BEFORE THE UNITED STATES
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Inquiry and Interim Statement of Policy) Docket No. RM07-08

COMMENTS OF THE OCEAN RENEWABLE ENERGY COALITION ON NOTICE OF INQUIRY AND INTERIM STATEMENT OF POLICY ON PRELIMINARY PERMITS UNDER PART I OF THE FEDERAL POWER ACT FOR WAVE, CURRENT AND INSTREAM NEW TECHNOLOGY HYDROPOWER PROJECTS

I. INTRODUCTION AND OVERVIEW

The Ocean Renewable Energy Coalition (OREC) hereby submits these comments on the Federal Energy Regulatory Commission's (Commission) Notice of Inquiry and Interim Statement of Policy on Preliminary Permits Under Part I of the Federal Power Act for Wave, Current and Instream New Technology Hydropower Projects. The Notice seeks comment on the Commission's proposed "strict scrutiny" approach to ensure that permit holders are actively pursuing project exploration (Notice ¶14) and advises that the Commission may "consider whether alterations to the existing licensing process may be appropriate in future cases. (Notice ¶11).

OREC generally supports the Commission's proposed strict scrutiny approach, which strikes a fair balance between affording developers adequate security, through priority of application, to risk investment in preparation of a license application and maximizing competition for, and innovation at wave, current and tidal sites. And OREC anticipates that the strict scrutiny approach will enable the Commission to avoid default reliance on the first to file rule to select between competitors. We have proposed some ways that the Commission can limit reliance on the first to file rule and enhance its review of permit applications. We address these issues in **Part II.A.1.**

OREC suggests some additional improvement to the strict scrutiny policy such as (a) incorporating adequate safeguards to ensure that permits are not rescinded where delays are attributable to agencies and beyond a developer's control; (b) revisions to the present docketing system and (c) strict enforcement of Rule 4.32 (a) requirements (listing of affected parties) and public notice to facilitate the ability of developers and the public to track permit filings and learn about initial and competing permit applications. We address these issues in **Part II.A.2** of our comments.

While OREC commends the Commission for an important step forward with this Notice, we caution that the Commission's permit policy cannot be considered in a vacuum. Most significantly, the Commission should take steps to ensure that the three year permit term "matches" the time required to prepare and file a license application to avoid issuance of successive permits. Second, we urge the Commission to create a five year pilot or early stage license (with a [supra?]-expedited, proportionate licensing process) to bridge the gap between the preliminary permit, which does not authorize construction and operation of small array and demonstration projects, and the long term, Part I license which is designed to authorize commercial development. Finally, we recommend the Commission play a more proactive role in defining the scope of federal statutory requirements that relate to the licensing process. We address these issues in **Part II.B** of our comments.

II. OREC COMMENTS

The Ocean Renewable Energy Coalition is the national trade association for marine renewables, including wave, tidal and offshore wind. OREC is comprised of technology developers, environmental consultants, vendors, investment bankers and law firms both

within the United States and Europe. Our member developers account for nineteen of the thirty two preliminary permits issued to date and eight of the twenty three still pending.[1]

OREC commends the Commission for its recent focus on wave, tidal and current technologies and its willingness to reexamine and tailor existing regulatory policies to fit the needs of a nascent industry that holds so much promise to meet our nation's demand for domestic sources of emission-free, renewable energy. Our comments are intended to assist the Commission in fine-tuning its "strict scrutiny" proposal and further adjusting its existing regulatory processes to accelerate siting and commercialization of marine renewables technologies. We note that as the Commission re-examines its regulatory policies, Congress is currently considering the recently introduced Marine and Hydrokinetic Renewable Energy Promotion Act, which will provide an influx of desperately needed federal funds for marine renewable projects that incorporate principles of adaptive management in the licensing process. [cite HR #] In adopting regulatory policies, we believe that the Commission should be cognizant of the proposed legislation and develop policies that enable developers to take maximum advantage of funding opportunities offered by the statute.

A. The Proposed Strict Scrutiny Approach

1. Strict Scrutiny Strikes the Appropriate Balance Between Security to Developers, Maximizing Competition and Avoiding Site Banking

The Commission proposed three approaches to preliminary permits in the Notice of Policy.: (1) maintaining the standard preliminary permit approach, where traditionally, most applications are not subjected to close review; (2) a strict scrutiny approach under which the

[1] *See* List of Issued and Pending Permits, http://www.ferc.gov/industries/hydropower/indus-act/tidal-energy/permits.asp (last visited April 24, 2007).

