

169 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Tomlin Energy LLC

Project No. 14983-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued October 17, 2019)

1. On March 19, 2019, Tomlin Energy LLC (Tomlin) 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 proposed Closed Loop Pumped Storage Project No. 14983 to be located on the Kiamichi River, in Pushmataha County, Oklahoma.

I. Project Proposal

2. Tomlin's project would be a closed-loop pumped storage project with an upper reservoir, a lower reservoir, and an impoundment to capture water from the Kiamichi River during times of high flow. More specifically, the project would consist of: (1) a 2,050-foot-long, 200-foot-high upper dam; (2) an upper reservoir with a surface area of 100 acres; (3) an 8,200 foot-long, 32-foot-diameter tunnel connecting the upper and lower reservoirs with (4) a powerhouse containing four pump/generating units with a total capacity of 1,200 megawatts; (5) a 7,600 foot-long, 40-foot-high lower dam with a 300-foot-wide emergency spillway and channel to the impoundment; (6) a lower reservoir with a surface area of 200 acres; (7) two 1,000-foot-long pipes connecting the impoundment to the lower reservoir; (8) a pump station structure containing pumps to move water from the impoundment to the lower reservoir; (9) the impoundment with a surface area of 30 acres and a storage capacity of 1,800 acre-feet, which would fill from periodic high flow in the Kiamichi River; and (10) a 46-mile-long transmission line. The project would have an estimated average annual generation of 4,200,000 megawatt-hours. No federal lands are associated with the project.

II. Background

3. On April 12, 2019, the Commission issued public notice of Tomlin's permit application, establishing a deadline of June 11, 2019, for filing comments, motions to

¹ 16 U.S.C. § 797(f) (2018).

intervene, and competing applications. No competing applications were filed. Comments were filed by Terri Morgan on June 6, 2019, and Peggy Simmons Hart Miller on June 10, 2019. Southeast Oklahoma Power Corporation (Southeast Oklahoma) filed a motion to intervene and protest on June 11, 2019.² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.³ The comments and protest are addressed below.

III. Discussion

A. Southeast Oklahoma's Protest

4. In its motion to intervene and protest, Southeast Oklahoma contends that Tomlin's application is contrary to section 4.33(a)(1) of the Commission's regulations, which prohibits applications for a preliminary permit for project works that would develop, conserve, and utilize the same water resource that would be developed by a project for which there is an unexpired permit.⁴ Specifically, Southeast Oklahoma asserts that it has undertaken a preliminary hydrologic evaluation indicating that "unallocated flows" from the Kiamichi River may be insufficient to maximize development of Project Nos. 14887 and 14890,⁵ which are both under Commission-issued preliminary permits and would directly connect to the Kiamichi River.⁶ Southeast Oklahoma extends this assertion to claim that Tomlin will likely be unable to obtain sufficient water for its project, which would take overflow from the Kiamichi River. As a result, Southeast Oklahoma

² Southeast Oklahoma June 11, 2019 Motion to Intervene and Protest. On June 20, 2019, Tomlin filed an answer to the protest. On June 27, 2019, Southeast Oklahoma filed an answer to the answer. Tomlin responded on July 1, 2019. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits answers to protests and answers unless otherwise ordered by the Commission. Here, we do not find these pleadings to provide additional information that would be helpful in our decision-making. Therefore, these pleadings are rejected as impermissible answers.

³ 18 C.F.R. § 385.214(c) (2019).

⁴ 18 CFR § 4.33(a)(1) (2019).

⁵ The Commission issued preliminary permits for Project Nos. 14887 and 14890 on March 1, 2019, and April 10, 2019, respectively. *Southeast Oklahoma Power Corp.*, 166 FERC ¶ 62,095 (2019); *Southeast Oklahoma Power Corp.*, 167 FERC ¶ 62,019 (2019).

⁶ Southeast Oklahoma June 11, 2019 Motion to Intervene and Protest at 1-2, 4.

concludes that Project Nos. 14887 and 14890 will compete with Tomlin's proposed Project No. 14983 for a "limited amount of water in the vicinity" and that issuance of a preliminary permit for the project could "frustrate [Southeast Oklahoma's] ability to acquire necessary sources of water to comprehensively develop [its] projects."⁷

5. We are unpersuaded by Southeast Oklahoma's argument. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential operational impacts. These studies are meant to allow the permittee to determine whether it can design the project in a way so as to avoid or mitigate those impacts. We have found it appropriate, in similar situations, to issue a preliminary permit where there is "insufficient data in the permit application to ascertain whether such impacts would actually occur" and where an eventual license application "may differ in important respects from the permit proposals."⁸ That is the case here, where Southeast Oklahoma's allegations about the probability of Tomlin's ability to develop its project are speculative.⁹

6. Moreover, Southeast Oklahoma's attempt to find support in *Grand Coulee Project Hydroelectric Authority* is similarly unpersuasive.¹⁰ There, unlike here, the applicant's proposed pumped storage project would use the same existing reservoir as a project for which the permittee held an unexpired permit.¹¹ Southeast Oklahoma is correct that the Commission will generally not issue a permit for a pumped storage project proposing to use an existing reservoir already under study or where the proposed project boundaries

⁷ Southeast Oklahoma June 11, 2019 Motion to Intervene and Protest at 4-7.

