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**HYDROPOWER
REFORM
COALITION**

*Putting water, wildlife,
and people back in rivers.*

Filed Electronically

April 17, 2007

Philis J. Posey
Acting Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

**RE: Preliminary Permits for Wave, Current, and Instream New Technology Hydropower
Projects (Docket No. RM07-8-000)**

Dear Ms. Salas,

The Hydropower Reform Coalition respectfully submits these comments on the Federal Energy Regulatory Commission's Notice of Inquiry and Interim Statement of Policy regarding its treatment of preliminary permit applications for proposed "wave, current, and instream new technology" energy projects. We appreciate this opportunity to comment and hope that the Commission will find our perspective useful as it addresses the new challenges posed by these hydrokinetic technologies.

Sincerely,

A handwritten signature in blue ink that reads "Robbin Marks". The signature is fluid and cursive.

Robbin Marks
Chair
Hydropower Reform Coalition

Steering Committee:

Alabama Rivers Alliance • American Rivers • American Whitewater • Appalachian Mountain Club
California Hydropower Reform Coalition • Friends of the River • Idaho Rivers United
Michigan Hydro Relicensing Coalition • Natural Heritage Institute • New England FLOW • New York Rivers United
River Alliance of Wisconsin • South Carolina Coastal Conservation League • Trout Unlimited

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Preliminary Permits for Wave, Current, and Instream)	
New Technology Hydropower Projects)	RM07-8-000
)	

COMMENTS BY THE HYDROPOWER REFORM COALITION

The Hydropower Reform Coalition represents more than 1 million members of more than 140 American conservation and recreation organizations. Our members are actively involved in many of the hydropower licensing proceedings currently pending before the Commission. Our Steering Committee of fourteen organizations has actively participated in hydropower policy reform efforts since 1992, including membership in the National Review Group (1998-2002) and the Federal Advisory Committee on the Interagency Task Force on Hydropower Licensing (1999-2000), comments on all of the Commission's hydropower rulemaking proceedings since 1992, direct involvement in the development of the Commission's new Integrated Licensing Process, and testimony before Congress.

The flood of new preliminary permit applications for proposed hydrokinetic projects filed during the past year has brought some of the underlying flaws in the Commission's preliminary permit system to the surface. It is clear that the traditional approach of issuing preliminary permits with minimal review is no longer adequate - especially for hydrokinetic projects - and we applaud the Commission for its willingness to address these problems.

**ELIMINATING PRELIMINARY PERMITS COULD END SITE BANKING, BUT
IS NOT FEASIBLE AT THIS TIME**

The Commission's Notice of Inquiry appears to be heavily focused on the problem of site banking. If preliminary permits are indeed the mechanism that allows site banking to take place, we note that the Commission's third alternative poses the most simple solution: decline to issue preliminary permits for hydrokinetic projects altogether.

This approach would ultimately reward applicants with the best proposals for developing a given site or set of sites rather than those who were simply able to stake a claim first.

We recognize, however, that preliminary permits serve a useful purpose: they provide a developer with the certainty of knowing that it can research a site for a reasonable period of time without relinquishing its priority rights to that site to a competitor. Without this assurance, potential applicants may be unwilling to take the risk of expending the significant resources necessary to study a site and developing a proposal. Presumably, such risks would be even greater for hydrokinetic projects, which rely on new technologies that have not yet been fully tested. While the Coalition feels that the public interest would be best served by a highly competitive system that rewards developers with the best (not the first) filing, we also recognize that the elimination of preliminary permits altogether might make it extremely difficult for developers in the nascent and undercapitalized hydrokinetic industry to find and secure the funding and information necessary to move forward with any projects at all. Thus, despite the potential benefits, we feel that eliminating preliminary permits at this time is not a feasible option.

