

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Chapter I

(Docket No. RM07-08-000)

Preliminary Permits for Wave, Current, and Instream New Technology
Hydropower Projects

(February 15, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Inquiry (NOI) and Interim Statement of Policy.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is inviting comments on its procedures with respect to the treatment of preliminary permits under Part I of the Federal Power Act for wave, current, and instream new technology hydropower projects.

DATES: Comments on this NOI are due on **[insert date 60 days after publication in the FEDERAL REGISTER]**.

ADDRESSES: You may submit comments identified by Docket No. RM07-8-000, by one of the following methods:

- Agency Web Site: <http://ferc.gov>. Follow the instructions for submitting comments via the eFiling link found in the Comment Procedures Section of the preamble.
- Mail: Commenters unable to file comments electronically must mail or hand

deliver an original and 14 copies of their comments to the Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington, D.C. 20426. Please refer to the Comment Procedures Section of the preamble for additional information on how to file paper comments.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Preliminary Permits for Wave, Current, and
Instream New Technology Hydropower Projects

Docket No. RM07-8-000

NOTICE OF INQUIRY AND INTERIM STATEMENT OF POLICY

(February 15, 2007)

Introduction

1. The Federal Energy Regulatory Commission (Commission) is issuing this Notice of Inquiry to seek 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.¹ The Commission is also seeking comments on how it should oversee any such permits during their terms. Finally, the Commission also sets an interim policy pending the outcome of this proceeding.

2. The Commission has seen increasing interest in new hydroelectric technologies that would utilize ocean waves, tides, and currents from free-flowing rivers, as evidenced by a surge in applications for preliminary permits to study such projects. Commission staff has issued 11 preliminary permits for projects of this type; three are for proposed

¹ There are a variety of technologies in various stages of development to produce electric power using ocean currents, tides, and wave action, rather than the traditional hydropower model involving hydraulic head developed by use of a dam or other diversion structure. For purposes of this notice of inquiry, the Commission refers to these newer forms of technology as “wave, current, and instream new technology” or simply “new technology.” However, the Commission is using the terms as shorthand, and is not attempting to define or limit the scope of these technologies.

tidal energy projects (in New York, Washington, and California), and eight are for proposed ocean current energy projects (off the coast of Florida). Over 40 preliminary permit applications for ocean projects are currently pending before the Commission, all of which have been filed since March 2006.

3. These new technologies have significant potential: it has been estimated that the potential for wave and current power could be over 350-terawatt hours per year, which would more than double current hydropower production.² The Commission anticipates further exploration of how these technologies can fit within the national energy infrastructure in terms of the amount of potential energy that can be developed, its reliability, environmental and safety implications, and its commercial viability. The Commission wants to reduce regulatory barriers to the development of new technologies, where possible, and has exhibited the maximum flexibility permitted by law in regulating these projects.³

Background

4. Under Part I of the Federal Power Act (FPA),⁴ the Commission regulates non-federal hydropower projects that are: located on navigable waters; located on

² See Hydroelectric Infrastructure Technical Conference, Docket No. AD06-13-000 (December 6, 2006), transcript at 12; 22 (testimony of George Hagerman).

³ For example, in Verdant, Power, LLC, 111 FERC ¶ 61,024, on reh'g, 112 FERC ¶ 61, 143 (2005), the Commission concluded that, under specified circumstances, the short-term testing of new hydropower technology would not require a Commission license.

⁴ 16 U.S.C. §§ 791a, *et seq.* (2000).

nonnavigable waters over which Congress has Commerce Clause jurisdiction, were constructed after 1935, and affect the interests of interstate or foreign commerce; located on public lands or reservations of the United States; or use surplus water or water power from a federal dam. The Commission has construed the term “navigable water” to include waters off the U.S. coast.⁵

5. Section 4(f) of the FPA⁶ 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 FPA section 9,⁷ which in turn sets forth the material that must accompany an application for license. FPA section 5⁸ states:

Each preliminary permit issued under this part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.[⁹]

⁵ See *AquaEnergy Group, LTD.*, 102 FERC ¶ 61,242 (2003).

⁶ 16 U.S.C. § 797(f) (2000).

⁷ 16 U.S.C. § 802 (2000).

⁸ 16 U.S.C. § 798 (2000).

⁹ Nothing in the FPA requires the Commission to issue a preliminary permit; whether to do so is a matter solely within the Commission’s discretion.

