



Oregon

Kate Brown, Governor

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June 11, 2020

VIA EMAIL, CERTIFIED MAIL, and U.S. FIRST CLASS MAIL

Dan Hellin, Deputy Director
Oregon State University – PacWave South
104 CEOAS Admin Building
Corvallis, OR 97331-5503

RE: Clean Water Act Section 401 Water Quality Certification for FERC License
PacWave South Hydrokinetic Project, FERC No.14616

Dear Mr. Hellin:

On April 17, 2020, the Oregon Department of Environmental Quality received the Oregon State University's application for 401 certification for the issuance of an original license by the Federal Energy Regulatory Commission to construct and operate the PacWave South Hydrokinetic project (Project) for a term of 25 years. The grid-connected wave energy-testing facility includes both onshore and offshore elements including an array of wave energy converters located about six nautical miles off the Oregon Coast west of Newport, Oregon.

Project activities authorized by the Commission will cause discharge to waters of the state. Section 401 of the federal Clean Water Act (33 U.S.C. §1341) prevents federal agencies from issuing licenses that authorize such discharge without first obtaining a section 401 water quality certification (401 WQC) from the state. DEQ's evaluation of these proposed actions was conducted pursuant to Section 401 of the Clean Water Act, 33 USC §1341, ORS 468B.035 through 468B.047, and DEQ's certification rules found in Oregon Administrative Rules 340, Division 048. To certify the Project, DEQ must have reasonable assurance that the proposed activities will be conducted in a manner that will not violate the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, and Oregon water quality standards in Oregon Administrative Rules 340, Division 041, adopted to implement these sections.

The DEQ has reviewed your application for section 401 WQC for issuance of the FERC license. After consideration of public comment and effective as of the date of this letter, DEQ approves OSU's request for water quality certification, as conditioned in the attached certification decision and for the reasons specified in the associated following evaluation.

Background

On September 9, 2019, OSU sought authorization from the U.S. Army Corps of Engineers (USACE) pursuant to CWA section 404 to discharge material to waters of the state during Project construction.¹ Oregon Administrative Rule OAR 340-048-0032(1) provides that an

¹ See Joint Permit Application with Corps Action ID Number NWP-2014-367-2 (Sept. 9, 2019).

application to the USACE for CWA section 404 permit also constitutes an application to DEQ for CWA section 401 WQC for issuance of that USACE permit.² On April 7, 2020, DEQ issued OSU a section 401 WQC for activities authorized by the USACE and described in a Joint Permit Application (JPA) with ID Number NWP-2014-367-2. OSU maintains that activities proposed in its FERC license application currently pending before FERC are identical to those represented in the JPA submitted to the USACE, asserting that the requested FERC license will authorize activities that are coextensive with those authorized by the USACE. For this reason, OSU submitted to DEQ the September 2019 JPA in support of their request for section 401 WQC for issuance of an original license by FERC.

DEQ has reviewed the proposed activity described in OSU's application currently pending before FERC. DEQ finds such actions are consistent with those previously represented in the September 2019 JPA submitted to USACE for a Section 404 permit, and DEQ has confirmed that the requested FERC license will not authorize any additional activities that require DEQ's evaluation for compliance with state water quality standards. While the April 7, 2020, section 401 WQC includes conditions sufficient to protect water quality during activities authorized by the USACE, DEQ finds that given the difference in the duration of the FERC's license additional conditions are required to adequately protect water quality during the license term for the activities authorized by FERC.

Project Description

The PacWave South Hydrokinetic Project is a wave energy testing facility consisting of both marine (offshore) and terrestrial (onshore) components. Offshore Project components include four test berths anchored to the sea floor within a 2.65 square mile area on the Outer Continental Shelf. The PacWave South test area will be located about six nautical miles offshore in water ranging in depth from 65 to 70 meters. Up to 20 wave energy converters will be tethered to the test berth array. Five subsea cables will connect the test berth area to the cable landfall site in the parking lot of the Driftwood Beach State Recreation Site near Seal Rock, Oregon.

From the point of landfall in the Driftwood parking area, the cables will be installed below ground to a new Utility Connection and Monitoring Facility located approximately 2,400-feet southeast from Driftwood. The UCMF conditions the electricity prior to an interconnection with the public utility grid at the Central Lincoln People's Utility District distribution system on Highway 101.