**THE COMMISSION SHOULD ADOPT THE "STRICT SCRUTINY"
APPROACH FOR ALL PRELIMINARY PERMITS**

The Coalition supports the Commission's "strict scrutiny" approach to preliminary permits, as well as the Commission's decision to adopt it as an interim policy. The Federal Power Act gives the Commission the authority to issue preliminary permits to developers, allowing them to lay the groundwork for developing a high-quality license application by taking care of the necessary "examinations and surveys, [...] maps, plans, specifications, [...] estimates, and [...] financial arrangements"¹ without the risk of having a competitor "jump their claim" to the site. By granting the Commission the discretion to determine "the conditions under which priority shall be maintained,"² the Federal Power Act makes clear that a preliminary permit is not a guaranteed right, but rather a

¹ 16 U.S.C. § 802

² 16 U.S.C. § 802

conditional privilege. In exchange for the valuable right conveyed by the permit (a three year preference advantage over competitors for a given site), a potential applicant must make a serious effort to collect information, reach out to the local community, consult with appropriate federal, state, local, and tribal agencies, and otherwise make progress towards developing a license application.

A system of preliminary permits that allows permit holders to lay claim to a prospective site while expending no effort towards its eventual development is an open invitation to site-banking. The "strict scrutiny" alternative, which proposes that the Commission would "carefully scrutinize the reports that permit holders are required to file on a semi-annual basis, and [...] where sufficient progress was not shown, consider canceling the permit,"³ should discourage site banking by requiring applicants to show that they are making a serious effort.

We also support the Commission's suggested indicators of progress: "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." These requirements are exactly the sort of requirements that are needed to ensure a serious effort on the part of permit holders, and will be most effective if they are applied consistently. Rather than developing a different set of conditions for each permit issued, we recommend that FERC issue policy guidance which lays out, as specifically as possible, the Commission's information requirements under the strict scrutiny standard, giving permit applicants a clear understanding of what field investigations, meetings with investors and regulatory agencies, filings with the commission, etc. will be required of them *before* they file a permit application.

The Commission's "strict scrutiny" standard is good public policy: it is likely to discourage site banking, weed out potential developers that do not have the capacity or intention to actually develop a project, and encourage the best and most efficient use of public resources. We note that the public interest principles here are not limited to

³ 118 FERC ¶ 61,112 (2007), para. 14

hydrokinetic projects, and in fact are equally applicable to traditional hydropower projects, *especially* those projects where developers may be competing for the privilege of a license to develop a hydropower project at an existing dam. We strongly encourage the Commission to apply this “strict scrutiny” standard to *all* preliminary permits, regardless of whether a permit was issued for a hydrokinetic project or a traditional hydroelectric project.

INITIAL SCREENING OF APPLICANTS IS NECESSARY

We encourage the Commission to further refine its "strict scrutiny" policy by including an initial screening mechanism during which the Commission determines if a permit applicant is a credible, competent entity that is capable of operating an energy project in the navigable waters of the United States. This would not be new for the Commission, which has in recent years refused to issue several preliminary permits because of concerns with the applicant's lack of “fitness.”⁴ Expanding this principle into a consistent policy would help to prevent site banking by weeding out applicants that are obviously not committed to developing a project. Aside from preventing abuse of the preliminary permits system, it would also have the additional public benefit of discouraging frivolous license applications, thus keeping FERC staff workload reasonable and in tune with actual demand for hydroelectric development.⁵ Further, licensing is a time and resource-intensive process, not only for the license applicant, but also for FERC staff, federal and state agencies, and other stakeholders. When an applicant moves forward with the licensing of a poorly-conceived hydropower project or a project for which it lacks sufficient expertise or resources to actually bring to fruition, the result is often a waste of time and resources for all involved.

⁴ See, for example: *Order Denying Rehearing*, 111 FERC ¶ 61,072, P-12454. April 18, 2005 (East Fork of the White River, Indiana); *Order Denying Rehearing*, 117 FERC ¶ 61,013, P-12708, October 4, 2006 (Savannah River, South Carolina); or *Order Denying Preliminary Permit Application*, 113 FERC ¶ 61,043, P-12570. October 14, 2005 (Cheoah River, North Carolina).

