

190 FERC ¶ 62,018  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Orcas Power & Light Cooperative

Project No. 15368-000

ORDER ISSUING PRELIMINARY PERMIT  
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(January 13, 2025)

1. On July 22, 2024, Orcas Power & Light Cooperative (OPALCO) 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 Rosario Strait Tidal Energy Project (project) to be located on Rosario Strait in the Salish Sea, near the town of Eastsound, Washington. For the reasons discussed below, we are issuing a preliminary permit to OPALCO.

**I. Proposal**

2. The proposed project would consist of one Orbital Marine 02 Floating Tidal Turbine (Orbital 02) and one submarine cable connecting to the OAPLCO's distribution system via a preexisting marine shoreline conduit that attaches to an existing land-based shoreline conduit facility on the southern end of Blakely Island. Specifically, the project would consist of: (1) a 245 foot-long, 13 foot-wide floating hull; (2) two 65 foot diameter rotors suspended below the hull for an overall project width of 165 feet; (3) two 1.2-megawatt (MW) turbines, for a total 2.4 MW capacity; (4) four catenary mooring lines (each approximately 740 feet long); (5) four seabed anchors; (6) a 3.3-mile-long, 12.47-kilovolt subsea power cable; and (7) one subsea junction box connected to an existing shoreline power conduit and OPALCO's electrical grid. The proposed project would convert tidal current energy into electrical power. The estimated average annual generation of the project would be 5.7 gigawatt-hours.

3. In its application, OPALCO requests a permit term of 36 months.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 797(f).

<sup>2</sup> The Commission may issue a permit for a term of up to four years. 16 U.S.C. § 798(a).

## **II. Notice, Interventions, and Comments**

4. On September 17, 2024, the Commission issued public notice of the application, establishing a deadline of November 16, 2024, for filing comments, interventions, and competing applications.<sup>3</sup> Notice of the application was published in the *Federal Register* on September 24, 2024.<sup>4</sup>

5. On October 29, 2024, the Swinomish Indian Tribal Community (Swinomish Tribe) filed comments on the application.<sup>5</sup> On December 13, 2024, OPALCO filed a response to the Swinomish Tribe's comments.<sup>6</sup> The comments, which are discussed below, have been fully considered in determining whether to issue the preliminary permit.

## **III. Discussion**

6. 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> 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 proposed project that is being studied.<sup>8</sup> A preliminary permit does not authorize the permittee to access lands and does not authorize the

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<sup>3</sup> The Commission's Rules of Practice and Procedure provide that if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is closed for business, the filing deadline does not end until the close of business on the next business day. 18 C.F.R. § 385.2007(a)(2) (2024). Because the 60-day deadline fell on a Saturday (i.e., November 16, 2024), the filing deadline was extended until the close of business on Monday, November 18, 2024.

<sup>4</sup> 89 Fed. Reg. 77,861 (Sept. 24, 2024).

<sup>5</sup> Swinomish Tribe October 29, 2024 Comments on OPALCO Tidal Energy Project (Swinomish Tribe October 29, 2024 Comments).

<sup>6</sup> OPALCO December 13, 2024 Record of Communication Between OPALCO and the Swinomish Tribe at 5 (OPALCO December 13, 2024 Response).

<sup>7</sup> 16 U.S.C. § 802.

<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.”).

permittee to undertake any land-disturbing activities.<sup>9</sup> The permittee must obtain authorization and comply with all applicable laws and regulations to conduct any field studies. Further, permit conditions are 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>10</sup> If the project is found to be feasible, the permittee can use the data and information gathered to prepare an application for a license.

7. A preliminary permit is not a prerequisite for filing a license application. Further, the issuance of a permit does not in any way predetermine how the Commission might act on any license application; it merely preserves the right of the permittee to be the first to file such an application during the permit's term.

**A. Public Interest**

8. The Swinomish Tribe questions whether the estimated energy production of the potential project justifies the potential impacts of the project on Treaty resources and the environment.<sup>11</sup> The Tribe asks the Commission to require OPALCO to conduct a cost-benefit analysis for the project, balancing the benefits of its potential energy production against any trade-offs.<sup>12</sup>

9. The Commission does not make a public interest finding at the preliminary permit stage.<sup>13</sup> The Commission will make such a finding upon its review of any information and analyses that are developed and submitted as part of an application for a hydropower

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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., BOSTI Hydroelectric, LLC*, 185 FERC ¶ 61,041, at P 14 (2023); *Desert Pumped Storage LLC*, 177 FERC ¶ 61,104, at PP 6-9 (2021); *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301, at P 10 (2003).

<sup>10</sup> *See City of Richmond, Va.*, 46 FERC ¶ 62,041 (1989), *denying appeal*, 52 FERC ¶ 61,322, at 62,281 (1990).

<sup>11</sup> Swinomish Tribe October 29, 2024 Comments at 5.

