

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Preliminary Permits for Hydroelectric Power Projects Docket No.

NOTICE OF PROPOSED RULEMAKING

(Issued DATE)

I. Introduction

1. Pursuant to section 403 of the Department of Energy Organization Act, the Secretary of Energy (Secretary) proposes revisions to the Federal Energy Regulatory Commission's (Commission) regulations¹ regarding preliminary permits, pursuant to sections 4, 5, and 7 of the Federal Power Act (FPA), as applicable.²

II. Background

A. Statutory Authority

2. Under section 4(f) of the FPA, the Commission is “authorized and empowered” to issue preliminary permits, which “enable[e] applicants for a license to secure the data and perform the acts required by section 802 of the FPA.”³ Section 4(f) of the FPA provides only that the Commission “shall at once give notice of such application in writing to any

¹ 18 C.F.R. pt. 4 (2025).

² 16 U.S.C. §§ 797(f), 798, 800.

³ *Id.*

State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.”⁴

3. Section 5(a) of the FPA further expands upon the purpose of a preliminary permit, explaining that “the sole purpose” of a preliminary permit is to “maintain[] priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of 4 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.”⁵ Section 5(b) of the FPA provides that the Commission may extend the period of a preliminary permit one time for not more than an additional 4 years, and that the Commission may issue an additional permit after the end of an extension if warranted by extraordinary circumstances.⁶

⁴ *Id.*

⁵ 16 U.S.C. § 798(a).

⁶ 16 U.S.C. § 798(b). Section 5 also provides that each permit shall set forth conditions under which priority shall be maintained, that permits shall not be transferable, and that permits 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. 16 U.S.C. § 798(c)-(d).

4. Section 7(a) of the FPA requires the Commission to give preference among competing applications.⁷ First, “the Commission shall give preference to applications therefor by States, Indian tribes, and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.”⁸ Second, “as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.”⁹

B. Commission Regulations

5. The Commission’s regulations regarding preliminary permits and licenses are set forth in Part 4 of the Commission’s regulations. Section 4.31(a) provides that “[a]ny citizen, association of citizens, domestic corporation, municipality, or state may submit a filing for an initial application or a competing application for a preliminary permit or a license for a water power project”¹⁰ Section 4.32(a) sets forth the information that

⁷ 16 U.S.C. § 800(a). Section 7(a) of the FPA also applies to original licenses where no preliminary permit has been issued. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ 18 C.F.R. 4.31(a).

must be included in an application for a preliminary permit and section 4.32(b) sets forth the filing and requirements to serve copies of the application.¹¹ Section 4.32(d) provides that when an application for a preliminary permit is found to conform with the requirements in sections 4.32(a)-(c), the Commission or its delegate will “[n]otify the applicant that the application has been accepted for filing, specifying the project number assigned and the date upon which the application was accepted for filing” and “issue public notice of the application as required in the [FPA.]”¹²

6. Sections 4.80 through 4.83 of the Commission’s regulations also relate to preliminary permits. Section 4.80 provides that “[t]he sole purpose of a preliminary permit is to secure priority of application for a license for a water power project under Part I of the [FPA] while the permittee obtains the data and performs the acts required to determine the feasibility of the project and to support an application for a license.”¹³ Section 4.81 sets forth the required contents of each application for a preliminary permit, including a specified initial statement and numbered exhibits.¹⁴

¹¹ 18 C.F.R. § 4.32(a)-(b). Section 4.32(c) pertains specifically to applicants for a license or exemption for a project with a capacity of 80 MW or less.

¹² 18 C.F.R. § 4.32(d). Section 4.32(f) establishes that any such application will be considered accepted for filing as of the application filing date.

¹³ 18 C.F.R. § 4.80.

¹⁴ 18 C.F.R. § 4.81. Section 4.82 pertains to amendments, section 4.83 pertains to cancellation and loss of priority, and section 4.84 pertains to surrender of permit.

