georgia Power Company* proceeding, the instant proceeding does not involve federal site-development studies made at public expense that should be equally available to the public. Moreover, as the *Georgia Power Company* order found,<sup>17</sup> the purpose of a preliminary permit is to grant the permittee priority for filing an application for license, and not simply to facilitate the permittee's study of developing the site.<sup>18</sup> Consequently, neither the availability of Puget's licensing studies nor the findings in the *Georgia Power Company* order require denying the instant application. In addition, it is not necessarily the case that Mr. Hansen will study a project that is the same as that covered by Puget's license, or that environmental conditions are the same as when Puget's project was analyzed more than 15 years ago.

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<sup>15</sup> 27 FPC 663 (1962).

<sup>16</sup> 27 FPC at 664.

<sup>17</sup> *Id.*

<sup>18</sup> Moreover, the studies Puget completed for its 1997 license do not address the circumstances that may affect the licensing of the proposed project that have occurred since issuance and rescission of Puget's license, including the activities of intervenors concerning water rights and fish passage, as described in this order.

11. The Water Alliance and Puget next argue that Mr. Hansen's application should be denied because it lacks information required under the Commission's regulations governing the content of preliminary permit applications.<sup>19</sup> They contend that the application's Exhibits 2 and 3 fail to adequately describe the studies to be conducted under the permit, the relevant studies that have already been conducted at the proposed site, and the sources of financing for undertaking the studies, as required by section 4.81(c) of the regulations.<sup>20</sup> Citing denials of preliminary permit applications in *Chatanika Power Co., Inc.*,<sup>21</sup> (*Chatanika*) and *Ebb Lake Mutual Electric Company*,<sup>22</sup> (*Ebb Lake*), the Water Alliance and Puget argue that the application's lack of information about the studies to be conducted under the permit and the sources of their financing cast doubt on his ability and intent to proceed with project studies and development.

12. However, Exhibit 2 of Mr. Hansen's application lists the types of studies he plans to perform during the term of the permit. This list, although generally-worded, meets the requirements of section 4.81(c).<sup>23</sup> Moreover, while Exhibit 3 fails to include a specific source of financing for the proposed studies, the application is required to specify "the expected sources and extent of financing available to the applicant" to carry out permit activities "to the extent possible."<sup>24</sup> Thus, our regulations clearly contemplate that full, detailed information may not be available when a permit application is filed.<sup>25</sup>

13. Moreover, the *Chatanika* and *Ebb Lake* orders cited by the Water Alliance and Puget do not reflect current Commission policy. Since 1980, it has been our policy that,

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<sup>19</sup> 18 C.F.R. § 4.81 (2006).

<sup>20</sup> See 18 C.F.R. § 4.81(c) (2006).

<sup>21</sup> 26 FPC 751 (1961).

<sup>22</sup> 44 FPC 1160 (1970).

<sup>23</sup> See *Bear Creek Hydro Associates, LLC, et al.*, 118 FERC ¶ 61,024 at P 9 (2007) and the orders cited therein.

<sup>24</sup> See 18 C.F.R. § 4.81(c)(4)(ii) (2006) (emphasis in original).

<sup>25</sup> Reflecting the indefinite nature and amount of studies that will be conducted under the permit, Exhibit 3 of the application estimates that the feasibility studies will cost \$100,000 "more or less depending if [sic] the prior license owner's [Puget] studies may be used during my preliminary application (feasibility study)," and states that, "I strongly believe that I can work with the Fish & Game department to find solutions for any issue that may arise."

at least where there is no competition for a permit, we will not base a grant of a permit on proof of an applicant's ability to finance or perform the studies required under the permit.<sup>26</sup> Normally, proof of an applicant's ability to finance studies required under the permit will not be a material issue, and we do not find it to be so here. If the permittee subsequently fails to meet its obligations under the permit, the permit will be cancelled. Additionally, contrary to the Water Alliance and Puget's contentions concerning applicant's lack of demonstrated ability and intent to develop the proposed project, no permit applicant can be expected to demonstrate such intent, since the feasibility of the project is the subject of the permit studies.<sup>27</sup>

14. Puget and the Water Alliance contend that the application is deficient because it fails to include maps showing the locations of principal project features relative to one another or a proposed project boundary.<sup>28</sup> However, as supplemented,<sup>29</sup> the application includes maps that meet the requirements of our regulations.<sup>30</sup> Staff has broad discretion