Commission will require developers to set and meet certain deadlines, including submission of a Notice of Intent (NOI) to File a License Application and PAD within a year of issuance of the permit and (3) elimination of the preliminary permits for wave, tidal and current technologies as a matter of policy, and requiring developers to study a site without any guarantee of a first to file priority.

OREC endorses the strict scrutiny approach, and supports the Commission's initial rejection of the two other alternatives. The minimal requirements of the current preliminary permit process (the first approach) promotes a "gold rush" mentality, by which developers race to snatch up sites on the chance of eventually identifying or securing rights to a suitable technology to deploy. A developer that does not have any tidal technology under development or evaluation or has not even begun negotiations to license technology will need far more than three years to prepare a credible license application, thereby delaying access to the site by bonafide developers for at least three years[2] at a time when the wave and tidal industry is gaining traction with the private investment community.

Eliminating preliminary permits entirely will also negatively impact the wave and tidal industry. Virtually all wave and tidal developers[3] rely on the "first to file" priority afforded by the preliminary permit to attract private investment to finance initial study and site

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[2] *See* OREC Policy Paper on Preliminary Permits, Site Banking and Wave and Tidal Energy Development (submitted to Commission August 2006, online at http://www.oceanrenewable.com/linksreports) at 8-14 (lengthy discussion of drawbacks to existing FERC permit process).

[3] We note that the sole wave or tidal company to proceed in the absence of a preliminary permit is Finavera Renewables (formerly AquaEnergy), the developers of the Makah Bay Pilot Project No. 12751 which will be located in the Olympic Coast National Marine Sanctuary off the coast of Washington State. Finavera initiated exploration of this site and collaboration with local stakeholders in early 2002, before the Commission formally asserted jurisdiction over wave and tidal projects and before other technologies were sufficiently advanced to pose a competitive threat at the site.

evaluation. Depriving developers of the preliminary permit will deter private investment in wave and tidal technologies. Indeed, Congress authorized the preliminary permit as part of the original version of the Federal Power Act of 1920 because it recognized that even well funded utilities would not invest the time and money necessary to develop conventional hydropower sites without assurance of a priority right to file a license application.

The Commission's strict scrutiny policy will allow bonafide developers to secure sites and explore their suitability while minimizing the potential for site banking. Under the strict scrutiny approach, permit holders will continue to submit six-month progress reports, but staff will monitor and review these reports to ensure adequate progress. And in recent orders implementing the strict scrutiny policy, the Commission has directed developers to file, within 45 days of issuance of a permit, a schedule of activities to be carried out under the permit and target dates for completion.[4] And within one year, a developer must file a Preliminary Application Document (PAD) and a Notice of Intent to file a license application. While OREC would prefer a 60-day deadline for submitting the schedule, (the additional time frame would allow for feedback from agencies) we support the schedule/deadline requirement. Developing a schedule of activities will impose discipline on the licensing process for developers, participating agencies and stakeholders, while target deadlines can assist in attracting financing, because investors gain more certainty about the duration of the study and evaluation process. And requiring completion of schedule within a relatively short time frame will also weed out those developers who have merely flirted with the permit process and have not even started to explore the extent of studies needed to bring their concept from whim to water.

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[4] *See, e.g., Ocean Renewable Power Corporation*, Project No. 12679, 119 ¶ 62,045 (April 17, 2007). at 4.

2. **Improvements to Existing Permit Process**

OREC believes that the Commission's strict scrutiny program can benefit from some of the additional refinements and safeguards that we propose below.

a. Additional informational requirements and avoiding first to file where possible

The purpose of a preliminary permit is to study a site, and thus, the Commission cannot expect applicant to submit an extensively detailed permit application. At the same time, applicants can reasonably be expected to provide slightly more information than required at present, if only to ensure that an applicant is a bonafide developer.

OREC believes that most of the technical and financial application requirements, discussed in comments submitted by the National Hydropower Association (NHA) are reasonable. Specifically, NHA proposed that the Commission, at a minimum, ask applicants to identify a technology that will be evaluated at the site. During the course of the permit, a permit holder could study other technologies and might eventually decide that another technology is superior. But as NHA discusses, vague references to unidentified technologies should not suffice as the basis of a permit application. Likewise, OREC agrees with NHA's suggestion that a permit applicant should either submit information on unit size and capacity, or if unit size and capacity are not available, then a description of site characteristics such as flow velocity and other criteria that can be readily ascertained from publicly available data. This data will provide the Commission more information about a site, and does not unduly burden developers. Finally, developers should be asked to identify impacts to be studied during the term of the permit, and to submit information on financial ability to carry out proposed studies.

