

UNITED STATES OF AMERICA 118 FERC ¶ 62,143
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of Snohomish County,
Washington

Project No. 12691-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued February 22, 2007)

On June 15, 2006, Public Utility District No. 1 of Snohomish County, Washington (Snohomish) filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the Agate Passage Tidal Energy Project. The proposed project would be located in Agate Passage in the Puget Sound, in Kitsap County, Washington.

The proposed project would consist of 130 Tidal In-Stream Energy Conversion (TISEC) devices having a total installed capacity of 400 kW, a proposed 115-kilovolt transmission line, and appurtenant facilities. The project is estimated to have an annual generation of 146.2 gigawatt-hours annually, which would be sold to a local utility.

Background

The Commission issued public notice of the application on July 3, 2006. Timely motions to intervene were filed by the Washington Department of Ecology (WDE), the Washington Department of Fish and Wildlife (WDFW), the Washington Department of Natural Resources (WDNR), the Whidbey Environmental Action Network (WEAN), the Tulalip Tribes of Washington (Tulalip Tribes), the City of Bainbridge Island (Bainbridge), and Kitsap County.² The National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) filed a late motion to intervene on September 14, 2006, that was granted by the Commission on November 16, 2006. Comments were filed by the U.S. Department of the Interior (Interior), the U.S. Army Corps of Engineers (Corps), Senator Jay Inslee, and Senator Rick Larsen. None of the commenters or intervenors opposes issuance of a permit to Snohomish.

The WFWS, WDNR, Bainbridge, NMFS, and Kitsap County intervened to be parties to the proceeding. The WDE states that only it can represent its interests in this proceeding, and that issuance of a preliminary permit for the project may impact water quality (therefore requiring a water quality certification) if test units are installed. The WEAN states that the

¹ 16 U.S.C. § 797(f) (2000).

² Because these motions were timely and unopposed, they were granted 15 days after they were filed. *See* 18 C.F.R. § 385.214(c) (2006).

proposed project may adversely affect or degrade the environmental and aesthetic resources of the project area, which will result in degradation of the opportunities afforded by those resources to WEAN members. The Tulalip Tribes state that they are not adequately represented by any other party, and that the proposed project has the potential to affect marine mammals, anadromous fish, cultural resources, and its rights under several federal treaties.

Interior, while not raising any specific issues, notes generally that, while it is supportive of the development of environmentally sound alternative energy technologies, the project has the potential to adversely impact resources of interest to Interior. Interior requests that the permittee be required to consult with the U.S. Fish and Wildlife Service (FWS) and other relevant agencies during the permit term, that the Commission issue the permit for the proposed studies for no more than 4 test units, that the Commission initiate consultation with the FWS pursuant to the Endangered Species Act (ESA) because activities under the permit could affect threatened or endangered species, and that Snohomish conduct a cumulative impact analysis for all seven of its proposed projects. The Corps requests that Snohomish consult with them throughout the term of the permit. Both Senator Inslee and Senator Larsen supported the application.

On February 1, 2007, staff requested that Snohomish provide additional information pertaining to the technology considered for use at the project. Snohomish provided the additional information on February 5, 2007.

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 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 6}

³ 16 U.S.C. § 802 (2000).

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

As noted, a preliminary permit does not authorize a permittee to undertake any construction or to enter onto lands owned by others. Therefore, Interior's impression that the Commission might allow the placement of test units under the preliminary permit is misplaced. Placement of test units is not authorized by the issuance of a permit pursuant to the FPA; however, such activities would be subject to other federal and state laws.

As discussed below, the Commission expects the permittee to engage in prefiling consultation, including consultation with FWS during the permit term. While the Commission expects the permittee to investigate whether endangered species might be affected by the proposed project and to discuss such matters in its prefiling consultation, it would be premature for the Commission to begin ESA consultation with FWS prior to a development application being filed. Before that time, there would be no proposed federal action regarding which to consult.

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.⁷ In the notice of inquiry, the Commission poses three possible alternatives and states 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,⁸ and would, where sufficient progress was 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.

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 nature of preliminary permits).

⁶ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment.

⁷ *See Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,____ (2007).

⁸ As a standard condition in all preliminary permits, the Commission requires the permit holder to file progress reports every six months.

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.

Under the interim policy, this permit will include 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 effective 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. 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, 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

⁹ 18 C.F.R. §§ 5.5 and 5.6 (2006).

¹⁰ See 18 C.F.R. § 5.3 (2006).

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

The Director orders:

(A) A preliminary permit is issued for the Agate Passage Tidal Energy Project to the Public Utility District No. 1 of Snohomish County, Washington, 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 effective 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 effective 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. 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.

(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.