

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. RM07-8-000

**COMMENTS OF CITY AND COUNTY OF SAN FRANCISCO, THE
CITY OF SAN JOSE, THE CITY OF OAKLAND, THE CITY OF
SACRAMENTO AND THE COUNTY OF MARIN
IN RESPONSE TO THE COMMISSION NOTICE OF INQUIRY AND
INTERIM STATEMENT OF POLICY**

The City and County of San Francisco (“CCSF”), The City of San Jose, the City of Oakland, the City of Sacramento and the County of Marin (together the “Commenting Parties”) welcome the opportunity to respond to the Federal Energy Regulatory Commission’s (“Commission”) February 15, 2007 Notice of Inquiry (“NOI”)¹ on preliminary permits for wave, current, and instream new technology hydropower projects under Part I of the Federal Power Act (“FPA”). The NOI is an important step toward developing a regulatory framework that is tailored to the special needs of these projects and fosters, rather than discourages, the development of these emerging technologies and the generation projects that rely on them.

The Commenting Parties strongly agree with the concern, recognized by the NOI (at p.13), that preliminary permits are being used to bank new technology hydropower sites with no realistic expectation of developing them within a reasonable time. We also share the concern that permit applicants are being allowed to set project boundaries that are much too wide for the specific generating units they have proposed—effectively precluding competing development in large swathes of the ocean. *Id.* Left unchecked,

¹ 118 F.E.R.C. ¶ 61,112 (2007).

these practices will both discourage the development of these emerging technologies and increase the cost of new technology hydropower projects.

Given the urgent need for new, non-carbon-producing electric generation resources, the nation cannot afford a “business as usual” approach based on the standard permitting and licensing model developed for conventional hydropower projects. Specifically, the Commenting Parties urge the Commission: (1) to discontinue issuing preliminary permits for new technology hydropower projects, until it has been conclusively and/or reasonably demonstrated that these new technologies are ready for commercial development; and (2) to enforce strict progress requirements on the new technology preliminary permits that have already been granted, and reserve the Commission’s right to terminate the permits.

We are also concerned that the speculative value of new technology hydropower sites will encourage inefficient and incomplete development of wave, current, and instream new technology hydropower resources. To prevent such projects from locking-in what may be less-than-optimal, first-generation technologies, the Commission should consider methods of ensuring such projects are not granted permanent monopolies. The Commission should also consider requiring an Advance Notice of Interest to ensure that local governments are kept informed of license applications that may affect them. Lastly the statutory municipal/state preference should be maintained for new technology hydropower projects, given the public nature of local wave, tidal, current, and free flowing river-based energy resources and the longer time that it usually takes such entities to secure the approvals of their councils and governing bodies to undertake the preparation and filing of a license application.

I. BACKGROUND

Municipal governments in California have a keen interest in the development of wave, tide, and natural current resources. CCSF, for example, has adopted a resolution to support the development of a pilot project for electric power generation from tidal energy in San Francisco Bay. In addition, CCSF has intervened in the Commission proceeding that has granted a preliminary permit for the San Francisco Bay (Project No. 12585); and is actively discussing options for potential cooperation with several parties interested in developing the tidal resources of the Bay. The Commenting Parties want to see new technology hydropower developed as a commercially viable source of generation, with fair terms for both the developers and the affected public.

At the same time, California's bays and coastline are unique resources and depending on how wave, current, and natural current new technology hydropower projects are developed, local governments and their residents in California could be impacted significantly. The matters are discussed in greater detail in the pre-technical conference comments submitted on behalf of California Cities and Counties (Which included the Commenting Parties).²

The Commenting Parties are concerned that the Commission's current regulatory approach will not achieve the goal of economically viable, commercial new technology hydropower development that is compatible with the multiple and joint uses of California's coastline and bays, and consistent with the Commission's obligation to license only projects that are "best adapted" and in the "public interest". FPA

² Comments on Issues of Concern to California Cities and Counties for FERC Technical Conference on Hydroelectric Infrastructure, Washington D.C., December 6, 2006 at 5, Docket No. AD06-13, filed Dec. 4, 2006, available at eLibrary Accession No. 20061204-5022.

Sections 4(e) and 10(a)(1), 16 U.S.C. §§ 797(e) and 803(a)(1) (2000). We discuss our concerns below.

II. COMMENTS

The statutory purpose of a preliminary permit is to allow the permit holder to study hydropower development at a specific site, confident that it will have priority over competitors if it submits a license application within the three-year permit period. This purpose assumes that it is possible for a permit holder to prepare and support a license application, within that permit period, for a commercially acceptable project that can be financed and constructed. The basic problem, underscored by the Commission's December 6, 2006 technical conference, is that this assumption is not currently correct with respect to new technology hydropower projects.