Waters Affected by the Project

Oregon's Territorial Sea includes the waters and seabed extending three geographical miles seaward from the Pacific coastline. In accordance with Oregon's Territorial Sea Plan, Oregon's regulatory responsibilities for administering state law extends seaward and encompasses offshore waters and lands of the Territorial Sea. The 2.65-square mile test berth area on the OCS is about six nautical miles offshore and, therefore, is located beyond Oregon's Territorial Sea.

² OAR 340-048-0032(1) ("An application to the Corps for a permit constitutes an application for certification, provided that the department may request additional information as described in OAR 340-048-0020(2).").

The only Project action proposed within the Territorial Sea is the installation of the five subsea cables. From the western boundary of the Territorial Sea to a point about 0.8 miles offshore, cables will be installed to a depth of one to two meters below the sea floor using a jet plow or similar technique. From this point until landfall at Driftwood, the subsea cables will be placed in conduits installed using horizontal directional drilling techniques.

No onshore activities are proposed in areas that will potentially affect waters of the state.

Findings

DEQ has reviewed OSU's April 17, 2020, request for section 401 WQC for a FERC license. In particular, our review considered the proposed activities as represented in the JPA submitted to the USACE in September 2019 and the Final License Application submitted to FERC in May 2019. With respect to activities that will or may affect waters of the state, DEQ finds the proposed activities in the two federal applications to be identical. While the FERC license differs in that it will also authorize the installation, operation and maintenance of the wave energy converters in the test berth area for the duration of the license term, this portion of the Project is located beyond the Oregon Territorial Sea boundary and, therefore, does not affect state waters.

On January 8, 2020, the USACE verified the actions described in the JPA were authorized under Nationwide Permit (NWP) No.12 provided OSU first obtain water quality certification from DEQ. The verification is valid until March 18, 2022, unless the NWP is modified, reissued, or revoked prior to that date. In contrast with the term of the USACE permit, FERC's license is for a period of 25 years; therefore, for the activities affecting state waters the following additional conditions are necessary to provide reasonable assurance of compliance with applicable standards throughout the duration of that license. Condition 13 requires OSU to implement adaptive management strategies for the duration of the FERC license term if conditions are recognized that may violate water quality standards or reduce support for beneficial uses. Condition 14 requires OSU notify DEQ in the event of change in project ownership during the FERC license term. Condition 15 requires OSU to notify DEQ of maintenance or repair actions to provide for consultation prior to engaging in actions that may affect water quality. Last, Condition 16 provides a blanket prohibition of activities that may negatively affect water quality. Collectively, these added conditions provide protections needed to ensure water quality standards are maintained for the term of the FERC license.

Based on the preceding evaluation, DEQ is reasonably assured the construction and operation of the PacWave South Hydrokinetic Project will comply with water quality standards, relevant sections of the CWA, and other requirements of state law provided the conditions attached hereto are incorporated into the FERC license and implemented by OSU.

Public Comment

DEQ made the draft section 401 WQC available for public comment from April 28, 2020, until June 3, 2020. On May 14, 2020, DEQ also held a public hearing via teleconference to receive public comment. DEQ received one written comment, on May 12, 2020, from Oregon Wild. Oregon Wild also presented their comments during the public hearing on May 14, 2020. DEQ received no other comments during the public comment period.

Oregon Wild is concerned the network of cables used to anchor the wave energy converters to the seafloor will cause whale entanglement. Oregon Wild requests DEQ broadly interpret the Biocriteria water quality standard (OAR 230-041-0011) to include protections for aquatic resources that utilize the area of the proposed test berth facility. Oregon Wild further requests DEQ include conditions to require monitoring and research to reveal the extent and significance of potential conflicts involving whale entanglement and methods of minimizing and mitigating those conflicts.

DEQ reviewed and considered the written and oral comments provided by Oregon Wild. The test berth facility and all anchor cables are located beyond Oregon's Territorial Sea. DEQ cannot place conditions on an activity that does not occur within waters of the state. No changes were made to the certification conditions based on this comment.

Final Certification Decision

DEQ approves OSU's request for section 401 water quality certification, as conditioned in the attached certification decision. DEQ is reasonably assured the proposed activity will comply with water quality standards, relevant sections of the CWA, and other requirements of state law provided the conditions attached hereto are incorporated into the FERC license and implemented by OSU.