As to the applicable criteria for choosing between competing applications, OREC recommends that the Commission avoid application of the first to file rule, unless absolutely

necessary. Initially, the Commission should review competing applications to determine whether they include all information required by the Commission's regulations, and follow up requests. A first filed applicant which fails to supply required information should not prevail over a second filed applicant which has complied with the rules. Next, the Commission should examine competing applications closely to determine whether they actually overlap or compete. And the Commission should ask competing applicants to examine their project boundaries and consider whether they can be modified to eliminate any conflicts. These measures may help the Commission avoid the need to choose between competing applications.

b. Ensure No Penalties for Delays Beyond Control

Commission orders implementing its policy provide for cancellation of a permit where the progress reports do not show significant progress.[5] OREC supports this approach, as long as it incorporates safeguards for delays beyond a developer's control. First, the Commission should not cancel a permit where a developer has been unable to carry out certain studies because a participating resource agency failed to provide necessary feedback despite the developer's diligence. Moreover, the deadlines established in the permit's schedule should cut both ways: where the Commission perceives delays resulting from participating agencies, the Commission should solicit their cooperation to assist the permit holder.

Second, the Commission should remain flexible regarding delays caused by a permit holder's inability to obtain financing for completion of studies. We agree generally with NHA's suggestion that developers should be able to demonstrate that they have the ability to complete studies proposed under the preliminary permit. But even with the best planning,

[5] *See, e.g., OPT Reedsport Project*, Project No. 12713 (February 16, 2007).

there are multiple reasons that a developer may miss deadlines, including, but not limited to running short on funding or delays by reviewing agencies. Where a milestone is going to be missed, the developer should advise the Commission as early as it can and state the reasons for the anticipated delay. The Commission should evaluate the reasons under a due diligence and good faith standard.

Though the Commission should not allow a developer to hold on to a site where it has no realistic chance of ever raising money for studies, at the same time, the Commission should not be too quick to cancel a permit, particularly where a developer has already made substantial investments. Moreover, the Commission should allow developers to form partnerships with better-financed entities to address funding issues without loss of first filed priority.[6]

c. Assignment of Docketing Numbers

With so many permit filings, many in competition with each other, we recommend that the Commission re-examine its present system of assigning docket numbers for competing projects. Moreover, with the new strict scrutiny approach, many permit applications will remain pending for longer periods where staff needs more time to obtain information from the applicant about the project boundary. Because of these longer time frames, several competing applications may be filed for the same site, without the other competitors realizing it, as a result of the Commission's existing docketing system.

At present, when the first preliminary permit application is filed for a site, the Commission assigns a "Project Number." However, when a second company files a

[6] Under the Commission's present policy, only the identical permit holder obtains first to file priority for a license application. *See Tropicana Corp*, 65 FERC ¶ 61,094 at 61,552 (1993); *Larry Pane*, 24 FERC ¶ 61,326 (1982)(finding that partnership and individual partner are two distinct entitles and individual partner cannot avail itself of first to file status where partnership held permit).

preliminary permit application with the potential to compete with the earlier application (*e.g.*, where the proposed project boundaries overlap, or where the projects have adjacent boundaries and may block each others' ability to expand), the Commission assigns a separate docket number, which is not cross referenced with the first. Consequently, many permit applicants, even those who closely monitor their own dockets, never realize that a competing permit application has been filed until it is too late to file comments or potentially negotiate a resolution to the conflict with the competitor. The problem is exacerbated by the fact that the Commission's regulations do not explicitly require a company to serve its competitor with a copy of a competing application. And indeed, in some instances, a company that files a competing application may not be aware of the one filed earlier.

The Commission can rectify this situation by cross referencing competing applications in both dockets. Thus, where a permit application is filed that is docketed as P-12345, and partly competes with an already filed application for P-12678, the Commission should lodge notice of the filing in the P-12678 docket to alert that applicant to the competing application.

Another alternative to alert the public and other competitors to potential sites would be to install an application like Google Maps at the Commission website. Upon filing an application, a permit applicant would be required to enter its project coordinates into the map, which other developers could review prior to filing (Google Maps or Frapple includes a feature for self-entry of coordinates). The map would provide a readily available visual of the location of the project and convey information about the location of other sites, without use of Commission resources.

d. Strict Enforcement of Public Notice

Section 4.32(a) provides that applicants must identify and provide names and mailing lists of all potentially affected property owners, communities, Indian tribes and state and federal government agencies. This information is used to notify potentially affected stakeholders about a proposed application.