Nevertheless, by obtaining preliminary permits for such projects, it is possible for applicants to lock-up large areas and potential sites without any reasonable expectation that within three years, they will have been able to design the necessary technology, as well as have it reviewed for environmental and other impacts prior to the preparation and filing of a complete license application. The current permit approach will likely inhibit innovation and development of these new technologies, since opportunities to build projects will be restricted to a select few who managed to stake their claims long before commercial projects that reflect the best state-of-the-art could be successfully constructed. The *status quo* can also create a market in potential development sites—a market based on the speculative, future value of a monopoly over the use of a public resource (the waves, tides, and waters of the United States), in which an unscrupulous

permit holder, not the public, is the primary beneficiary and could leverage that monopoly into higher prices.

A. The Commission Should Decline to Issue Preliminary Permits for New Technology Hydropower Projects

The Commission has identified three alternative approaches in reviewing the rules for preliminary permits for new technology hydropower projects: (1) continuation of the *status quo*, based on the standard preliminary permit approach used for conventional hydropower projects (NOI at p.12-13); (2) "stricter scrutiny," in which 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" (*id.* at p.14); and (3) a Commission decision, "as a matter of policy, not to issue preliminary permits for new technology hydropower projects" (*id.* at p.15).

The Commenting Parties believe that the third alternative is the best approach, and that the Commission should adopt the policy, effective immediately, of declining to issue preliminary permits for wave, current, and instream new technology hydropower projects, until it has been conclusively and/or reasonably demonstrated that these new technologies are ready for commercial development. This step is amply supported by the evidence presented at the December 6, 2006, technical conference and related written comments, which demonstrate that these technologies - notwithstanding their real promise and the enthusiasm of their supporters - are not sufficiently developed to enable permit holders to prepare and submit commercially viable license applications within the three-year term of a preliminary permit.

By declining at this time to issue preliminary permits for new technology hydropower projects, the Commission should significantly reduce the immediate site-banking and speculation problem. In addition, all competing projects would be on an equal footing in terms of access to the nation's coasts and bays. Developers of potentially viable technologies would have an incentive to study all possible sites; and when a new hydropower technology is ready for full-scale commercial development, license applications can be prepared without the need to buy-out the holders of preliminary permits and compensate them for the monopoly they have through those permits.³

A policy of declining to issue preliminary permits at this time is also better than the "stricter scrutiny" alternative described in the NOI. As explained below, the Commenting Parties welcome the interim policy of stricter scrutiny for existing preliminary permits, but doubts its value in the long-term given the increased demands upon Commission resources, the complexity of the evaluation processes, and the much greater risk of litigation. The first problem the Commenting Parties foresee with the stricter scrutiny approach is that considerable Commission resources will be required to apply it consistently. That regulatory effort will also be ongoing and long-term—and

³ The NOI identifies two potential concerns regarding the adoption of a policy of declining to issue preliminary permits for new technology hydropower projects. First, the Commission appears to be concerned that preliminary permits should continue to be issued in order to preserve "the guarantee of first-to-file priority [for permit holders] while they explored potential projects," and because "[t]o the extent that a preliminary permit provides some assistance in obtaining financing, this aid would no longer be available." (NOI at p. 15) However, until new hydropower technologies are both commercially viable and can meet the Federal Power Act's "best adapted" and public interest licensing criteria, the guarantee of first-to-file priority simply discourages competition and alternative technologies without producing projects that can contribute meaningful amounts of electricity to the Grid.

In addition, although one speaker at the December 6 technical conference noted that holding a U.S. Army Corps of Engineers permit may have facilitated his company's financing (Transcript of Hydroelectric Infrastructure Technical Conference at 56-57 (Gibson), FERC, Washington DC, Dec. 6, 2006, Docket No. AD06-13, available at eLibrary Accession No. 20061206-4017), it is unclear whether preliminary permits provide any such advantage, or would continue to do so as more and more entities receive preliminary permits, and as it becomes clear to investors that receipt of a preliminary permit does not assure the proposed project will be developed within the permit period. Indeed, the greater danger to the development of new technologies may lie in the fact that preliminary permits currently have no necessary relationship with how advanced or viable a project is. A situation in which investor dollars simply follow the permits may actually be to the detriment of funding for more viable or advanced projects. To the extent that investors may be providing funds based on the speculative, site-banking value of the preliminary permits, preservation of this speculative value is not an appropriate justification for continuing to grant preliminary permits.

likely to produce decreasing returns. The NOI itself notes the growing interest in these types of projects and the recent surge in the number of applications for preliminary permits.⁴ Most likely, the sites most suitable for wave and tidal power projects are finite. Thus, it seems likely that increasing the number of applications will mean that more and more marginal and less promising sites will be staked out. Nevertheless, the Commission staff will be required to carefully track and give attention to each site and proposed project. When these new technologies start to reach the stage of being viable for long-term licensing, the Commenting Parties believe that the Commission should make maximum use of its limited resources and devote the required staff and review time to assessing and supporting such license applications—not marginalize their efforts and drain their resources because it has promised strict scrutiny of all new technology preliminary permits.