Thus, 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.¹⁰

Because a permit is issued only to allow the permit holder to investigate the feasibility of a project, and grants no land-disturbing or other property rights,¹¹ the Commission historically has generally liberally granted such permits without requiring an extensive showing by the applicant.¹²

6. In contrast, a license issued by the Commission gives the licensee the authority to construct and operate a project. Standard license Article 5 require licensees to acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of a project. Where licensees cannot obtain such rights through contract, they may use eminent domain to do so.¹³ In consequence, before issuing any license, the Commission conducts a full, searching public interest inquiry, and the licensing process is completely distinct from the permit process.

¹⁰ 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”).

¹¹ 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.

¹² 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).

¹³ See FPA section 21, 16 U.S.C. § 814 (2000).

7. A permit holder is not required to file a license application. Likewise, a developer may study a project without holding a preliminary permit. However, the holding of a permit does give a developer first-in-time preference over any competitors who file applications for projects at the same site, during the permit term. As noted above, it is only if and when a project license is issued that the licensee can, under the conditions imposed in the license, engage in ground-disturbing activities, and if necessary use eminent domain to acquire lands for the project.

8. The Commission has begun to receive preliminary permit applications for proposed projects that would produce electric power through innovative technologies that would take advantage of various types of water movement, including ocean wave action and tides and currents both offshore and in rivers. In the last two years, the Commission has granted permits to study projects off the coast of Florida,¹⁴ in San Francisco Bay,¹⁵ in the East River of New York,¹⁶ and in Puget Sound, Washington.¹⁷ Approximately 45 additional applications of this type are pending.

¹⁴ Red Circle Systems Corporation, 110 FERC ¶ 62,113 (2005); Red Circle Systems Corporation, 110 FERC ¶ 62,114 (2005); Red Circle Systems Corporation, 110 FERC ¶ 62,115 (2005); Red Circle Systems Corporation, 110 FERC ¶ 62,116 (2005); Red Circle Systems Corporation, 110 FERC ¶ 62,117 (2005); Florida Hydro, Inc., 110 FERC ¶ 62,270 (2005); Red Circle Systems Corporation, 110 FERC ¶ 62,271 (2005); Red Circle Systems Corporation, 110 FERC ¶ 62,272 (2005).

¹⁵ Golden Gate Energy Company, 113 FERC ¶ 62,028 (2005).

¹⁶ Verdant Power, LLC, 113 FERC ¶ 62,193 (2005).

¹⁷ Tacoma Power, 114 FERC ¶ 62,174 (2006).

9. On December 6, 2006, the Commission held a technical conference with respect to the new technologies.¹⁸ At the conference, and in comments subsequently filed by interested entities, the Commission heard a wide variety of ideas regarding the preliminary permit program, ranging from statements that the current program works well for new technologies,¹⁹ to suggestions that the Commission shorten the typical three-year preliminary permit period to 18 months,²⁰ to comments that the Commission should adopt a much stricter policy with respect to the issuance of preliminary permits for new technology projects, in order to prevent site-banking (the reservation of potential sites without the current intent to develop a project).²¹ This diversity of opinion suggested that it would be useful for us to conduct a public inquiry into this subject, to determine if the Commission should in any way change the manner in which it treats preliminary permits for new technology projects.

The Subject of the Notice of Inquiry

10. The Commission seeks comment on the standard of review it should apply to applications for preliminary permits for ocean wave, tidal, and other non-traditional hydropower projects, and how it should regulate those permits during their terms. We outline below three alternatives, and encourage comments on these approaches, as well as

¹⁸ Hydroelectric Infrastructure Technical Conference, Docket No. AD06-13-000.

¹⁹ See Comments of Oceania Energy Company (filed December 20, 2006).

²⁰ See Comments of Ocean Renewable Energy Coalition (filed December 20, 2006).

²¹ See Comments of Gil Sperling, Verdant Power, LLC (technical conference transcript at 106-07).

the suggestion of any other methods that commenters believe would be fruitful in encouraging and appropriately regulating the initial exploration of new technology projects.

11. We received comments at and following the technical conference concerning the possibility of creating new or modified procedures for the licensing process for new technology projects. We recognize that this issue is complex, given that there are many requirements governing hydropower licensing that are established by law and that an examination of this issue has implications extending to small traditional hydropower projects, as well as those involving new technology. Moreover, we are aware that our staff, with a view towards simplifying and shortening the licensing process where possible, has been able to recommend waiver of certain aspects of the process and to expeditiously process license applications where the applicant has: (a) chosen a site that minimizes environmental impacts, (b) built consensus among stakeholders (including the local community and state and federal resource agencies) regarding project issues and appropriate environmental measures, and (c) provided the Commission with all necessary information.²² Such streamlined procedures may be applicable to some new technology projects. Given that we recently received the first license application for this type of project, we are not prepared at this time to decide if these or other procedures can be applied generally to new technology projects in a manner consistent with law and sound

²² See F & B Wood Corporation, 117 FERC ¶ 62,059 (2006); Birch Power Company, 116 FERC ¶ 62,075 (2006); Birch Power Company, 116 FERC ¶ 61,074 (2006); Wade Jacobson, 116 FERC ¶ 62,073 (2006).

policy. However, we will be monitoring new technology proceedings, and as these proceedings evolve, we may consider whether alterations to our process may be appropriate generically or in individual cases. In addition, the Commission will hold a technical conference on this issue at a future date.

