

CONDITIONED LICENSES

I. INTRODUCTION

On November 30, 2007, the Commission issued its Policy Statement on Conditioned Licenses for Hydrokinetic Projects. In the Policy Statement, the Commission concluded that, in appropriate cases, where the Commission has completed its processing of license applications for hydrokinetic projects, but where other authorizations required under federal law have not yet been received, it may issue conditioned licenses for hydrokinetic projects. Under such licenses, the licensee would be precluded from commencing construction until receiving the necessary federal authorizations. Although the Commission may issue a conditioned license, its preference is to have all federal authorizations completed by the time it is ready to issue the licensing decision.

The Commission received comments on the Policy Statement from over 20 different entities, including federal and state agencies, Indian tribes, non-governmental organizations, and individuals. Many of the entities requested clarification on a number of points. In response to the comments on the Policy Statement and to address many of the questions raised in the filings, Commission staff has prepared responses to this list of Frequently Asked Questions.

II. FREQUENTLY ASKED QUESTIONS (FAQs)

GENERAL

What is a conditioned license?

A conditioned license authorizes the construction, operation, and maintenance of an original (*i.e.*, unconstructed) hydrokinetic project with the proviso that the licensee may not begin on-site construction or installation until further Commission order after the licensee has received all other authorizations required by federal law.

What is the difference between a conditioned license and a pilot project license?

A pilot project license authorizes the construction, operation, and maintenance of an original (*i.e.*, unconstructed) hydrokinetic project that is: (1) small (5 megawatts or less); (2) easily removed or shut down quickly; (3) located in a non-sensitive area; and (4) has the primary purpose of testing new technologies or locating suitable generation sites.¹ Commission staff envisions

¹ The term “pilot project license” was introduced by Commission staff at a Technical Conference in Portland, Oregon, on October 2, 2007 (AD07-14-000).

that because the primary purpose of a pilot hydrokinetic project would be to test new technologies or locate suitable generation sites, a pilot project license would have a term of no more than 5 years.

A conditioned license is different from a pilot project license in that a conditioned license could be issued for either a pilot or non-pilot hydrokinetic project, and a conditioned license contains the proviso that the licensee may not begin on-site construction or installation until further Commission action after the licensee has received all other authorizations required by federal law. Once the authorizations have been received, the formerly conditioned license will be just like any other license.

How is a conditioned license different from a preliminary permit in terms of providing a “first-in-time, first-in-right” benefit?

The purpose of a preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and gathers data necessary for it to determine the feasibility of the proposed project, and if the project is found to be feasible, while the permittee prepares an acceptable license application. The permit does not allow construction, operation, or maintenance of a project.

A conditioned license, issued only after the Commission has developed a complete record regarding a license application, authorizes the construction, operation, and maintenance of a hydrokinetic project, thereby giving a licensee the exclusive right to develop the site for purposes of hydrokinetic generation in accordance with the terms of the license.

To what types of projects does a conditioned license apply?

A conditioned license could apply to any license application for a proposed hydrokinetic project using any of the Commission’s licensing processes.

Who will determine whether a project should be issued a conditioned license?

The Commission will determine whether it is appropriate to issue a conditioned license in a given case. In doing so, the Commission would consider any filed comments on the issue.

Under Commission staff’s proposal, staff would expedite processing of license applications for hydrokinetic pilot projects that would meet the four criteria. A license issued for a hydrokinetic pilot project processed under the expedited procedures would be called a pilot project license.

Under what circumstances would the Commission deem a conditioned license to be “appropriate” (ref. paragraphs 1 and 8 of the Policy Statement)?

Commission staff interprets the use of the word “appropriate” in the Policy Statement to mean that the decision to issue a conditioned license will be made on a case-by-case basis after considering the specific circumstances of the case.

Would a prospective licensee’s need for a conditioned license for purposes of securing project financing qualify as an “appropriate” circumstance?

The decision to issue a conditioned license will be made on a case-by-case basis after considering the circumstances of the case. Project financing could be one of the factors that the Commission considers.

Would a prospective licensee for a hydrokinetic project have the option of requesting a non-conditioned license?

Yes. A license applicant may propose that the Commission issue a non-conditioned license; however, the final decision whether to issue a conditioned license would rest with the Commission after considering the circumstances of the case.

**COORDINATION WITH FEDERAL AND STATE RESOURCE
AGENCIES, INDIAN TRIBES, AND LICENSEES
ON RECEIPT OF OTHER REQUIRED FEDERAL AND STATE
AUTHORIZATIONS OR WAIVERS**

How will the Commission ensure that it meets its obligations with respect to the requirements of the Endangered Species Act, Federal Power Act, National Marine Sanctuaries Act, Magnuson-Fishery Conservation and Management Act, and the National Environmental Policy Act?

