

146 FERC ¶ 62,101  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Houtama Hydropower, LLC

Project No. 14546-000

ORDER ISSUING PRELIMINARY PERMIT  
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(February 6, 2014)

1. On August 14, 2013, Houtama Hydropower, LLC (Houtama) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the proposed McKay Dam Hydroelectric Project No. 14546 (project) to be located on the U.S. Bureau of Reclamation's (Reclamation) existing McKay Dam near the city of Pendleton in Umatilla county, Oregon. The project would occupy approximately 5.6 acres of federal land managed by the U.S. Fish and Wildlife Service (FWS).

**I. Project Proposal**

2. The proposed project would utilize flows from the existing McKay Reservoir, and would consist of the following new features: (1) a 48-inch diameter, 60-foot-long steel penstock that extends from the existing dam penstock to a powerhouse; (2) a 20-foot by 30-foot powerhouse; (3) a single 2.3-megawatt turbine/generator; (4) a switchyard with a 69 kilovolt (kV) step-up transformer; (5) an approximately 3,000-foot-long, 69-kV transmission line interconnecting to the Pacific Power distribution system; and (6) appurtenant facilities. The estimated annual generation of the project would be 5 gigawatt-hours.

**II. Background**

3. The Commission issued public notice of Houtama's permit application on November 8, 2013. The Oregon Water Resources Department (Oregon WRD) and Oregon Department of Fish and Wildlife (Oregon DFW) filed a timely motion to intervene with comments. The National Marine Fisheries Service filed a timely motion to intervene.<sup>2</sup> A late notice of intervention was filed by the Oregon Department of

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<sup>1</sup> 16 U.S.C. § 797(f) (2012).

<sup>2</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2013).

Environmental Quality on January 9, 2014.<sup>3</sup> Comments were filed by the U.S. Department of the Interior (Interior).

### **III. Discussion**

#### **A. Issues Related to Project Construction and Operation**

4. Oregon WRD explains that any new water right that may result in mortality of, injury to, or loss of habitat for anadromous salmonids cannot be granted. Additionally, any new water right for power generation would be junior to current and future water rights for beneficial consumptive uses (i.e., irrigation, operation of McKay Reservoir, etc.).
5. Oregon DFW raises concerns that McKay Creek contains several species of fish that are federally protected under the Endangered Species Act, as well as others considered to be native migratory species and thus protected under the Oregon Native Fish Conservation Policy. Similarly, Interior comments that there are significant issues with anadromous fish downstream from McKay Dam in the Umatilla River, of which McKay Creek is a tributary.
6. Interior indicates that any future licensee would have to enter into certain agreements with Reclamation, as stipulated by the existing memorandum of understanding between Reclamation and the Commission, available at <http://www.ferc.gov/legal/mou.asp>. These agreements will establish procedures for coordination, construction, reimbursement of costs, and project operations between the licensee and Reclamation. Interior also states that Reclamation would require the project's facilities to maintain the flows released from McKay Dam, and the project must be able to handle maximum releases from McKay Dam outlet works at all times and under all conditions, even when the project is not operating. Additionally, Interior states that Reclamation will not modify the operations or maintenance of McKay Dam or other federal facilities for the construction and operation of the project.
7. 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 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. Should the permittee file a license application, these issues will be addressed in the licensing process.

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<sup>3</sup> A late motion to intervene was granted to the Oregon Department of Environmental Quality on February 4, 2014.

## **B. Consultation and Study Requirements Under the Permit**

8. Oregon DFW recommends consultation with state and federal fisheries managers, as well as tribal co-managers, while studying the feasibility of the proposed project.

9. Interior states that a significant area of study during the preliminary permit period will be to define an acceptable way to construct and operate the proposed project while having no impact on the operations of McKay Dam.

10. The Commission has not sought to place all relevant study requirements in preliminary permits.<sup>4</sup> Rather, the studies to be undertaken by a permittee are shaped by 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.<sup>5</sup> 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.<sup>6</sup>

## **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,<sup>7</sup> 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.<sup>8</sup> 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

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<sup>4</sup> See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

<sup>5</sup> See 18 C.F.R. § 4.38 (2013).

<sup>6</sup> See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

<sup>7</sup> 16 U.S.C. § 802 (2012).

<sup>8</sup> 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.”).

project and to prepare a license application, it grants no land-disturbing or other property rights.<sup>9</sup>

12. 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. 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 his 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.<sup>10</sup> 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.<sup>11</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.

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

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<sup>9</sup> 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).

<sup>10</sup> 18 C.F.R. §§ 5.5 and 5.6 (2013).

<sup>11</sup> *See* 18 C.F.R. § 5.3 (2013).

applicants for license, the joint application will not be eligible for any permit-based priority.<sup>12</sup>

The Director orders:

(A) A preliminary permit is issued for the McKay Dam Hydroelectric Project No. 14546 to Houtama Hydropower, 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) 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. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2013).

Jennifer Hill, Chief  
Northwest Branch  
Division of Hydropower Licensing

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<sup>12</sup> See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

**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.

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