Section 4.32 (a) applies to all permit applications, but because it is not cross-referenced in Section 4.81, many permit applicants do not realize that they must include this information in their applications. Consequently, affected communities often do not learn about a proposed permit until it is granted and are deprived of input into the process.[7] Some communities that are "surprised" by a proposed development can even retaliate by refusing to approve a project at all, which harms the entire wave and tidal industry. Though all of OREC's members have been exemplary in their community outreach efforts, other developers may not follow this example. Thus, the Commission must ensure that communities are informed of development by strictly enforcing the Section 4.32(a) requirement for permit applications.

B. Modifications to the License Process

The Commission's interim policy and NOI are important steps towards improving the permit process. But the Commission cannot consider the permit process in a vacuum, and must begin to evaluate its license process in anticipation of the applications

[7] In theory, publication of a proposed application in the Federal Register and local papers is deemed to provide adequate notice. But many coastal communities do not have the resources to track the *Federal Register* and may not always read the local paper (many people now obtain news online and indeed, never open the newspaper. As a practical matter, these mechanisms are not sufficient to inform coastal communities of proposed projects in their own backyards.

that will be filed in the coming years. Below, we propose several approaches to further improve the Commission's present regulatory process and address the gap that exists for small array demonstration and early commercial stage projects.

1. The preliminary permit term must match the time for filing a license application

In our view, the Commission should consider and implement licensing reforms to ensure that the three year permit term "matches" the time required to prepare and file a license application. The Commission's flowchart on the Integrated License Process (ILP) anticipates a three year time frame from *after* the NOI and PAD to filing the license application. Wave and tidal developers are not required to file an NOI and PAD until a year into their permit, which gives them only two years to complete the license application under the present ILP.

OREC expects that many wave and tidal developers will be able to incorporate principles of adaptive management into their license proposals, and thus bypass the two rounds of studies required in the ILP for major, conventional hydropower projects. Some developers may also opt for the ALP, if they can reach favorable agreement with participating agencies and stakeholders that will result in a shorter licensing time frame. Ultimately, OREC hopes that as the license process for wave and tidal technologies evolves, the Commission can achieve the 18 month process proposed by OREC in the framework submitted on December 20, 2006.

2. Supra-expedited pilot and demonstration projects

Even if the Commission cannot considerably reduce the time frame for licensing full size, commercial projects, at a minimum, it must create a [supra?]-expedited process for demonstration and early, small scale commercial projects. The British Wind Energy Industry recognizes that siting individual units and small array projects represent a critical

step on the path to commercialization of wave and tidal power, and that principles of proportionality must apply to siting of early stage projects.[8] Neither the preliminary permit nor a full blown license are the appropriate authorization mechanisms for demonstration and small array, early commercial stage plants that interconnect and sell power to individual customers or a utility. A preliminary permit does not authorize construction, nor does it allow sale of power to the grid to generate revenues that can be reinvested in the project to fund any additional environmental measures.[9] At the same time, a thirty year license, with the attendant lengthy environmental review period, is not necessarily appropriate for an early stage project with a smaller capacity or comprised of a small array of units.

To bridge the gap between (a) a permit that authorizes mostly studies and (b) a long term operating license, the Commission should create a special pilot project or first stage license that would provide for short term installation of demonstration or early commercial projects. The Commission could implement this license through its authority under Section 803(i) of the Federal Power Act, 16 U.S.C. § 803 (i) to waive licensing requirement for projects of 1.5 MW or less, or under Section 309 of the FPA which empowers the Commission to "perform any and all acts" and prescribe or issue rules" to carry out the provisions of the Federal Power Act, which includes making best comprehensive use of energy resources within the nation's waterways. The Commission could create a [supra?]-expedited, one year process that would bring together all stakeholders

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[8] *The Path to Wave and Tidal Power*, British Wave Energy Association (November 2005), online at www.bwea.com/pdf/pathtopower/Stage1.pdf

[9] The *Verdant* exemption, announced in *Verdant Power*, [cite] (2005) allows developers to interconnect wave and tidal technologies to the grid without a license for a period of up to 18 months. But a developer must obtain all necessary authorizations from jurisdictional agencies to secure a *Verdant* exemption, which can take many months. Moreover, the Commission does not permit developers to sell power, and in fact, may require them to reimburse the utility for power supplied to avoid impacts on interstate commerce.

to propose and prioritize studies and identify impacts. Stakeholders, with guidance from Commission staff would identify those effects to be studied prior to siting, and those which could be monitored post-licensing. These early stage developments could interconnect and sell power to the local utility without any limitation, and operate for a period of up to five years.