⁸ *See McGinnis, Inc.*, 129 FERC ¶ 61,229, at PP 8-10 (2009) (denying rehearing of an order issuing a preliminary permit over objections from an existing licensee because it is Commission policy to issue the permit where the proposed project could be designed to avoid conflict with licensed projects).

⁹ *See* Southeast Oklahoma June 11, 2019 Motion to Intervene and Protest at 1, 4, 6-7 (voicing Southeast Oklahoma's concerns about the impacts Tomlin's proposed project "may" or "could" have); *see also, e.g.*, Tomlin Application at 9-11 (generally describing Tomlin's proposed project and noting how various details would be further developed during the study phase).

¹⁰ Southeast Oklahoma June 11, 2019 Motion to Intervene and Protest at 7 (citing *Grand Coulee Project Hydroelectric Auth.*, 135 FERC ¶ 61,046, at P 9 (2011) (*Grand Coulee*)).

¹¹ *Grand Coulee*, 135 FERC ¶ 61,046 at PP 2-3.

otherwise overlap.¹² However, Tomlin's proposal involves the creation of new reservoirs,¹³ separate from those proposed in the preliminary permits held by Southeast Oklahoma. As Southeast Oklahoma concedes, neither Project No. 14887 nor No. 14890 proposes to use either of the same reservoirs as Tomlin's proposed project nor does Tomlin's proposal overlap with either of Southeast Oklahoma's proposed project boundaries.¹⁴ Therefore, we do not find that section 4.33(a)(1) prohibits the issuance of a preliminary permit to Tomlin to study its proposed pumped storage project.

B. Project Construction and Operation

7. In their comments, Ms. Morgan and Ms. Miller oppose issuance of the permit, expressing concerns about the effects of project operation on landowners in the Kiamichi River basin and on the environmental quality of the river. Specifically, Ms. Morgan states that her family has cattle on land adjacent to the Kiamichi River and expresses concern about how the project could impact the river's levels and how those impacts could affect livestock, fish and mussels, and families who recreate on the river.¹⁵ Ms. Miller questions whether compensation will be available to those whose hunting, fishing, and economic interests may be impacted by operation of the project.¹⁶

8. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. As explained above and further discussed below, the purpose of a preliminary permit is to secure the permit holders priority for hydropower development while they study the feasibility of the project, including studying potential impacts. Should the permittee file a license application, these issues will be addressed in the licensing process.

¹² *Grand Coulee Project Hydroelectric Auth.*, 133 FERC ¶ 62,245, at P 3 (2010), *order on reh'g*, 135 FERC ¶ 61,046; *Russell Canyon Corp.*, 58 FERC ¶ 61,288, at 61,924 (1992).

¹³ Tomlin Application at 9.

¹⁴ Southeast Oklahoma June 11, 2019 Motion to Intervene and Protest at 4.

¹⁵ June 6, 2019 Comment of Terri Morgan at 1.

¹⁶ June 10, 2019 Comment of Peggy Simmons Hart Miller at 1-2.

C. Consultation and Study Requirements under the Permit

9. Ms. Miller also asks about opportunities for citizens to voice questions and concerns during the permit term, questions the nature of studies that will be completed under the permit, and asks if Tomlin and the Commission have considered alternatives aside from Tomlin's proposed project.¹⁷

10. In response to Ms. Miller's questions about the nature of the studies to be completed under the permit, we note that Tomlin's application outlines the type of studies it intends to complete during the permit term, including studies on environmental impacts, groundwater, and water sourcing.¹⁸ The Commission has not sought to place all relevant study requirements in preliminary permits.¹⁹ Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. With respect to Ms. Miller's concerns about opportunities for stakeholder input and alternatives, as explained below, the Commission expects that Tomlin will carry out pre-filing consultation 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.²⁰ Should Tomlin file a development application, notice of the application will be published, and interested individuals will have an opportunity to intervene and to present their views concerning the project.

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,²¹ 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.²² Because a permit is issued only to allow

¹⁷ June 10, 2019 Comment of Peggy Simmons Hart Miller at 1-2.

¹⁸ Tomlin Application at 12.

¹⁹ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

²⁰ See 18 C.F.R. § 4.38 (2019).

²¹ 16 U.S.C. § 802 (2018).

²² 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

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.²³ 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.²⁴

12. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each twelve-month period from the effective date of this permit. 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.

13. 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.²⁵ 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.²⁶ As stated above, if the permittee files a development application, notice of the application will be published, and those interested may intervene and comment on the project and the effects of its construction and operation.

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.”).

²³ 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).

²⁴ *See City of Richmond, Va.*, 53 FERC ¶ 61,342, at 62,247 (1990).

²⁵ 18 C.F.R. §§ 5.5 and 5.6 (2019).

²⁶ *See* 18 C.F.R. § 5.3 (2019).

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 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.²⁷

The Commission orders:

(A) A preliminary permit is issued for the Closed Loop Pumped Storage Project No. 14983 to Tomlin Energy LLC, for a period effective the first day of the month in which this permit is issued, and ending either 48 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 (2018), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2019).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁷ See *City of Fayetteville Public Works Comm.*, 16 FERC ¶ 61,209 (1981).

Form P-1 (Revised October 2018)

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 12-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.