<sup>12</sup> *Id.*

<sup>13</sup> The FPA does not condition the issuance of a preliminary permit upon a finding that the project is in the public interest. *Michael Arkoosh*, 30 FERC ¶ 61,002 (1985); *Wind River Hydro, LLC*, 115 FERC ¶ 61,009, at P 10 (2006).

license, should one be filed. Accordingly, the Tribe's arguments would warrant consideration in a licensing proceeding but are premature here.

**B. Project Construction and Operation**

10. The Swinomish Tribe expresses concern regarding the potential impacts of project construction and operation on: (1) the marine environment, specifically benthic habitats; (2) Tribal fishing rights in the Salish Sea; (3) aquatic species, particularly salmon, rockfish, killer whales, humpback whales, and other endangered and/or tribally important species; and (4) culturally significant sites.<sup>14</sup> The Tribe requests that the Commission require adaptive management for unforeseen impacts, ongoing environmental monitoring, and mitigation plans for project-related impacts.<sup>15</sup> Relatedly, the Tribe asks OPALCO to provide details regarding routing of the seafloor cable to avoid damage to rockfish habitat and kelp beds.<sup>16</sup> The Tribe also requests that the Commission ensure project construction and operation do not adversely affect the Tribe's traditional fishing grounds and require OPALCO to minimize and mitigate any adverse effects on marine mammals.<sup>17</sup>

11. The Swinomish Tribe also expresses concern with potential environmental impacts that may result should OPALCO install additional turbines in the future.<sup>18</sup> The Tribe requests that OPALCO provide final engineering design specifications, including the project's potential to expand to three units, as well as the nature and timing of such an expansion.<sup>19</sup> The Tribe also asks the applicant to clarify under what circumstances it would seek to expand the project,<sup>20</sup> and the Commission to clarify the criteria and level of environmental analysis that would apply to any future expansion of the pilot project.<sup>21</sup> In its December 13 response, OPALCO asserts that it does not currently plan to install additional units.<sup>22</sup>

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<sup>14</sup> Swinomish Tribe October 29, 2024 Comments at 2-5.

<sup>15</sup> *Id.* at 4-5.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.* at 2, 5.

<sup>22</sup> OPALCO December 13, 2024 Response at 1.

12. As noted above, a preliminary permit does not authorize access to the project lands or project construction.<sup>23</sup> Therefore, addressing these concerns at the permit stage is premature. The purpose of a preliminary permit is to secure the permit holder's priority for filing a development application while it studies the feasibility of a project, including studying potential impacts, such as those identified by the Tribe here.<sup>24</sup> Concerns regarding the impacts of project construction and operation on any resource, including water quality, fish, wildlife, aquatic and riparian habitat, recreation, aesthetics, historic sites, or any impacts on the surrounding community would be addressed and considered during a licensing proceeding, should OPALCO ultimately prepare a license application.<sup>25</sup>

### **C. Consultation and Study Requirements**

13. The Swinomish Tribe asserts that OPALCO must conduct environmental studies that: (1) assess potential impacts of the anchor and mooring systems on benthic habitats and species; (2) analyze how the subsea cable will affect benthic habitats and species; (3) use hydrodynamic modeling to determine how the anchored turbine will impact tidal flows and sediment transportation; and (4) evaluate the cumulative impacts of adding additional turbines to the project.<sup>26</sup> The Tribe also asks that OPALCO conduct a formal cultural resource assessment to ensure that no culturally significant sites will be affected by project construction or operation.<sup>27</sup> The Tribe requests that the applicant publish any

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<sup>23</sup> See, e.g., *Green Energy Storage Corp.*, 150 FERC ¶ 61,042, at P 10 (2015) (opposition to the construction of the project is outside the scope of the preliminary permit proceeding); *Tomlin Energy LLC*, 169 FERC ¶ 61,037, at P 8 (2019) (explaining that concerns about impacts of project operation are premature at the permit stage); *Alaska Power Co., Inc.*, 138 FERC ¶ 62,130, at P 7 (2012) (stating that concerns over the project's impact on fish and wildlife resources and the cumulative impacts of basin development are premature at the permit stage); *SV Hydro, LLC*, 173 FERC ¶ 62,047, at P 5 (2020) (declining to address commenters' claims that the upper reservoir could fail and endanger residents and infrastructure downstream; that the initial fill water may be unavailable because it is subject to private and public ownerships; and that the project could be an impediment to accessing iron ore deposits because they are premature).

<sup>24</sup> See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4.

<sup>25</sup> See, e.g., *Tomlin Energy LLC*, 169 FERC ¶ 61,037 at P 8.

<sup>26</sup> Swinomish Tribe October 29, 2024 Comments at 2-4.