However, after one year of operation, the developer would be required to file notice of intent to (a) obtain a permanent, long term minor license under Section 10 of the FPA (or for a 5 MW or under exemption) to operate the project in a smaller form on a permanent basis, or (b) to build the project out. In the event that the developer decides to seek a license to build out the site, the developer could continue to operate the early stage development during the pendency of the proceeding for the long term license.

Finally, we note that other developments, such as the recently proposed Inslee legislation (H.R. 2036) may also help the Commission expedite the licensing process. The Inslee legislation requires preparation of a Programmatic EIS, which will direct developers to more environmentally suitable sites. Moreover, a Programmatic EIS might make findings on certain technical issues, such as finding that a specific type of turbine does not adversely affect fish or that an array of a certain size will not increase sedimentation. These types of findings will eliminate the need for further study of these issues, which will also expedite the licensing process.

3. The Commission must provide guidance to developers and stakeholders on the scope of federal statutory requirements.

One factor that drives the length of today's license process is that developers must comply with a litany of state and federal statutes administered by other agencies, over which the Commission may lack control. Nonetheless, the Commission is not completely

powerless in these situations. As lead agency for the licensing process, the Commission can gently prod participating agencies to move forward and can help broker resolution of disputes between developers and agencies over required studies. Most importantly the Commission can interpret the applicability of other federal statutes to the licensing process to provide guidance to other agencies.

For example, some Corps regional offices require developers to apply for a Section 10 permit under the Rivers and Harbors Act, notwithstanding 33 CF.R. § 221.3 which provides that "Corps responsibilities under Section 10…for power related activities, may normal be met through the FERC licensing procedure including insertion of terms and conditions in the license of the interest of navigation." [10] The Commission should consult with the Corps and obtain clarification of its policies. Though a Section 10 permit is only one of many authorizations required for licensing, even elimination of one permit requirement is a step in the right direction towards streamlining the licensing process and avoiding duplication.

The Commission should consider issuing guidance on whether all wave and tidal developer must obtain a Section 401 water quality certificates (WQCs) for project construction. Section 401 provides that "any applicant for a federal license or permit to conduct any activity…which may result in any discharge into navigable waters" must obtain a WQC from the state agency where the discharge originate. Recently, the Supreme Court confirmed that operation of a conventional hydropower project is an activity that requires a WQC because water releases from the project

[10] The Corps retains authority under the Clean Water Act to issue a Section 404 "dredge/fill" permit where applicable, to projects within navigable waters, *i.e.*, waters up to three miles from shore. Section 404 does not apply to projects on the OCS.

constitute a discharge within the meaning of Section 401.[11] But most wave and tidal project designs do not rely on impoundments or penstocks for operation and therefore, neither capture nor release or "discharge" water in the course of operation. Moreover, in contrast to construction of a dam, which requires substantial dredging and discharge into waters, some of the construction techniques for wave and tidal projects may not result in discharges. Yet despite some uncertainty about the applicability of Section 401 to wave and tidal project, most state agencies continue to require a Section 401 and developers acting in good faith, comply without protest. As the federal agency ultimately responsible for compliance with Section 401, the Commission has a role in interpreting the applicability of, and compliance with Section 401.[12] Accordingly, the Commission should examine whether Section 401 applies across the board to all wave and tidal projects, as it does for conventional hydropower projects, and provide guidance to those state agencies that administer Section 401. If the Commisison determines that Section 401 does not apply in part or total to the license process (*e.g.*, WQC might be required for full build out, but not smaller, early stage project), water quality issues would be addressed through inclusion of conditions in the FERC license.

III. **CONCLUSION**

OREC and its members commend the Commission for the steps it takes in fostering development of wave and tidal resources. We look forward to participating in future

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[11] *SD Warren Company v. Maine Department of Environmental Protection*, 126 S.Ct. 1843 (2006).

[12] *See Alabama Rivers Alliance v. Lake Watch of Lake Martin*, 325 F.3d 290 (D.C. Cir. 2002)(rejecting Commission determination that Section 401 does not apply to turbine replacements which will increase withdrawal and release of reservoir waters); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006)("if the question is not the application of state water quality standards but compliance with the terms of Section 401, then FERC must address it.").

Commission proceedings and workshops and we offer our assistance and expertise. We believe that the Commission is moving in the right direction to ensure that principles of proportionality and flexibility apply to wave and tidal projects while adequately protecting the environment and to eliminate any obstacles to commercialization of these promising technologies during this critical period that they are gaining momentum.

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