

149 FERC ¶ 62,059  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Dynergy Estero Bay Wave Park, LLC

Project No. 14585-000

ORDER ISSUING PRELIMINARY PERMIT  
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(October 28, 2014)

1. On February 7, 2014, Dynergy Estero Bay Wave Park, LLC (Dynergy) 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 Estero Bay Wave Park Project (project). The requested project boundary comprises approximately 2.73 square miles (1.0-mile-wide by 2.73-miles-long) of coastal waters located between 2.5 and 3.0 miles off the coast of San Luis Obispo County, California, and land near the town of Morro Bay.

**I. Project Proposal**

2. Dynergy would develop the proposed project in a phased approach. First, under a demonstration phase, Dynergy plans to deploy a single approximately 1-megawatt (MW) GWAVE Power Generating Vessel (wave energy converter or WEC). Under a second phase, Dynergy plans to deploy 10 to 16 approximately 1-MW WEC's. Finally, Dynergy plans to seek authorization to deploy additional WEC's with a total installed capacity of 650 MW. In addition to the WEC's, the project would consist of: (1) anchors and mooring lines; (2) submerged substations; (3) submerged transformer buoys; (3) two or more 2.5-mile-long 230-kilovolt (kV) alternating current submarine cables; (4) an existing 230-kV transmission line interconnecting with Pacific Gas and Electric's switchyard facilities at Morro Bay; and (5) appurtenant facilities.

**II. Background**

3. The Commission issued public notice of Dynergy's permit application on July 16, 2014. National Marine Fisheries Service (NMFS) filed a timely notice of intervention and comments on August 11, 2014.<sup>2</sup> Timely motions to intervene were filed by Surfrider Foundation, the City of Morro Bay, AT&T Corporation, and jointly by Southern Cross

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

<sup>2</sup> A timely notice of intervention filed by the U.S. Department of Commerce is granted by operation of Rule 214(a)(2). 18 C.F.R. § 385.214 (2014).

Cables Limited and Pacific Carriage Limited.<sup>3</sup> Comments were filed by the National Oceanic and Atmospheric Administration's (NOAA) Office of Coast Survey, Morro Bay Commercial Fisherman's Organization, Inc. (Commercial Fishermen), the California State Lands Commission, the North American Submarine Cable Association (NASCA), and Judith Meissen, a resident of Morro Bay. The Department of the Interior filed a letter stating it had no comments.

### III. Discussion

4. NMFS expresses concern that the preliminary permit application does not contain adequate information to conduct an assessment of the potential impacts that the proposed project may have on various fish species, essential fish habitat, species listed under the Endangered Species Act (ESA), and marine mammals. NOAA's Office of Coast Survey requests that Dynegy consult with them and conduct hydrographic surveys with complete seafloor coverage to identify all potential dangers to navigation. The California State Lands Commission states that the any aspect of the project within its jurisdiction would require consultation, environmental review, and prior authorization for construction of the project.

5. 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>

6. Commercial Fishermen comment that the proposed project, because of its location at the mouth of Morro Bay Harbor, would create a significant navigation hazard and would interfere with recreational and commercial fisheries. The City of Morro Bay states that the proposed project would significantly disrupt commercial and recreational fishing, pose a navigational hazard creating a significant safety issue for commercial and

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<sup>3</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214(a)(2) (2014).

<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 (2014).

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

recreational boating, and negatively impact marine mammals. Judith Meissen is concerned that the proposed project would interfere with navigation along the coast and at the entrance to Morro Bay for commercial and recreational watercraft.

7. NASCA recommends that the preliminary permit be denied unless Dynegy provides additional information to assess risks and ensure that the proposed project would not threaten or impair four existing submarine cable systems or preclude installation of future submarine cable infrastructure. NASCA explains that the proposed project threatens existing submarine cables with direct physical disturbance and seafloor scouring, poses significant safety concerns, increases the complexity, cost, and time required for repair operations, and presents impaired access to submarine cables at the surface and on the seafloor. NASCA recommends that a list of seven measures be implemented for the proposed project to avoid harm to existing submarine cables and to allow installation of future submarine cable infrastructure. Southern Cross and Pacific Carriage, and AT&T repeat and support comments made by NASCA.

8. We note that 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.

#### **IV. Permit Information**

9. 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>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>

10. 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.

11. 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.

12. 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 (2014).

<sup>11</sup> *See* 18 C.F.R. § 5.3 (2014).

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 Estero Bay Wave Park Project No. 14585 to Dynegy Estero Bay Wave Park, 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. § 8251 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2014).

Timothy J. Welch, Chief  
West Branch  
Division of Hydropower Licensing

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

**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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