In accordance with OAR 340-048-0045(2), OSU may request a contested case hearing in accordance with the Oregon Administrative Procedures Act (Oregon Revised Statute, chapter 183 and OAR 137-003-0501 to -0700) if dissatisfied with the certification decision, including any conditions to the approved certification. Such a request must be made in writing and comply with OAR 340-011-0530(2) and OAR 340-048-0045(2). The request for hearing must be mailed to and received by the Department of Environmental Quality within 20 days of the date of mailing (set forth above):

Oregon Department of Environmental Quality

Attn: Chris Stine

165 E.7th Avenue, Suite 100

Eugene, OR 97401

If a written request for hearing is not received within the 20-day period, your right to a hearing shall be considered waived. If a timely request for hearing is received by the Department, you will be notified of the time and place of the hearing and provided information on the procedures by which contested cases are heard, your rights, the import and effect of such a hearing, and your rights and remedies. As required by OAR 137-003-0505(h), you must be represented by legal counsel at this hearing, if any. In accordance with OAR 340-048-0045(3), this certification decision is effective upon the issuance of this decision, notwithstanding a request for a contested case hearing or other judicial review, if any.

If you have any questions, please contact Chris Stine at (541) 686-7810 or via email at stine.chris@deq.state.or.us.

Sincerely,



Keith N. Andersen

DEQ Western Region Administrator

encl.: Section 401 Water Quality Certification for FERC License

cc: Dan Hellin, OSU
Justin Klure, OSU
Michael Campbell, Stoel Rives
Diane Lloyd, DOJ
Chris Stine, DEQ

NOTICE TO ACTIVE DUTY SERVICEMEMBERS

Active duty service members have a right to stay these proceedings under the federal Service members Civil Relief Act. For more information, contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through:

<http://legalassistance.law.af.mil/content/locator.php>



Clean Water Act Section 401 Water Quality Certification for PacWave South Hydrokinetic Project (FERC No.14616)

June 2020

Upon the Federal Energy Regulatory Commission (FERC) issuance of a license for the PacWave South Hydrokinetic Project (Project), the Oregon State University (OSU or “the Applicant”) must comply with the following § 401 Certification conditions (401 WQC):

- 1) **Project Operation:** Throughout the life of the FERC license, OSU must operate the Project as specifically described in Exhibit B of its Final License Application to FERC (dated May 31, 2019) (FERC application materials). In accordance with applicable law, OSU shall notify DEQ if FERC authorizes modification to these operations so as to allow DEQ to determine whether such changes may result in any discharge to state waters, and if so, whether such changes may affect compliance with applicable water quality standards.
- 2) **Responsible parties:** This 401 WQC applies to the Applicant. The Applicant is responsible for the work of its contractors and sub-contractors, as well as any other entity that performs work related to this WQC.
- 3) **Work Authorized:** Work authorized by this 401 WQC is limited to the work described in FERC application materials as well as in the Application or Pre-Construction Notification submitted to the U.S. Army Corps of Engineers (USACE) and additional application materials (hereafter “the Section 404 permit application materials”), unless otherwise authorized by DEQ. If the project is operated in a manner not consistent with the project description contained in the FERC and Section 404 permit application materials, the Applicant is not in compliance with this 401 WQC and may be subject to enforcement. To the extent that there are any conflicts between the terms and conditions in this 401 WQC and how activities, obligations, and processes are described in FERC and Section 404 application materials, the terms and conditions in this 401 WQC, as interpreted by DEQ, shall control.

- 4) **Copy of 401 WQC:** A copy of this 401 WQC must be kept on the job site and readily available for reference by Applicant and its contractors, as well as by DEQ, USACE, National Marine Fisheries Service (NMFS), Oregon Department of Fish and Wildlife (ODFW), and other appropriate state and local government officials.

- 5) **Modification to 401 WQC:** Without limiting DEQ's discretion to take other actions in accordance with 33 USC 1341, DEQ may modify the Certification: (a) to add, delete, or modify Certification conditions as authorized by OAR 340-048-0050, (b) if project activities are having an adverse impact on state water quality or beneficial uses, or (c) if the Applicant is otherwise in violation of the conditions of this 401 WQC.

- 6) **Access:** The Applicant and its contractors must allow DEQ access to the project site, staging areas, and mitigation sites to monitor compliance with these 401 WQC conditions, including:
 - a. Access to any records, logs, and reports that must be kept under the conditions of this 401 WQC;
 - b. To inspect best management practices (BMPs), monitoring or operational equipment or methods; and
 - c. To collect samples or monitor any discharge of pollutants.

- 7) **Enforcement:** Failure of any person or entity to comply with this 401 WQC may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce its terms.

