

118 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Reedsport OPT Wave Park, LLC

Project No. 12713-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued February 16, 2007)

1. This order grants the request of Reedsport OPT Wave Park, LLC (Reedsport) for a preliminary permit to study the proposed 50-megawatt (MW) Reedsport OPT Wave Park Project No. 12713, to be located in the Pacific Ocean about three miles offshore of Douglas County, Oregon.

Background

2. On July 14, 2006, Reedsport filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the Reedsport OPT Wave Park Project. According to Reedsport, the proposed project would consist of 200 power buoys having a total installed capacity of 50 MW, a proposed 2.6-mile-long transmission line, and appurtenant facilities. The project is estimated to have an annual generation of 153.3 gigawatt hours, which would be sold to a local utility.

3. The Commission issued public notice of the application. Timely motions to intervene were filed by Umpqua Watersheds, Inc., the State of Oregon, and Portland General Electric Company.²

4. On October 17, 2006, National Marine Fisheries Service of the Department of Commerce's National Oceanic and Atmospheric Administration (NMFS) filed a notice of

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).

late intervention. While our regulations provide that the Department of Commerce, among other federal, state, and tribal entities, can become party to a proceeding upon filing a notice of intervention, the regulations also provide that if the entity does not file the notice within the intervention period established in the proceeding, the entity then must follow the otherwise-applicable procedures for motions to intervene.³ We therefore treat the “notice” as a motion for late intervention. This means that the NMFS must show good cause why the time limitation for interventions should be waived.⁴ Here, NMFS asserts that it became aware of the proceeding after the intervention deadline because it didn’t receive personal notice of the proceeding and it is too understaffed to “catch” every public notice issued by the Commission. It states that, given the early stage of the proceeding, granting late intervention will not prejudice any party or disrupt the proceeding. NMFS avers that, given its statutory role in protecting marine mammals and anadromous fish, no other party can represent its interests and, further, that since that it will have to be consulted in the course of project development, its participation in the early stages of this proceeding is crucial.

5. While we sympathize with NMFS’ staffing difficulties (an issue facing many entities involved in administrative proceedings), we cannot accept that as an excuse for missing deadlines, nor do the FPA or our regulations require that NMFS be served notices of applications for preliminary permits. Thus, NMFS is responsible for reviewing our public notices and intervening timely, like any other entity. However, we agree that NMFS’ late intervention will not prejudice any party or disrupt the proceeding, and that NMFS, as an agency with jurisdiction over resources that could be affected by the proposed project, has a unique interest in the proceeding. We will therefore grant NMFS’ motion.

6. In addition to the motions to intervene, comments were filed by the U.S. Department of the Interior (Interior), City of Reedsport, the Lower Umpqua Hospital District, Kathryn van der Horst, Donald C. and Jeanne M. Tucker, and the Oregon Parks and Recreation Department. None of the commenters opposes issuance of the permit.

Discussion

7. 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

³ See 18 C.F.R. § 385.214(a)(2) (2006).

⁴ See 18 C.F.R. § 385.214(b)(3) (2006).

data and perform the acts required by FPA section 9,⁵ 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.⁶ 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.⁷

8. The City of Reedsport supports the proposed project, as does the lower Umpqua Hospital District, which sees the project as providing local economic and national energy supply benefits. The Tuckers also support the project, on the assumption that its impacts on marine life will be studied. Umpqua Watersheds states that it encourages the use of alternative sources of energy. Ms. Van der Horst requests that safety systems be put in place to ameliorate any negative impacts should one of the project buoys break loose. The Oregon Parks and Recreation Department asks the Commission to be mindful that the project's proposed transmission line may traverse ocean shore areas subject to the Department's jurisdiction. Interior, while not raising any specific issues about the project, 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 asks that the permittee be required to consult with the U.S. Fish and Wildlife Service (FWS) and other relevant agencies throughout the term of the permit, that the Commission consult with FWS under the Endangered Species Act (ESA), and that the Commission issue the permit for study only, and not to allow the installation of any buoys.

⁵ 16 U.S.C. § 802 (2000).

⁶ 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.”)

⁷ 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 nature of preliminary permits).

9. As noted above, a preliminary permit does not authorize a permittee to undertake any construction or to enter onto lands owned by others. Therefore, Interior's concern that the Commission might allow the placement of buoys under the preliminary permit is misplaced. 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.⁸ Before that time, there would be no proposed federal action regarding which to consult.

10. Contemporaneous with the issuance of this order, the Commission is issuing 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 to develop hydropower.⁹ 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,¹⁰ 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 preliminary application document.

11. This is the first instance in which the Commission is applying its interim policy. During the course of the permit, the Commission expects that the permittee will carry out prefiling consultation and study development leading to the possible development of a

⁸ The Commission also expects the permittee to consider safety issues, such as those raised by Ms. Van der Horst, as it develops a license application.

⁹ 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).

¹⁰ As a standard condition in all preliminary permits, the Commission requires the permit holder to file progress reports every six months.

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.¹¹ 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.¹² 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. Under our interim policy, we are conditioning this permit to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports we have hitherto required of permittees, we are also requiring the permittee to file, within 45 days of the effective date of this permit, a schedule of activities to be carried out under the permit and target dates for completion of these activities. At a minimum, this will include 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 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.

13. A preliminary permit is not transferable. The named permittee is the only entity entitled to the priority of 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.¹³

¹¹ 18 C.F.R. §§ 5.5 and 5.6 (2006).

¹² See 18 C.F.R. § 5.3 (2006).

¹³ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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The Commission orders:

(A) The late motion to intervene, filed on October 17, 2006, by the National Marine Fisheries Service of the Department of Commerce's National Oceanic and Atmospheric Administration, is granted.

(B) A preliminary permit is issued to Reedsport OPT 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.

(C) 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.

(D) 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 preliminary 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.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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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 time 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 §§ 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 therefor.