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<sup>26</sup> See *Central Vermont Public Service Corporation, et al.*, 10 FERC ¶ 61,132 (1980). See also *Upper Falls Hydro Associates, dba Current Power Technologies, Inc.*, 65 FERC ¶ 61,203 at 61,966 (1993), where the Commission, citing *Central Vermont*, rejected a request (based on the *Chatanika Power Co., Inc.* order) to deny a preliminary permit for lack of information about the financing of permit studies. As noted, the sole competing application (Rainier's) has been dismissed. Yet, even if the competing application had not been dismissed, the lack of information on the sources of financing for permit studies in Mr. Hanson's application would not have produced a different result here. Exhibit 3 of Rainier's application, pertaining to study costs, does not list any specific sources of study financing, but simply states that Rainier's partners "are engineers and biologists with utility experience and will perform all studies without the need for significant external expenses," which is similar in effect to Mr. Hanson's information regarding the financing of permit studies described above.

<sup>27</sup> See *Symbiotics, LLC*, 99 FERC ¶ 61,101, *supra*, n. 13 (2002).

<sup>28</sup> See 18 C.F.R. § 4.81(d) (2006).

<sup>29</sup> As noted, staff issued a May 4, 2007 letter requesting Mr. Hansen to correct a deficiency in his application by filing a revised map showing a project boundary that encloses all proposed project facilities. In response, on June 11, 2007, Mr. Hansen filed a new application that included the revised maps.

<sup>30</sup> See Figures 1 of Exhibit 4 of Mr. Hansen's originally-filed application and Figures 2-6 of Exhibit 3 of his June 11, 2007 filing, respectively. Figures 2-6 of the June 11, 2007 filing cure the deficiency in the maps included in Mr. Hansen's originally-filed application by including a project boundary that encloses all proposed project

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to determine whether to reject as patently deficient applications failing to comply with the preliminary permit regulations of section 4.81, and the Commission will not overturn staff's decision on such matters unless it can be shown that staff was acting arbitrarily or unreasonably, which is not the case here.<sup>31</sup> Following the timely correction of deficiencies, Mr. Hansen's application is deemed filed on its original filing date.<sup>32</sup>

15. Based on the foregoing review of Mr. Hansen's preliminary permit application, we conclude that, as supplemented, it contains sufficient information for processing and should be granted.

### **Permit Information**

16. The purpose of a preliminary 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 development application. The permit confers no authority on the permittee to undertake construction of the proposed project or any part thereof,<sup>33</sup> or to occupy or use lands or other property of the United States or of any other entity or individual.

17. If, during the course of the permittee's investigation into the feasibility of the proposal, the permittee decides to prepare a development application, it must first prepare a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's Regulations.<sup>34</sup> Pursuant to Part 5 of the Commission's

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facilities. Moreover, with the exception of the map showing the general location of the project (Figure 1 of Exhibit 3 of the June 11, 2007 filing) the maps in Exhibit 3 of the June 11, 2007 filing are prepared on United States Geological Survey topographic quadrangle sheets, as required by section 4.81(d).

<sup>31</sup> 18 C.F.R. § 4.32(e)(2) (2006). *See Bear Creek Hydro Associates, LLC and Western Hydro, LLC*, 118 FERC ¶ 61,024, *supra*, P10 (2007), *citing Inter-West, Ltd.*, 55 FERC ¶ 61,041 at 61,117 (1991) (permit application found deficient (but not patently deficient) for lack of a project boundary map and other information and applicant given the opportunity to correct its application by filing the required map and information).

<sup>32</sup> *See* 18 C.F.R. § 4.32(f) (2006).

<sup>33</sup> Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment.

<sup>34</sup> 18 C.F.R. §§ 5.5 and 5.6 (2006).

regulations, the permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process).<sup>35</sup> Pursuant to Section 5.3, such a request must accompany the NOI and PAD and set forth specific information justifying the request.<sup>36</sup> 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.

18. A preliminary permit is not transferable. The named permittee is the only entity entitled to the priority of 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. *See City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

The Commission orders:

(A) In Project No. 12685-000, a preliminary permit is issued to Don L. Hansen, 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 in Project No. 12685 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.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary

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<sup>35</sup> 18 C.F.R. Part 5 (2006).

<sup>36</sup> 18 C.F.R. §§ 5.3(b) and (c) (2006).

**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 said 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. All test sites shall be restored as closely as possible to their original condition and to the satisfaction of the Commission's authorized representative or, where federal lands are affected, to the satisfaction of the agency administering such lands.

**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.** At the close of each six-month period from the effective date of this permit, the Permittee shall file four copies of a progress report with the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; and shall serve a copy on the interveners in this proceeding. The report shall describe, for that report period, the nature and timing of what the Permittee has done under the pre-filing requirements of 18 CFR sections 4.38 and 5 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.