- 8) **Erosion and Sediment Control:** During construction, erosion and sediment control measures must be implemented to prevent or control movement of sediment, soil or pollutants into waters of the state. The Applicant is required to develop and implement an effective erosion and sediment control plan. **Any project that disturbs more than one acre is required to obtain an NPDES 1200-C construction stormwater permit from DEQ.** In addition, the Applicant (or responsible party) must:
 - a. Where practicable, use removable pads or mats to prevent soil compaction at all construction access points through, and staging areas in, riparian or wetland areas to prevent soil compaction.
 - b. Demarcate wetlands not specifically authorized to be impacted to protect from disturbance and/or erosion.
 - c. Place dredged or other excavated material on upland areas with stable slopes to prevent materials from eroding back into waterways or wetlands. Place BMPs as necessary to stabilize and prevent erosion.

- 9) **Spill Prevention:** The Applicant must fuel, operate, maintain and store vehicles, and must store construction materials, in areas that will not impact water quality either directly or due to potential discharges.
- 10) **Spill & Incident Reporting:**
- a. In the event that petroleum products, chemicals, or any other deleterious materials are discharged into state waters, the discharge must be promptly reported to the Oregon Emergency Response Service (OERS) at 800-452-0311. Containment and cleanup must begin immediately and be completed as soon as practicable.
 - b. If the project operations result in distressed or dying fish, the operator must immediately: cease operations; take appropriate corrective measures to prevent further environmental damage; and immediately notify DEQ and ODFW.
- 11) **Vegetation Protection and Site Restoration:**
- a. The Applicant must protect riparian, wetland, and shoreline vegetation in the authorized project area from disturbance through one or more of the following:
 - i. Minimization of project and impact footprint;
 - ii. Designation of staging areas and access points in open, upland areas;
 - iii. Fencing and other barriers demarking construction areas; and
 - iv. Use of alternative equipment (e.g., spider hoe or crane).
 - b. If authorized work results in any vegetative disturbance and the disturbance has not been accounted for in planned mitigation actions, the Applicant must successfully reestablish vegetation to a degree of function equivalent or better than before the disturbance.
- 12) **Wetland, Riparian and Water Quality Protection:** The Applicant shall avoid and protect from harm, **all wetlands and riparian areas located within 50 feet of USACE jurisdictional waters**, unless proposed, necessary, and approved as part of the project. If a local jurisdiction has a more stringent buffer requirement, that requirement will override this certification requirement.
- a. For proposals that include directionally-bored stream or wetland crossings:
 - i. All drilling equipment, drill recovery and recycling pits, and any waste or spoil produced, must be completely isolated, recovered, then recycled or disposed of to prevent entry into waters of the state.
 - ii. In the event that drilling fluids enter a water of the state, the equipment operator must stop work, immediately initiate containment measures and report the spill to the Oregon Emergency Response System (OERS) at 800-452-0311.

- iii. An adequate supply of materials needed to control erosion and to contain drilling fluids must be maintained at the project construction site and deployed as necessary.
 - iv. The Applicant must have a contingency plan in place prior to construction for the inadvertent return of drilling lubricant.
 - b. For proposals that include utility lines through wetlands, include anti-seep collars or equivalent technology to prevent draining the wetlands.
- 13) **Adaptive Management.** If DEQ determines exceedances of water quality standards are occurring as a result of Project activities, OSU shall develop and propose measures to address such an exceedance as part of an adaptive management plan. OSU shall develop and submit to DEQ an adaptive management plan to ensure that the Project does not cause or contribute to a violation of applicable criteria. Following DEQ approval, OSU shall implement the plan in accordance with DEQ's approval. If DEQ determines monitoring demonstrates that applicable criteria are being met, then DEQ may allow OSU to cease monitoring for a period of time or for the remaining term of the license.
- 14) **Project Ownership.** Applicant shall notify DEQ of any change in ownership of the Project, and obtain DEQ's review and approval prior to such change.
- 15) **Project Repair or Maintenance.** OSU shall obtain DEQ's review and approval before undertaking Project repair or maintenance activities that may potentially affect water quality (other than repair or maintenance activities authorized by the new FERC license). DEQ may, at OSU's request, approve specified repair and maintenance activities on a periodic or ongoing basis.
- 16) **Water Quality Standards Compliance.** Notwithstanding the conditions of this 401 WQC, no wastes shall be discharged and no activities shall be conducted which will violate state water quality standards.