



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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April 30, 2007

Ms. Kimberly D. Bose, Secretary
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Subject: Rule making for preliminary permits for wave, current, and instream new technology hydropower projects (**RM07-08**)

Dear Ms. Bose:

I am writing to provide you with the Washington Department of Fish and Wildlife's (WDFW) comments regarding the rule making identified above. This letter has been formatted per the Federal Energy Regulatory Commission (FERC) filing regulations.

Summary of WDFW'S Jurisdictional Authority

WDFW has jurisdictional authority to review hydroelectric projects that could impact anadromous fish, resident fish, shellfish, marine fish, and wildlife resources. WDFW, under state law, has the responsibility for preserving, protecting, perpetuating, and

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managing the fish and wildlife resources of the state (Title 77, RCW). WDFW is provided consultation requirements for hydroelectric project development by the Fish and Wildlife Coordination Act, and the Federal Energy Regulatory Commission rules 18 C.F.R. Part 4, to set forth recommended Terms and Conditions for the protection, mitigation of damages to, and enhancement of fish and wildlife. WDFW, pursuant to Sections 10(a) and 10(j) of the Federal Power Act (FPA), provides recommendations for fish and wildlife enhancement, protection, and mitigation measures.

WDFW's Concerns

We are very interested in the preliminary permit process for the types of hydropower projects that would be covered by this rule making. There have been 13 preliminary permit applications submitted to the FERC for projects in Washington State waters. Twelve of these applications have been submitted within the last year. In 2006 the first FERC marine hydropower license application came from a wave energy project proposed in Washington State. We are concerned that these projects have the potential to significantly impact fish, shellfish, and wildlife resources in Washington State.

WDFW believes that the best preliminary permit option that the FERC has identified for these types of projects is the stricter scrutiny approach. Because these projects are

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utilizing new technologies, in environments for which information is incomplete, WDFW believes that more information development before and during the preliminary permit period would be helpful to the applicant and agencies trying to address project related issues.

Because the licenses for these projects will likely be for 50 years, and reopening a license is very difficult, it is very important to carefully evaluate and address the environmental effects of the proposed projects. As we have seen with traditional hydropower, our understanding of the environmental impacts from the projects is often greater now, than when the projects were first constructed 50 to 80 years ago. During the time of a FERC license there is usually little, if any, opportunity to address newly identified impacts. The situation is similar with another new energy technology, wind power. We are still learning about the impacts to wildlife from wind power projects, and about the best project configuration to minimize impacts. For these reasons WDFW believes that a conservative approach, regarding environmental issues, should be taken in the preliminary permit and licensing processes for the types of hydroelectric projects being considered under this rule making.

Several preliminary permits issued in Washington under the FERC's "stricter scrutiny" approach require applicants to develop a pre-application document (PAD) and a notice of

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intent (NOI) within one year of receipt of their preliminary permit. Despite the handful of pilot projects for these new technologies in locations around the world, very little is known about actual environmental impacts or reliability of these energy devices.

Answering the questions about environmental impacts will require further and extensive studies in order for applicants to proceed to the licensing stage. Several types of technologies are currently undergoing testing, which may influence the ultimate choice of technology and project design by a permit holder. The FERC's Notice of Inquiry (Docket RM07-8-000) summarized that, historically, preliminary permits were given for the purpose of studying feasibility of a project and maintaining priority of application for a license. In the FERC's guidance on the default Integrated Licensing Process (ILP), the FERC recommends, "an applicant should file its NOI and PAD when it is confident of the project's feasibility and prepared to begin developing its license application." In this same guidance document, the FERC emphasizes the importance of a complete, detailed PAD as the "cornerstone of the ILP." Applicants will need information from and involvement of agencies to develop a useful PAD. This will take time. As an important launch for the licensing process, WDFW suggests that the FERC allow more time for applicants to develop an adequate licensing PAD, and that the FERC require a detailed preliminary permit information document early in the preliminary permit process.

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WDFW is concerned that the early deadline for licensing-related documents under preliminary permits might discourage or alternatively rush a full examination of a project's feasibility, including environmental impacts of these new technologies. It may also force development of a pre-application document before the results of impact and feasibility studies are available. As suggested earlier, the feasibility information will be critical to development of a complete PAD. Lacking information from these studies, applicants may be unable to produce a useful PAD.