III. Discussion

7. Until recently, the Commission's longstanding policy has been to grant applications for preliminary permits over the opposition of third parties, such as federal land managers, similarly affected agencies, or Tribes, as applicable.¹⁵

8. Consistent with the FPA and the Commission's implementing regulations, the Commission has viewed preliminary permits as "encouraging 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."¹⁶ The Commission has explained that preliminary permits are "issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights."¹⁷

9. Recently, however, the Commission has denied applications for preliminary permits on the basis that third parties responsible for the lands on which the projects were

¹⁵ See, e.g., *Pumped Hydro Storage LLC*, 171 FERC ¶ 61,137 (2020) (issuing a preliminary permit over Tribal opposition); *Navajo Energy Storage Station LLC*, 174 FERC ¶ 61,106 (2021) (*Navajo Storage*) (issuing a preliminary permit over the Navajo Nation's opposition).

¹⁶ *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006).

¹⁷ *Navajo Storage*, 174 FERC ¶ 61,106 at P 14. See also *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301, at P 6 (2003) ("the very purpose of the preliminary permit is to give the applicant time to undertake the examinations to determine whether and with what design the project is feasible.").

to be located opposed the preliminary permit.¹⁸ In those orders, the Commission explained that it previously “denied preliminary permits for projects at federal facilities where the agency that operates the facility indicates that it opposes the project or where a federal land managing agency opposes permit issuance.”¹⁹

10. These orders cannot be squared with the FPA. Congress authorized and empowered *the Commission* to issue preliminary permits; it did not authorize and empower *third parties* to deny preliminary permits. Indeed, the FPA expresses a clear presumption in favor of issuing preliminary permits.

11. These orders also cannot be squared with the Commission’s regulations, which do not require an applicant to obtain the support of third parties. Nor should they. A preliminary permit grants no land-disturbing or other property rights; it merely allows the holder to investigate the feasibility of a project.

¹⁸ See, e.g., *Nature & People First Arizona PHS, LLC*, 186 FERC ¶ 61,117 (2024); *Nature & People First New Mexico PHS, LLC*, 186 FERC ¶ 61,118 (2024); *Nature & People First Arizona PHS, LLC*, 186 FERC ¶ 61,119 (2024); *W. Navajo Pumped Storage 1, LLC* *W. Navajo Pumped Storage 2, LLC*, 186 FERC ¶ 61,120 (2024).

¹⁹ See, e.g., *Nature & People First Arizona PHS, LLC*, 186 FERC ¶ 61,117 at 12 (citing *See FreedomWorks, LLC*, 167 FERC ¶ 62,026 (2019) (denying a permit application when the U.S. Forest Service stated it was unlikely to grant the applicant a special use permit to access the Monongahela National Forest); *Advanced Hydropower, Inc.*, 160 FERC ¶ 62,213, at P 6 (2017) (denying a permit application because the U.S. Army Corps of Engineers opposed the issuance of a permit); *Owyhee Hydro, LLC*, 153 FERC ¶ 62,133 (2015) (denying a permit application when the U.S. Bureau of Reclamation stated that it would not authorize private development of its Anderson Ranch dam)). See also *Nature & People First Arizona PHS, LLC*, 186 FERC ¶ 61,117 at 15 (“As noted, we have recently revised this policy when permits have been opposed by federal land managers or similarly affected federal agencies. We believe that our trust responsibility to Tribes counsels a similar policy in cases involving Tribal lands . . .”).

12. To provide regulatory certainty to applicants and interested parties, and to remove the potential for gamesmanship,²⁰ a new section 4.85 is proposed to be added to the Commission's regulations to codify and clarify that opposition from third parties is not a basis to deny an application for a preliminary permit.

List of subjects

18 CFR Part 4

Preliminary Permits

²⁰ For example, under the Commission's new policy, a third-party land manager can oppose an application to ensure that its preferred applicant is able to obtain first-to-file status. 18 C.F.R § 4.37.

Regulatory Text

In consideration of the foregoing, the Commission amends Part 4, Chapter I, Title 18, Code of Federal Regulations, as follows:

Part 4 – Licenses, Permits, Exemptions, and Determination of Project Costs

1. The authority citation for part 4 continues to read as follows:

Authority: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

2. Add new § 4.85 to read as follows:

§ 4.85 Issuance of preliminary permit.

An application for a preliminary permit will not be denied solely on the basis of opposition from a third party.