

163 FERC ¶ 62,080
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

BM Energy Park, LLC

Project No. 14863-000

ORDER ISSUING PRELIMINARY PERMIT,
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued May 8, 2018)

1. On November 29, 2017, BM Energy Park, LLC (BM Energy) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Banner Mountain Pumped Storage Hydro Project No. 14863 (project) to be located near Casper in Converse County, Wyoming.

I. Project Proposal

2. The proposed project would consist of the following new facilities: (1) an upper reservoir with a surface area of 50 acres and a storage capacity of 4,050 acre-feet at a surface elevation of approximately 7,125 feet above mean sea level (msl), created by a 5,700-foot-long, 50 to 75-foot-high earthen and/or roller-compacted concrete embankment; (2) a lower reservoir with a surface area of 80 acres and a storage capacity of 4,050 acre-feet at a surface elevation of 6,000 feet above msl, created by a 10,000-foot-long, 50 to 75-foot-high earthen and/or roller-compacted concrete embankment; (3) a 5,000-foot-long, 18-foot-diameter penstock connecting the upper and lower reservoirs; (4) a 400-foot-long, 125-foot-wide, 40-foot-high powerhouse containing three turbine-generator units with a total rated capacity of 400 megawatts; (5) either a 0.4-mile-long, 230-kilovolt (kV) transmission line to a substation on the planned Energy Gateway West 500-kV transmission line, or a 16-mile-long, 230-kV transmission line running to PacifiCorp's existing Windstar substation; and (6) appurtenant facilities. The proposed project would have an annual generation of 1,300 gigawatt-hours.

II. Background

3. The Commission issued public notice of BM Energy's permit application on February 7, 2018. Comments were filed by the U.S. Department of the Interior (Interior) and Wyoming Game and Fish Department (Wyoming GFD). No motions to intervene were filed on the proposed project.

¹ 16 U.S.C. § 797(f) (2012).

III. Discussion

A. Issues Related to Project Construction and Operation

4. Interior comments that wetland and riparian areas could be impacted by the proposed project and recommends taking avoidance and minimization approaches, and where impacts are unavoidable, mitigation or compensatory measures. Interior recommends measures to avoid and minimize impacts to migratory birds within and around the proposed project area.
5. Wyoming GFD comments that the proposed project could potentially result in permanent net loss of key habitat for the overwinter survival of part of the Bates Hole/Hat Six mule deer herd. Wyoming GFD further notes that the proposed project lies within the Natrona core area for sage-grouse, and may impact sage-grouse habitat. Also, Wyoming GFD recommends undertaking measures to minimize the drowning risk for wildlife in the proposed project reservoirs. Wyoming GFD states that the project could have potential impacts to fish in Deer Creek, and that project construction or operation activities could impact public parking or angler access to Deer Creek.
6. 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.

B. ESA Consultation and Study Requirements under the Permit

7. Interior notes that as a water-related project in the Platte River System, if the proposal leads to consumptive use of water or affects water quality, it could potentially impact the following federally-listed species inhabiting the downstream reaches of the river system: the piping plover, the western prairie fringed orchid, the pallid sturgeon, the interior population of the least tern, and the whooping crane as well its designated critical habitat. Interior provides information on the option to seek ESA coverage for water-related activities through the Platte River Recovery Implementation Program, as well as the option to seek a stand-alone consultation for these species. WGFD states that because the potential project is located in the North Platte drainage, securing a water right will be critical for this project, and that retirement of existing water rights or acquisition of evaporation credits are among the opportunities toward securing that right.
8. Interior recommends surveys for the federally-listed species Preble's meadow jumping mouse and Ute ladies'-tresses orchid, to be conducted by trained biologists prior to any action.

9. Wyoming GFD recommends conducting surveys for nesting raptors, including northern goshawks. If work may occur near eagles or their nests, Interior recommends prior coordination with them regarding potential nest permits or other means to avoid take of eagles or their nests, eggs, or young.

10. The Commission has not sought to place all relevant study requirements in preliminary permits.² 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.³ 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.⁴

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,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

² See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

³ See 18 C.F.R. § 4.38 (2017).

⁴ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁵ 16 U.S.C. § 802 (2012).

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 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

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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 this 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.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.

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 applicants for license, the joint application will not be eligible for any permit-based priority.¹⁰

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).

⁸ 18 C.F.R. §§ 5.5 and 5.6 (2017).

⁹ *See* 18 C.F.R. § 5.3 (2017).

¹⁰ *See City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

The Director orders:

(A) A preliminary permit is issued for the Banner Mountain Pumped Storage Hydro Project No. 14863 to BM Energy 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. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2017).

David Turner, Chief
Northwest Branch
Division of Hydropower Licensing

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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