Although not considered under the FERC's three options, WDFW suggests modifying the "stricter scrutiny" approach by de-linking or delaying the early development of license application documents under a preliminary permit. For example, the FERC could require an information document that is specific to the preliminary permit process. This document should include all available information about the site and the proponent's proposal. This document should be required to include all available environmental information about the site. This would include the fish (including shellfish) and wildlife species that are present, the quantities of each species, the times of the year each species uses the area, what they use the area for, information about the types of habitat at the project site and in the vicinity of the project, and information about the proposed technology and its potential impacts on fish and wildlife. Requiring this information be provided early in the preliminary permit process will enable the applicant to better inform

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the agencies and stakeholders about the potential impacts of the project and to more efficiently develop studies designs. Requiring this information early in the preliminary permit process should encourage preliminary permit applicants to consult with agencies and stakeholders prior to submitting a preliminary permit application. This early consultation and the early availability of a complete informational document should aid in both the preliminary permit process and the licensing process. This approach will ensure appropriate examination of the issues posed by these new technologies prior to transitioning to the licensing process. WDFW suggests requiring specific types of environmental studies or benchmarks during the preliminary permit process, and articulating an open and transparent process for requesting studies under the preliminary permits process.

Since these technologies are new and experimental, resources agencies, tribes and other interested parties should have an open and transparent process through which to request studies during the preliminary permit process, as allowed under the licensing processes. Studies developed and conducted during this process will assist interested parties in answering their technical questions, establish baselines, and allow more efficient and effective permitting of projects under the FERC licensing process.

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WDFW suggests that the FERC consider requesting specific environmental information be provided as part of the preliminary permit process, and include a requirement for environmental studies as another method of achieving “stricter scrutiny” of preliminary permits. This will also improve information gathered under preliminary permits, which will, assist agencies in identifying the types of further studies needed for licensing these new technologies. Due to the new nature of these technologies, agencies have yet to determine all specific studies that might be necessary to license a project. However, studies conducted under preliminary permits could improve knowledge and illuminate data gaps. Some examples of studies that could be performed under preliminary permits include: utilizing computer modeling to predict impacts to physical processes such as tidal range; determining typical current or wave environment (depending on the technology proposed) and any numerical limits to energy extraction at a particular site; conducting initial baseline site characterization including social, economic, regulatory, and environmental parameters; performing laboratory experiments to test potential impacts on fish and wildlife; and survivability of devices in the marine environment (e.g. bio-fouling, mechanical reliability and maintenance requirements, and lifespan of devices).

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Protection and Mitigation

Another complication associated with marine energy projects is the lack of clear options for fish and wildlife protection, and mitigation of fish and wildlife impacts. For example, if a project is killing squid, herring, rockfish, diving birds, and/or marine mammals, there are few measures currently available for mitigating these losses. At this time, it appears that adding screening to preclude interactions between the turbine blades and fish and wildlife would make the projects infeasible. Additionally, quantifying impacts is likely to be very difficult. The magnitude of fish and wildlife populations are constantly changing throughout the year, and from year to year.

These projects are likely to cause a loss of fishing areas, and there is no obvious way to replace fishing areas. It is likely that mitigation will need to be in another place and out of kind. Fishing regulations in Washington State have been extremely complex for many years. The fishing restrictions are tailored each year to the biological needs of many species, to legal restrictions, and to economic and social needs. Additionally, each tribe is restricted to its usual and accustomed fishing areas, which they were using in the 1850s (as determined by the courts). With over 17 tribes in Puget Sound, each with their own

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fishing regulations, Washington State fishing regulations, and court ordered processes for setting fishing regulations, the regulatory processes for setting fishing areas and times is very complex. We are very concerned that these types of hydroelectric projects will create a loss of significant fishing areas. Finding answers to these issues will take time and creative thinking. It will also take significant funding.

Recommendations

WDFW recommends:

- 1) Apply the stricter scrutiny approach for these types of hydroelectric projects.
- 2) The applicants be required to develop and provide environmental information, assessments and evaluations early (6 months) in the preliminary permit process.
- 3) The preliminary permit document with the environmental, and technical information be called something other than a PAD, to avoid confusion with the licensing PAD.
- 4) The applicants be required to develop and conduct environmental studies during the preliminary permit. In the development of these studies require consultation with tribes, agencies, and other stakeholders.
- 5) Require complete tribal notification and consultation. The FERC should require all affected tribes to be notified of the preliminary permit applications for all hydroelectric projects. Through treaties with the United States and numerous federal

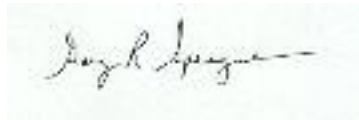
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court decisions it has been recognized that the tribes in Washington State reserved the right to fish and hunt, when they relinquished claims to the land in Washington State.

The courts have determined that the tribes are entitled to half of the harvestable salmon and steelhead. The affected tribes go beyond those in the immediate vicinity of a proposed project. Because many fish move from Puget Sound to the Pacific Ocean, then back to Puget Sound, and others move within Puget Sound, the impacts of a hydroelectric project at one end of Puget Sound has the potential to impact tribes at the other end of Puget Sound, through the reduction of the harvestable fish in their fishing areas.

Please contact me if you have any questions. I can be reached at the letterhead address, via phone at 360 902-2539, or via email at spraggrs@dfw.wa.gov .

Sincerely,



Gary R. Sprague
Major Projects Section Manager
Habitat Program

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