A. Maintain Standard Preliminary Permit Approach

12. As noted, traditionally, the Commission has not subjected most preliminary permit applications to extensive scrutiny. Further, the Commission has not often exercised the right it reserves in all preliminary permits to cancel the permit.

13. Continuing to follow this approach could provide some regulatory protection for developing and testing new technology, could prevent “claim jumping,” that is, interference with a prospective applicant’s ability to investigate the feasibility of a project, and may provide some modest facilitation for financing new projects. On the other hand, this approach would do nothing to resolve the concern we have seen expressed that an entity could site-bank by filing for a number of new technology projects that it has no real intent of developing. It also would not resolve the question, raised in some pending permit proceedings, of how to properly set the boundaries of the area reserved for study by a preliminary permit holder. While it is typically easy to determine the boundaries of a traditional, riverine hydropower project, we have heard contrasting suggestions that establishing strict boundaries for a new technology project would artificially restrict the potential scope of such a project and that allowing too wide boundaries in such cases would encourage site-banking, to the possible detriment of competition in project development.

B. Stricter Scrutiny Approach

14. In the alternative, the Commission could 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 would carefully scrutinize the reports that permit holders are required to file on a semi-annual basis,²³ 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. This approach could reduce site-banking, providing a disincentive for developers to seek permits for projects that they are not ready to pursue. By limiting the geographic scope of permits, we may encourage more thoughtful development of permit applications, as well as competition. On the negative side, this approach could, if not carefully administered, make it more difficult for even well-intentioned and prepared applicants to obtain multiple permits. It also could require additional Commission resources to be devoted to the permit program, both in more carefully examining applications, and in giving stricter scrutiny to progress reports.

²³ As a standard condition in all preliminary permits, the Commission requires the permit holder to file progress reports every six months.

C. Decline to Issue Preliminary Permits for New Technology Projects

15. As a third alternative, the Commission could decide, as a matter of policy, not to issue preliminary permits for new technology hydropower projects. In this case, all potential license applicants would have equal opportunities to explore the development of new technology projects, and the Commission would resolve any resultant competition during the licensing phase. This procedure would resolve concerns about site banking during the permit stage, because no entity would have priority with respect to a project site until an application was actually filed. Moreover, the Commission's regulatory authority would not be invoked, and its resources not utilized, until an entity had demonstrated the seriousness of its interest in a project by filing an application. This would leave the market free to explore potential projects, without the possibly artificial constraints imposed by the existence of a preliminary permit held by an entity that lacks the capacity, or does not have a serious intent, to develop a project. On the negative side, potential applicants would not have the guarantee of first-to-file priority while they explored potential projects. To the extent that a preliminary permit provides some assistance in obtaining financing, this aid would no longer be available.

Interim Statement of Policy

16. On balance, the Commission has decided to follow the "strict scrutiny" approach during the pendency of this proceeding, because this appears to respond to a significant number of the issues that have been raised at the technical conference and in individual proceedings, particularly with respect to site-banking and the scope of proposed projects. However, we have not in any way decided whether we will ultimately select one of the

three alternatives set forth in this notice of inquiry, and perhaps may choose some other approach. We will determine how to proceed only after the Commission has had the opportunity to review and consider the comments filed in response to this notice.

Procedure for Comments

17. The Commission invites interested persons to submit comments, and other information on the matters, issues and specific questions identified in this notice.

Comments are due on or before [INSERT DATE 60 days after publication in the FEDERAL REGISTER]. Comments must refer to Docket No. RM07-8-000, and must include the commenters' name, the organization they represent, if applicable, and their address.

18. Commenters are requested to use appropriate headings and to double space their comments.

19. Comments may be filed on paper or electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, D.C. 20426.

20. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section

below. Commenters are not required to serve copies of their comments on other commenters.

Document Availability

21. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

22. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

23. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact the Commission's Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@ferc.gov) or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

By direction of the Commission.

(S E A L)

Magalie R. Salas,
Secretary