⁵ See undocketed correspondence to Brent Smith, President, Symbiotics LLC, from Joseph Morgan, Director, Division of Hydropower Administration and Compliance in 2003 and 2004. For example, “RE: Outstanding Preliminary Permits and Pending Preliminary Permit Applications,” April 7, 2003.

Preliminary permits, especially those that are issued without “strict scrutiny,” may actually encourage this behavior: as the Commission acknowledges in paragraph 15 of its Notice of Inquiry, preliminary permits can “[provide] some assistance in obtaining financing.” A more rigorous pre-screening process would prevent abuses of the hydropower licensing process, and need not be overly burdensome on the applicant or on FERC staff. For instance, the Commission could require a potential applicant to demonstrate its competence by filing a business plan, biographies of key personnel, and, in the case of hydrokinetic projects, some documentation demonstrating that the project will be based on technology that is sufficiently mature so as to make timely development of the proposed project feasible. The Commission has required applicants to provide similar information for a preliminary permit in the past,⁶ and it could improve its “strict scrutiny” policy by applying this standard more consistently.

**GEOGRAPHIC SCOPE OF PERMITS SHOULD BE LIMITED,
BUT NOT EXCESSIVELY**

The Commission's "strict scrutiny" policy is likely to be effective at preventing one form of site-banking, in which developers file permits for projects that they are incapable of developing. However, it is less likely to be effective at preventing site-banking in cases where a competent developer files a single permit which covers a very large area that may include multiple sites. This type of site banking appears to be somewhat unique to hydrokinetic projects, and is unlikely to be a serious issue with traditional hydropower projects, where site selection is fairly straightforward and confined to a relatively specific geographic area.

We are not convinced that the Commission's approach of limiting the geographic scope of preliminary permits that is identified in its "strict scrutiny" alternative is the most efficient means of preventing this type of site banking. While some permit

⁶ See letter to Bull Lake Hydro, LLC, “RE: Additional Information Request,” P-12602, issued April 21, 2006, requesting articles of incorporation, state-issued certifications demonstrating the founding and status of the permit applicant, and other items in order to process the preliminary permit. The Commission’s ultimate decision not to issue a permit to Bull Lake Hydro (see *Order Issuing Preliminary Permit and Rejecting Competing Application*, 116 FERC ¶ 62,083, August 1, 2006) was a direct result of the information presented in the company’s response.

applications are clearly too broad (e.g. an entire coastline), others are not so clear-cut. Selecting a site for a hydrokinetic project involves multiple layers of complexity that do not apply to traditional hydropower projects. Tidal velocities can vary significantly across relatively short distances and at different depths. The precise location of a project, therefore, could have a major impact on the energy efficiency of a project. The same logic applies to environmental impacts: within a given site, there may be a great deal of ecologic and biologic variability. A few meters' difference (let alone a few hundred) could make an enormous difference in a project's impact on the environment, recreation, or other public values.

Given these variables, finding optimal sites for hydrokinetic projects that can produce the most energy with the least amount of adverse environmental impact will likely require extensive fieldwork in the water, a time-consuming and expensive undertaking. If the Commission adopts a system that requires developers to file permit applications with limited boundaries, then developers may be stuck with a difficult choice:

- File a narrow permit application for a “best guess” site that may or may not prove ideal, and risk losing an adjacent site that proves superior to a competitor; or
- Perform the research necessary to identify the best possible site before filing a preliminary permit, and risk having a competitor gain priority by filing a permit first.

The Commission could help to solve this dilemma within the “strict scrutiny” standard by placing more weight on a potential applicant’s actual performance under a preliminary permit than on the size of the area being studied. Alternately, the Commission could grant permits with a requirement that the applicant narrow the geographic scope of the permit as site-selection fieldwork progresses.

THE COMMISSION SHOULD NOT RUSH TO LICENSE HYDROKINETIC PROJECTS

In its Notice of Inquiry, the Commission indicated that it may be willing to consider changes to the licensing process for hydrokinetic (and small hydropower) projects, noting that it “wants to reduce regulatory barriers to the development of new technologies where possible.” While we commend the Commission for its desire to encourage innovation in waterpower technology, we would remind the Commission that its primary purpose is not to promote the development of energy projects but rather to *regulate* them.

