

124 FERC ¶ 62,082
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Grays Harbor Ocean Energy Company, LLC

Project No. 13058-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued July 31, 2008)

On November 5, 2007, and supplemented on March 19, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the Grays Harbor Ocean Energy Project. The project would be located in the Pacific Ocean in Grays Harbor County, Washington. The project uses no dam or impoundment.

The proposed project would consist of: (1) 12 proposed Oscillating Water Column turbine units having a total installed capacity of 6-megawatts; (2) a proposed transmission line; and (4) appurtenant facilities. The project would have an average annual generation of 316-gigawatt-hours, which would be sold to a local utility.

Background

The Commission issued a public notice of the permit application on April 31, 2008, that set June 30, 2008 as the deadline for filing comments, protests, and timely motions to intervene. The Washington Department of Ecology, David J. Hirsh, Washington Department of Fish and Wildlife, Washington Department of Natural Resources, the Columbia River Crab Fisherman's Association, and the Surfrider Foundation (Surfrider) filed motions to intervene to be parties to the proceeding.² The National Marine Fisheries Service (NMFS), within the National Oceanic and Atmospheric Administration, United States Department of Commerce, filed a late motion to intervene, which was subsequently granted by unpublished notice on July 30, 2008, to be a party to the proceeding. Comments were filed by Mike Coverdale, Natalie LaBerge, Surfrider, Friends of Grays Harbor (Friends), William Hamner, Douglas Hines, Randy Dutton, Joel Rett, the U.S. Department of the Interior (Interior), and Gary G. Nelson.

¹ 16 U.S.C. § 797(f) (2000).

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Regulations. *Id.* § 385.214(a)(3) (2008).

Although Interior does not object to the issuance of a preliminary permit for the Grays Harbor Ocean Energy Project, it states that it is very concerned about cumulative impacts, particularly those resulting from full build-out of one or more of the tidal or wave energy projects in Puget Sound, coastal waters, and along the coastline. Consequently, Interior requests that the applicant consult with the U. S. Fish and Wildlife Service, the National Park Service, the National Oceanic Atmospheric Administration's National Marine Fisheries Service, and any Indian Tribe or Nation whose treaty rights may be affected by the project. These agencies can provide guidance in developing the project in a manner that seeks to preserve, protect, and enhance fish and wildlife resources and other environmental values in the project area. It is especially important for the applicant to initiate consultation early so that studies may begin in a timely fashion and delays may be avoided. Consultation is required by section 4.38 of the Commission's regulations if the permittee would pursue a license.

Comments filed by Mike Coverdale, Natalie LaBerge, Surfrider, Friends, and Gary G. Nelson state concerns such as the impact on recreational industries, the construction and its impact on the surrounding communities, the unknown impact on valuable and protected endangered fish and mammalian species, and the impact of electromagnetic fields on the behavior of invertebrates, fishes, sharks, and marine mammals. These comments pertain to the construction of the project and are not addressed in a permit proceeding.

Comments filed by William Hamner, Douglas Hines, Randy Dutton, and Joel Rett are in support of the proposed project.

Discussion

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 FPA section 9,³ 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

³ 16 U.S.C. § 802 (2000).

is being studied.⁴ 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.⁵

The majority of the comments filed are related to the construction of the project or are related to the fact that more information is necessary in order to appropriately address the potential impacts the project might have on fish and wildlife resources. As noted, a preliminary permit does not authorize a permittee to undertake any construction. Furthermore, the purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts the project might have on fish and wildlife, recreational resources, and historic landmarks.

On February 15, 2007, the Commission issued a notice of inquiry seeking comments on how it should treat applications for preliminary permits to study hydropower projects involving proposals to utilize wave, current, and instream new technology methods.⁶ In the notice of inquiry, the Commission posed three possible alternatives and stated that, pending the outcome of the notice of inquiry proceeding, it is adopting in the interim a “strict scrutiny” approach. Under that approach, the Commission will process new technology preliminary permit applications with a view toward limiting the boundaries of the permits, to prevent site-banking and to promote competition. Further, to ensure that permit holders are actively pursuing project exploration, the Commission will carefully scrutinize the reports that permit holders are required to file on a semi-annual basis,⁷ and would, where sufficient progress was

⁴ 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.”).

⁵ Thus, 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). For these reasons, issuance of this preliminary permit is not a major federal action significantly affecting the quality of the human environment.

⁶ See *Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,112 (2007).

⁷ As a standard condition in all preliminary permits, the Commission requires the permit holder to file progress reports every six months.

not shown, consider canceling the permit. Stricter scrutiny could entail requirements such as reports on public outreach and agency consultation, development of study plans, and deadlines for filing a Notice of Intent to file a license application and a Pre-Application Document.

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.⁸ 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.⁹ 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.

This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of permittees, this permit will also require the permittee to file, within 45 days of the issuance date, a schedule of activities to be carried out under the permit and target dates for completion of these activities. At a minimum, this should include the filing of the NOI and PAD within one year of permit issuance, along with any request to use the traditional or alternative licensing process, or an NOI and Draft Application within two years of permit issuance for a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD must also include the time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and a preliminary list of issues identified and necessary studies related to these issues. If the periodic progress reports required by Article 4 of this permit do not show significant progress, or if the permittee fails to comply with any other conditions, the permit may be cancelled.

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,

⁸ 18 C.F.R. §§ 5.5 and 5.6 (2008).

⁹ *See id.* § 5.3 (2008).

and maintain the proposed project. Should any other parties intend 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.¹⁰

The Director orders:

(A) A preliminary permit is issued for the Grays Harbor Ocean Energy Project to Grays Harbor Ocean Energy Company, 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) The permittee, in addition to the six-month progress reports required under Article 4, shall file the following:

Within 45 days of the issuance date of the permit, a schedule of activities proposed by the permittee during the three-year permit term, leading to the filing of a development application. At a minimum, this shall include filing, within one year of the date of this permit, a notice of intent to file a license application (NOI) and pre-application document (PAD), accompanied by, if desired, a request to use the Traditional Licensing Process or Alternative Licensing Process, or the filing of an NOI and Draft Application no later than two years from permit issuance for development of a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD shall include a time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and for developing and filing a preliminary list of issues identified and studies related to these issues needed to develop a license application.

¹⁰ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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(D) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

William Guey-Lee
Chief, Engineering and Jurisdiction Branch
Division of Hydropower Administration
and Compliance

Form P-1 (Revised March 2000)

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.

Document Content(s)

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