There is also no assurance that “stricter scrutiny” will prevent site-banking and speculation. The approach may decrease the size of individual sites and the time that they are banked by specific permit holders. However, it will not prevent entities from filing to bank sites again and again through a series of special-purpose business entities, or from submitting separate permit applications for multiple, smaller sites, placing a further drain on Commission resources.

Finally, “stricter scrutiny” of preliminary permits substantially increases the risk of potentially costly litigation. For example, the holder of a permit that is revoked when a semi-annual report failed to show “sufficient progress” (NOI at p.14), may seek rehearing or appeal of the Commission’s decision. Litigation over the Commission’s

⁴ NOI at p.2.

judgment calls at this early stage would further stretch Commission resources and place a cloud on potential development sites pending the resolution of any litigation.

B. The Commission Should Implement the Stricter Scrutiny Approach For Any Preliminary Permits That Have Already Been Granted

For preliminary permits that have already been granted, a stricter scrutiny approach is appropriate. The Commission should also reassess several aspects of the process in light of the stricter scrutiny approach. We urge the Commission to consider the following:

1. Increasing the transparency requirements for preliminary permit applicants.

The Commission can do this by, *e.g.*: requiring disclosure of all other locations where the same applicant has applied or intends to apply for a preliminary permit; granting a preliminary permit only once the Commission has evaluated the identity of the applicant and its resources. The Commenting Parties believe that while such requirements can and should be crafted so that they do not create a barrier to entry, there must be assurance that an applicant is more than just a corporate shell, and that a name change should not suffice to change the real party in interest.

2. Applying increased accountability to preliminary permits.

The Commenting Parties agree with the Commission that preliminary permits for tidal and wave generation must have the proper geographic scale and not be permitted to bank blanket areas of the nation's bays and coastline. Also, stricter scrutiny implies that the standard articles for preliminary permits include provisions that assure permit holders diligently pursue development. Scrutiny thereof should be vigorously enforced to assure meaningful progress is being made and that potential development sites are not monopolized by entities unable or unwilling to develop them.

3. **Greater specificity in preliminary permit requirements.**

Specific requirements should be developed for bi-annual reports, including, for example, a development plan with project milestones and an assessment of progress in implementing the plan; substantive descriptions of meetings held and disclosure of any formal agreements or Memoranda of Understanding entered into. Active monitoring of these reports will require terminating permits with little or no significant progress.

Stakeholders should be served with copies of the bi-annual reports, and the Commission should accept stakeholder comments on those reports—*e.g.*, by soliciting comments in ongoing open dockets. The Commission should also require the permit holder to respond to reasonable questions raised by stakeholders, as a condition of retaining the permit. For the stricter scrutiny approach to be at all effective, the foregoing will require consistent application across the range of applicants and applications.

If, contrary to the Commenting Parties' recommendation, the Commission continues to issue preliminary permits for new technology hydropower projects, the stricter scrutiny approach also should be applied to those permits, until it has been conclusively demonstrated that these new technologies are ready for commercial development. As discussed above, this approach may needlessly waste Commission resources and encumber potential development sites. However, it is superior to the *status quo*, which is based on the permitting and licensing practices for conventional hydropower projects.

C. Implementation

Declining at this time to issue preliminary permits for new technology hydropower projects should commence immediately and should cover both currently

pending and future applications. For preliminary permits that have already been issued, the Commission should apply the proposed stricter scrutiny policy. Certain, very limited exceptions to these policies may be appropriate, based on specific facts, and if the underlying technology has been proven for commercial development. If, at any time, the Commission is persuaded that a new technology has surfaced that will enable the standard permit scheme to be restored on a broader basis, it can do so.

The Commission is still within the first wave of preliminary permit applications for new technology hydropower projects, and prompt action at this time should be within the discretion of the Commission, especially in light of the evidence presented in the December 6, 2006, technical conference and this NOI process. From an implementation perspective, the sooner the Commission takes steps to restrict the issuance of new preliminary permits, the better. Delaying implementation of this policy and granting a new generation of permits—only to terminate them 18-24 months later for the inevitable failure to meet developmental benchmarks—is a waste of Commission and public resources that can and should be avoided. In addition, to assure protection of the public interest, the Commission should revisit the policy no later than five years from now.