The regulatory “barriers” required by the Federal Power Act are in place to give the American public energy projects that deliver energy while minimizing adverse impacts to the environment and other public values. While the prospect of hydroelectric power without the harmful side effects that accompany dams and reservoirs is indeed promising, it is worth noting that most of these technologies are still quite experimental. Because these technologies are still very much untested, there is also very little known about the associated environmental impacts. At a recent tidal hydropower conference in Ketchikan, Alaska, Hydropower Reform Coalition staff learned that:

- The developer claiming the most operational hours for a prototype tidal turbine had still only performed only 150-200 hours of onsite testing.
- Another developer had logged only 80 hours of onsite testing of its prototype over three years.
- Of the remaining two developers, one has plans to place a prototype in the water this year; the other has yet to manufacture a single turbine.

We do not repeat these observations here to denigrate these technologies or the efforts of the companies that are developing them: indeed, all innovation must start somewhere. Our point is simply that these technologies are still far from mature, and that the Commission should exercise caution when licensing the use of these technologies for energy production in the waters of the United States. The lack of operational information

(both technical and environmental) poses a much more serious barrier to the deployment of hydrokinetic technologies than regulation does. This lack of information raises two issues:

First, while there are a finite number of sites with strong potential for generating cost-effective power, it is not yet clear which technologies are best suited for these sites. Licenses, however, lock in specific technologies to specific sites. A license issued to a project that did not utilize the best and most appropriate technology would effectively tie up a site for decades during which its full potential could not be realized. The Commission's "Decline to issue Preliminary Permits for New Technology Projects" alternative could pose one solution to this problem, requiring developers to compete for the privilege of using the best sites and awarding licenses to those developers which are able to make the most efficient use of a given site for power generation while causing the least amount of harm to the waterway. There is, however, a more elegant solution that would allow developers to retain the benefits of preliminary permits: the Commission could simply elect to issue licenses with shorter terms, opening sites to new and innovative technologies as they emerge.

Second, when dealing with an untested technology, a lack of data about environmental impacts does not indicate a lack of environmental impacts. FERC must exercise caution when considering a project's potential impacts. The Commission would not be doing the hydrokinetic industry – or the American public – any favors if it were to gloss over the current lack of data about potential impacts and give license applications the benefit of the doubt in order to encourage the development of this technology. The consequences of doing so could ultimately prove tragic, both for the waterway and for the reputations of the project operators, the nascent industry, and FERC itself.

These concerns over as-yet-unknown environmental impacts are far from insurmountable. The Commission should strive to issue flexible licenses that use predefined environmental performance standards, a strong monitoring regime, an aggressive adaptive management approach, and a requirement that sufficient funds be set aside to mitigate environmental harm (or if necessary, decommission and remove the

project) should the project have unforeseen adverse impacts. Such an approach might allow the Commission to expedite the licensing process while still providing the public with assurance that they will not have to wait several decades for a project is relicensed to correct operations that cause harm.

Finally, we also note that the Commission's brand-new Integrated Licensing Process (ILP) was designed in part to remove barriers to efficient licensing. The ILP has already resulted in one case where a licensee, working closely with local stakeholders, was able to file a consensus-based application that was ready for environmental analysis far in advance of its due date.⁷ The Commission should give the ILP a chance to work before assuming that it needs to be "streamlined" further.

CONCLUSION

The Coalition thanks the Commission for its inquiry into this issue, and appreciates the opportunity to Comment. We support the Commission's "strict scrutiny" standard for *all* preliminary permits, and urge the Commission to exercise appropriate caution and flexibility in the licensing of hydrokinetic projects that depend on new and relatively untested technology.

Dated: April 25, 2007

Respectfully Submitted,

/s/ Robbin Marks

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⁷ See *Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions*, P-2101-022, March 5, 2007 (Mystic Lake Hydroelectric Project, Montana).

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