<sup>27</sup> *Id.* at 4.

preliminary data collected during environmental assessments that have already occurred.<sup>28</sup>

14. The Commission does not dictate study requirements at the preliminary permit stage.<sup>29</sup> Rather, the studies undertaken by a permittee should be shaped by the Commission's filing requirements for development applications. Potential 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 applications before they are filed.<sup>30</sup>

15. The Swinomish Tribe also questions whether OPALCO has conducted adequate Tribal consultation and requests engagement with OPALCO on impact studies and mitigation plans and the opportunity to comment on their scope.<sup>31</sup> Specifically, the Tribe asks the applicant to engage with Tribal fishers regarding potential conflicts between construction and operation of the project and fishing activities.<sup>32</sup> The Tribe also asks the applicant to describe any Tribal engagement it has conducted thus far in the process.<sup>33</sup> In its December 13, 2024 filing, OPALCO states that it will describe its Tribal engagement in detail in its license application, and that it is committed to continued discussions with Tribal nations.<sup>34</sup>

16. The Tribe also questions if the preliminary permit application's Tribal distribution list is complete.<sup>35</sup> On September 3, 2024, OPALCO filed an updated list of affected Tribal nations to include the Confederated Tribes of the Umatilla Reservation, Jamestown S'Klallam, and the Port Gamble S'Klallam.<sup>36</sup> These three Tribal nations, along with the Swinomish, Lummi Nation, Suquamish Indian Tribe, Tulalip Tribes, and Samish Nation,

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<sup>28</sup> *Id.* at 2, 4.

<sup>29</sup> *See, e.g., Cont'l Lands Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

<sup>30</sup> *See* 18 C.F.R. § 4.38 (2024).

<sup>31</sup> *Id.* at 4-5.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> OPALCO December 13, 2024 Response at 5.

<sup>35</sup> Swinomish Tribe October 29, 2024 Comments at 4.

<sup>36</sup> OPALCO September 3, 2024 Response to FERC's July 29, 2024 Deficiency Letter at 3-4.

meet the Commission’s definition of “Indian tribe.”<sup>37</sup> OPALCO states that as Tribal engagement and outreach evolves, it will continue to reach out to additional Tribes that may be impacted.<sup>38</sup>

17. The Commission recognizes the unique relationship between the United States and Indian Tribes, acknowledges its trust responsibility to Indian Tribes, and endeavors to work with Tribes on a government-to-government basis, seeking to address the effects of proposed projects on Tribal rights and resources through consultation.<sup>39</sup> While we do not require permit applicants to consult with Tribes prior to filing permit applications, because, as noted above, a permit does not authorize any land-disturbing activity or entry onto land, applicants would be wise to do so. Hearing Tribal concerns and building positive relationships early on can greatly increase the likelihood of successful project development. Moreover, potential license applicants must consult with Tribes as they develop their applications. Finally, should the permittee begin the license application process, the Commission will offer to engage in government-to-government consultation with the Swinomish and other Tribes.

18. The Commission will consider in any future licensing proceedings potential project effects on water quality, fishery resources, terrestrial resources, recreation, land use, and aesthetic resources, cultural resources, and economics. Accordingly, it would be prudent for the permittee to consider and study these issues during the term of the permit.

#### **D. Permit Information**

19. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each 12-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.

20. 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

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<sup>37</sup> 18 C.F.R. § 4.30(b)(10).

<sup>38</sup> In addition to the Tribes identified in its preliminary permit application and its response to Commission staff’s deficiency letter, OPALCO has also contacted the Nooksack, Suak-Suiattle, Skokomish, Snoqualmie, Stillaguamish, and Upper Skagit Tribes. OPALCO December 13, 2024 Response at 4-5.

<sup>39</sup> 18 C.F.R. § 2.1c (2024).

and 5.6 of the Commission's regulations.<sup>40</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>41</sup> If the permittee files a development application, notice of the application will be published, and those interested may intervene and comment on the project and the effects of its construction and operation.

21. 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.<sup>42</sup>

The Director orders:

(A) A preliminary permit is issued for the Rosario Strait Tidal Energy Project No. 15368-000 to Orcas Power & Light Cooperative for a period effective from the first day of the month in which this preliminary 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 preliminary 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*, and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2024).

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<sup>40</sup> *Id.* §§ 5.5 and 5.6 (2024).

<sup>41</sup> *See* 18 C.F.R. § 5.3 (2024).

<sup>42</sup> *See City of Fayetteville Pub. Works Comm'n*, 16 FERC ¶ 61,209 (1981).

David Turner, Chief  
Northwest Branch  
Division of Hydropower Licensing

## Form P-1 (Revised May 2021)

**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 12-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. The Commission strongly encourages that progress reports be filed electronically via its eFiling system. Instructions for e-filing can be found on the Commission's website at <https://www.ferc.gov/ferc-online/overview>. For assistance, please contact FERC Online Support at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov); (866) 208-3676 (toll free); or (202) 502-8659 (for TTY). If eFiling is not an option, you may submit one paper copy. Submissions sent via the U.S. Postal Service (USPS) must be addressed to: the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Room 1A, Washington, D.C. 20426. Submissions sent via any other carrier must be addressed to: the Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.