D. Licenses

The focus of this NOI is on the preliminary permit rules and process, as this represents the first step in the Commission's licensing framework for conventional hydropower projects. Nonetheless, while the Commenting Parties recognize that the issue of licensing is beyond the scope of this NOI, we urge that the Commission soon also address the subject of licenses and their application, oversight, and role with respect to new technology hydropower projects. Even if the preliminary permit problem is

resolved as the Commenting Parties recommend, absent prompt guidance and clear Commission policies, we fears the existing licensing framework will encourage license applications for, and the premature implementation of, inefficient, still-developing technologies in order to bank those sites for the future. The Commenting Parties would welcome the opportunity to comment on and participate in any such future NOI on the subject of licenses.

E. OTHER ISSUES

The NOI invites comment on “any other methods that commenters believe would be fruitful in encouraging and appropriately regulating the initial exploration of new technology projects.”⁵ The following sections address those other issues.

1. Introducing an Advance Notice of Interest

The Commenting Parties believe that current notice provisions under the prevailing rules are inadequate. Federal rules require preliminary permit applicants to identify and provide FERC with a range of data and information on specific local political subdivisions.⁶ However, in contrast to license applicants, preliminary permit applicants are not required to certify that they have made a good faith effort to notify the local governments.⁷ Further, interpretation of subsection 4.32(a)(2)(iv) - which requires the applicant to identify and provide information on “[e]very other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application” - leaves too much discretion in the hands of the applicant and can undermine effective notice to all entities that *may indeed* be affected by

⁵ *Id.* at p.10.

⁶ 18 C.F.R. § 4.32(a)(2).

⁷ License applicants must show good faith efforts to contact all the entities identified in 18 C.F.R. § 4.32(a)(2). 18 C.F.R. § 4.32(a)(3).

- or have an interest in - an application, albeit not identified as such by an applicant. This loophole should be closed.

The Commenting Parties believe it is vital that potentially affected entities, particularly local governments, receive proper notice of activities in waters close to, or affecting/affected by, such potential technology projects. Not only are there environmental, planning, and economic considerations, local inhabitants expect their representatives to be made aware of such developments, particularly when the resources at issues are themselves public resources.

If, as the Commenting Parties believe is appropriate, FERC ceases to issue preliminary permits, a new concern could be that this step might exacerbate the issues of poor notice that already exist. Therefore, the Commenting Parties propose a new step, the Advance Notice of Interest, be introduced as part of the licensing process.

The Advance Notice of Interest would be a prerequisite for any entity seeking to apply for a license and would be required to be submitted *at least* one year in advance of any license application. Further, the Advance Notice of Interest would not only be noticed by the Commission, but the applicant would be required to serve all the entities identified at 18 C.F.R. § 4.32(a)(2). The Advance Notice of Interest should not give the applicant any special rights, and any given geographical area could be the subject of multiple Advance Notices of Interest.

By this means the license process itself is made more transparent, yet the advance notice provided to all interested or likely affected entities presents no regulatory or other barrier to alternate projects and could, in fact, spur competition.

2. Municipal/State Preference

The current preliminary permit and licensing system affords some advantages for local and state governmental entities wishing to become license applicants. These advantages should be retained for municipal and state entities, given the public nature of local wave, tidal, current, and free flowing river-based energy resources and the longer time that it takes such entities to secure the approvals of their councils and governing bodies to undertake the preparation and filing of a license application.

III. CONCLUSION

The Commenting Parties urge the Commission to consider seriously the alternatives identified herein. For the foregoing reasons, we believe that commercially-viable development of these critical, but still-emerging, energy resources is best served by the Commission exercising its discretion to adopt the policy of declining to issue preliminary permits at this time, until these technologies are more advanced. We also urge that the Commission soon consider revisions to the licensing process, so that it will encourage the filing of license applications that are truly best-adapted and adopt standard license conditions that assure full utilization of the potential of the nation's water resources and the Commenting Parties recommend the proposed Advance Notice of Interest as an enhancement to the license process.

In addition, we urge the Commission to continue this discussion in a more comprehensive review of the rules and processes for licensing, with the interested and concerned public.

Respectfully submitted,

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/S/

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Submission Contents

COMMENTS OF CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF SAN JOSE, THE CITY OF OAKLAND, THE CITY OF SACRAMENTO AND THE COUNTY OF MARIN
IN RESPONSE TO THE COMMISSION NOTICE OF INQUIRY AND INTERIM STATEMENT OF LICY

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