

UNITED STATES OF AMERICA 134 FERC ¶ 62,234
FEDERAL ENERGY REGULATORY COMMISSION

ORPC Alaska 2, LLC

Project No. 13821-000

ORDER ISSUING PRELIMINARY PERMIT AND GRANTING PRIORITY TO FILE
LICENSE APPLICATION

(March 11, 2011)

1. On August 2, 2010, and supplemented on September 27, 2010, and October 7, 2010, ORPC Alaska 2, LLC (ORPC) filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ proposing to study the feasibility of the East Foreland Tidal Energy Project (East Foreland project). The hydrokinetic tidal energy project would be located Cook Inlet in the vicinity of Nikiski, Alaska, in the Kenai Peninsula Borough, and would use no dam or impoundment. For the reasons discussed below, we are issuing a preliminary permit for the study of the feasibility of constructing the East Foreland project.

Background

2. The proposed East Foreland project consists of: (1) a series of 150-kilowatt (kW) TideGen and/or 150-kW OCGen turbine-generator modules with a combined capacity between 5 megawatts (MW) and 100 MW; (2) a 1- to 8-mile-long, 13.5-kilovolt (kV) direct current underwater transmission cable from the module site to a shore station on the west coast of the Kenai Peninsula; (3) an approximately 0.25-mile-long, 4.16- to 34.5-kV alternating current transmission line connecting the shore station to a substation site located on the Kenai Peninsula; and (4) appurtenant facilities. The project is estimated to have an average annual generation between 13 and 340 gigawatt-hours, which would be sold to a local utility.

3. The Commission issued public notice accepting the application for filing and soliciting comments, motions to intervene, and competing applications on October 20, 2010. A timely motion to intervene and comments were filed by the Department of the Interior (Interior).² A notice of intervention and comments were filed late by the National Marine Fisheries Service (NMFS) on January 31, 2011. The late notice of

¹ 16 U.S.C. § 797(f) (2006).

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2010).

intervention was dismissed by the Commission on March 8, 2011,³ however, the comments supplied by NMFS are addressed in the order below.

Discussion

4. 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,⁴ 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.⁵ 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.⁶

5. Interior commented that the proposed project has the potential to adversely affect fish and wildlife resources. The project would be located in a geographic constriction known as “the Forelands,” which is an area that separates the north (upper) and south (lower) regions of Cook Inlet. The turbines would be located in this bottleneck, potentially affecting fish migrating to and from upper and lower Cook Inlet watersheds. Cook Inlet supports important salmon habitat and salmon migration, including early life-rearing areas and migratory corridors for all five species of Pacific salmon. It also

³ The notice of intervention was dismissed because NMFS filed their notice of intervention 42 days after the end of the comment period with no explanation of why a late intervention should be granted.

⁴ 16 U.S.C. § 802 (2006).

⁵ 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.”).

⁶ 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).

affords a high value to active recreational, commercial, subsistence, and personal use fisheries in the region. The effects of climate and ocean conditions on highly migratory species like Pacific salmon are difficult to predict, owing to the diversity of environmental conditions that fish encounter during their marine life.

6. Interior also commented that more seabirds breed and nest in Cook Inlet than throughout the entire northeastern Gulf of Alaska, with fork-tailed storm petrels, tufted puffins, horned puffins, black-legged kittiwakes, common murrelets, and glaucous-winged gulls being the most abundant migratory seabirds in the project area. Other Interior trust resources that reside or migrate through the project area include migratory waterfowl (e.g., black, surf and white-winged scoters) and raptors, such as bald eagles and northern harrier. While no prime waterfowl, seabird, or shorebird habitat is apparent within the proposed project boundaries, project landfalls for the associated transmission line routes would require crossing these important, nearshore habitats which support Interior trust resources.

7. Interior further commented that Steller's eiders, and the southwestern Distinct Population Segment of the Northern sea otter, both listed as threatened under the Endangered Species Act, may occur to the south of the project area. Interior directed the applicant to conduct formal consultation with the Fish and Wildlife Service (FWS) if it is determined that the project is likely to adversely affect listed species.

8. Interior requested that the applicant consult with FWS before conducting project-related scientific studies or investigations involving Interior trust resources, and any work authorized under the preliminary permit. Also, Interior requested that the applicant conduct an assessment of the potential effects of the associated transmission line routes on shorebird species.

9. NMFS stated that potential effects to Cook Inlet Beluga whales at the East Forelands site appear to be lower than at ORPC's Fire Island project (P-12679). NMFS also stated that the project area was within an area designated as Essential Fish Habitat, under the Magnuson-Stevens Act, for all five species of Pacific salmon, as well as Pacific cod, longfin smelt, eulachon, and important forage species for other marine fish and marine mammal species. NMFS stated that baseline information on the fisheries habitat and use will be a critical component of baseline data collection for this project.

10. Some of the concerns expressed by the Interior and NMFS relate to the construction and operation of the proposed project. 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 issues raised in the comments are premature at the permit stage, but can properly be addressed in the licensing process.

11. To ensure that we have adequate information for determination of project effects and benefits, we require license applicants to provide detailed information regarding the proposed project, and, before applying, to have performed all reasonable studies requested by resource agencies, including site-specific and cumulative impact analyses.⁷ Consistent with that approach, the impact issues mentioned in the Interior and NMFS filings will be addressed in a licensing proceeding if this project reaches that stage.

12. 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 Preliminary 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.

13. This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of the permittee, 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 schedule shall include: (1) 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 in lieu of the Integrated Licensing Process; or (2) the filing of an NOI and Draft License Application for a Pilot Project within two years of the permit issuance with a request for the necessary waivers to the Integrated Licensing Process to pursue hydrokinetic pilot project licensing procedures. 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 for financial reasons or otherwise, the permit may be cancelled.

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

⁷ See *Symbiotics, L.L.C.*, 99 FERC ¶ 61,101 (2002).

⁸ 18 C.F.R. §§ 5.5 and 5.6 (2010)

⁹ See 18 C.F.R. § 5.3 (2010).

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 entities 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.¹⁰

The Director orders:

(A) A preliminary permit is issued for the East Foreland Tidal Energy Project to ORPC Alaska 2, 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) 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 issuance 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 in lieu of the Integrated Licensing Process, or the filing of an NOI and Draft License Application for a Pilot Project no later than two years from the date of issuance of this permit with a request for the necessary waivers to the Integrated Licensing Process 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).

Project No. 13821-000

- 6 -

(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.

Jennifer Hill, Chief
Northwest Branch
Division of Hydropower Licensing

Form P-1 (Revised December 2009)**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. At the close of each six-month period from the effective date of this permit, the permittee shall file a progress report electronically via the Internet; and shall serve a copy on the intervenors in this proceeding. 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. 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 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.

Document Content(s)

P-13821-000Order Fore82.DOC.....1-7