Under a conditioned license, a licensee may not begin on-site construction and installation of a hydrokinetic project until the Commission has determined that the requirements of all applicable federal laws are satisfied.

How will the Commission ensure that the licensee has received the other required federal and state authorizations or waivers after issuance of the conditioned license? What should a licensee do after the Commission or licensee, as applicable, receives the other required federal and state authorizations or waivers?

A conditioned license will require that the licensee file with the Commission written notification along with copies of all applicable authorizations or waivers under federal law. Therefore, upon receiving the federal and state authorizations or waivers, the licensee should file with the Commission written notification and copies of the authorizations. The Commission will then review the filing and take action to authorize the commencement of on-site construction

after making a finding that the licensee has satisfied the requirements of the applicable federal laws. Where appropriate, the Commission will incorporate additional conditions received with the federal and state authorizations into the license.

What steps will the Commission take to ensure that a prospective licensee, upon receiving a conditioned license, does not stall the process of obtaining the required federal and state authorizations with the express purpose of banking the licensed site until such time as the technology is either fully developed or the site is economically prime for development?

Upon receiving any license from the Commission, including a conditioned license, a licensee is required under section 13 of the Federal Power Act to begin on-site construction or installation of the project works within two years from the effective date of the license. With good reason, the Commission can extend the initial two-year period by up to an additional two years.

The Commission is required by section 13 to terminate a license if there is failure to begin actual construction of the project works within the time prescribed by the license, or as extended by the Commission.

How will the Commission secure the cooperation and encourage the expeditious action of the federal and state agencies and Indian tribes responsible for authorizations after issuance of a conditioned license?

As is currently Commission staff's practice, staff will periodically contact the applicable federal and state agencies and Indian tribes to inquire on the agencies' and tribes' progress and, where appropriate, offer assistance to the agencies and tribes to help expedite the process.

NEPA ANALYSIS AND TREATMENT OF RESOURCE AGENCY RECOMMENDATIONS

Will the scope of the Commission's NEPA analysis be different for a conditioned license as compared to a non-conditioned license?

No. The decision to issue a conditioned versus a non-conditioned license will have no bearing on the scope of Commission staff's NEPA analysis. All pre-filing (of the license application) and post-filing processes will remain the same, including pre-filing consultation; issue and study identification; solicitation of comments, recommendations, terms, conditions, and prescriptions; and NEPA review.

Will the Commission consider agency recommendations submitted pursuant to FPA sections 10(a) and 10(j) differently for a conditioned license as compared to a non-conditioned license?

No. The decision to issue a conditioned versus a non-conditioned license will have no bearing on the consideration of agency recommendations submitted pursuant to section 10(a) or section 10(j) of the FPA.

**REHEARINGS, LICENSE TRANSFERS, AND OTHER POST-LICENSE
ISSUANCE MATTERS**

Would the Commission consider suspending or extending the period for rehearing or staying the effective date of the license at the request of a prospective licensee until some or all of the required federal and state authorizations have been completed or waived?

Commission staff does not anticipate the need for such actions.

Can a conditioned license be transferred prior to a licensee receiving all required federal and state authorizations, and if so, what steps will the Commission take to limit the ability of licensees to “flip” the licensed sites to other entities?

Yes. A licensee and transferee may jointly file an application to transfer the license at any time after a license has been issued by the Commission. The Commission’s decision to approve the transfer would be made on a case-by-case basis and would be contingent upon, among other things, the showing that such a transfer is in the public interest. Upon approval and acceptance of the transfer, the transferee would be subject to all of the conditions of the license and to all of the provisions and conditions of the FPA, as though the transferee were the original licensee.

Under a conditioned license, when does the “two-year-clock” for commencing construction begin – after all required federal and state authorizations or waivers have been received or on the effective date of the conditioned license?

The “clock” begins on the effective date of the conditioned license.

What are some examples of the types of non-construction activities that a licensee may conduct under a conditioned license prior to receiving all other authorizations? What are some examples of the types of activities that are prohibited?

Examples of activities that would be allowed by a conditioned license prior to obtaining all other authorizations required by federal law would be development of plans and drawings in consultation with the federal and state agencies, Indian tribes, and others pursuant to the terms of the license and fabrication of project-related equipment (*e.g.*, generation equipment). Examples of prohibited activities would be any actual on-site construction and installation activities, including construction and equipment staging.