



**ORIGINAL**

WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**

DOUG SUTHERLAND  
Commissioner of Public Lands

March 16, 2007

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FEDERAL ENERGY  
REGULATORY COMMISSION

Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E., Room 1A  
Washington, DC 20426

**RE: DOCKET RM07-8-000**

Dear Ms. Salas:

Thank you for the opportunity to provide input on how the Federal Energy Regulatory Commission (FERC) should treat applications for preliminary permits to study new technology methods involving proposals to utilize wave, current, and in-stream hydropower.

As the FERC may already be aware, the Washington Department of Natural Resources (DNR) manages over 2.4 million acres of state-owned aquatic lands and attached resources, including the bedlands, shorelands, tidelands, and harbor areas upon and within which many wave and tidal projects are proposed to be located. Resources located upon aquatic lands that DNR manages include aquatic plants, aquatic animals; and valuable materials and minerals.

DNR management authority derives from the State's Constitution (Articles XV, XVII, XXVII), Revised Code (RCW 79.02, 79.10, 79.14 and, 79.105 to 79.145) and Administrative Code (WAC 332-30).

Based upon this statutory authority, the siting of many marine wave/tidal, and freshwater in-stream hydropower projects involving new technologies will involve state-owned aquatic lands. Thus, DNR would like to issue the following comments on ways to improve the preliminary permitting process for these projects:

**Washington Department of Natural Resources supports the "Stricter Scrutiny Approach" to Preliminary Permitting for these new technologies, until proven.**

The FERC is offering three approaches to preliminary permitting for review. Only one approach will support DNR in its effort to balance certain management goals when issuing use authorizations. That is the "Stricter Scrutiny Approach" to Preliminary Permitting.

As proprietary manager of state-owned aquatic lands, the DNR has been directed to manage the lands "...for the benefit of the public." in a manner that provides "...a balance of public benefits<sup>1</sup> for all citizens of the state..." that includes: (1) Encouraging direct public use and

<sup>1</sup> WAC 332-30-106 defines public benefit as "...that all of the citizens of the state may derive a direct benefit from

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*access; (2) Fostering water-dependant uses<sup>2</sup>; (3) Ensuring environmental protection; and (4) Utilizing renewable resources.” (RCW 79.105.030).*

This approach will ensure DNR obtains the information it needs so that informed decisions can be made about the management of state-owned aquatic lands with respect to marine wave/tidal and freshwater in-stream hydropower projects. The Stricter Scrutiny approach will also reduce uncertainty in DNR’s leasing decisions regarding aquatic lands that are the subject of a preliminary permit.

It is suggested, however, that once these technologies have “proven” themselves to the satisfaction of state and national criteria, the “Stricter Scrutiny Approach” could be replaced with the traditional hydropower approach, or with a tailored approach for marine wave/tidal and freshwater in-stream hydropower projects, so long as project applicants identify the aquatic lands on which projects will be located with sufficient specificity and obtain authorization to use such lands.

DNR would now like to offer some specific comments about the Stricter Scrutiny Approach:

**Suggestion – Ensure that applicants follow the appropriate sections of 18 CFR 4.32 with respect to notifying interested parties.**

All too often, interested parties, including DNR as a proprietary agency, are not notified about preliminary permits or other FERC regulated projects. In order to ensure this Stricter Scrutiny Approach is successful, DNR encourages the FERC to refer applicants to the appropriate sections of 18 CFR 4.32 as a supplement to the traditional Hydropower Compliance Guidance (DHAC, 2004). The higher level of instruction found in 18 CFR 4.32 might be appropriate for this approach.

**Suggestion – Identify jurisdiction and planned uses of any site in Preliminary Permit.**

Filing preliminary permits that appear to take up entire bays along the coast is not helpful to agencies that issue leases in those areas, particularly if there are current or pending leases, or inquiries about future leasing opportunities. It is highly suggested that the applicants research what uses exist or are planned for in the area, prior to applying for a preliminary permit. It is highly encouraged that all applicants research the status of these projects with the jurisdiction that oversees the local Shoreline Master Plans. In addition, as discussed more fully below, DNR supports a requirement that preliminary permittees file a preliminary application document early in the term of the preliminary permit and obtain authorization to use the lands identified in the document.

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departmental actions...”

<sup>2</sup> Water dependent uses are those uses that “...cannot logically exist in any location but on the water.” Examples include water-borne commerce; terminals; watercraft construction, repair or maintenance; moorage; aquaculture; and log booming. (RCW 79.90.465)

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### **Suggestion - Clarity Required Over “Exclusive Site Access.”**

The issue of exclusive site access for preliminary permit holders continues to create uncertainty for DNR in managing state owned aquatic lands. To help reduce this uncertainty DNR suggests that FERC require applicants to identify the location, planned uses of each potential site with specificity, and obtain authorization from the landowner to conduct its studies early in the term of the preliminary permit. If such a requirement were implemented, applicants for projects in Washington waters could ensure that any need for study during the preliminary permit phase does not conflict with DNR’s aquatic land management obligations by obtaining a use authorization from DNR for the specific lands needed for study under the permit.

The FERC has made clear that issuance of a preliminary permit will not obviate the permit holder’s obligation to comply with all applicable state and local law with regard to activities conducted under the preliminary permit.<sup>3</sup> In the Notice of Inquiry and Interim Statement of Policy, the FERC clarified that the preliminary permit grants no property rights.<sup>4</sup> In addition, in implementing its Interim Policy, the FERC has required the preliminary permit holders file a preliminary application document, (“PAD”), during the first year of the term of the preliminary permit.<sup>5</sup> Under the FERC’s rules, a PAD must specifically identify the project location, facilities, and operations.<sup>6</sup> DNR supports the requirement that applicants file a PAD within the first year of the term of a preliminary permit and suggests that FERC also require that applicants obtain a use authorization for lands identified in the PAD for the duration of the preliminary permit.

Without a use authorization for lands subject to a preliminary permit, it remains uncertain how DNR is to balance the potential need for study of state-owned aquatic lands with competing interests in use of the lands. DNR actively manages Washington’s state-owned aquatic lands for the benefit of all the people of the state. Accordingly, DNR will need to balance the need for lands to remain open to study under a preliminary permit with its statutory obligations to provide a balance of public benefits when managing state-owned aquatic land. It is also DNR’s position that if study under a preliminary permit will impede use of an area by the general public, the use of the area must be authorized by way of agreement, lease, permit or other instrument. (See Washington Administrative Code Sec. 332-30-122(a)). A requirement that applicants for preliminary permits identify the aquatic lands needed for study with specificity and obtain authorization to use the lands early in the term of the preliminary permit, would greatly assist DNR in balancing competing demands for the lands and reduce the possibility that study under a preliminary permit would be foreclosed by another use of the property.

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<sup>3</sup> Verdant Power, LLC., 111 FERC P 61024 (2005)

<sup>4</sup> Notice of Inquiry and Interim Statement of Policy at 4.

<sup>5</sup> See Public Utility District No. 1 of Snohomish County, 118 FERC 62,188 (2007)

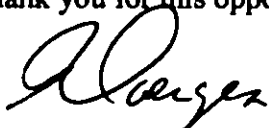
<sup>6</sup> 18 CFR 5.6(d)(2)

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**Suggestion – Make the Study Request Process open and transparent.**

Resources agencies, Tribes and other interested parties should have an open and transparent process through which to request studies, as allowed under the traditional preliminary permit process, which will help them answer their questions and establish baselines. The FERC can provide general guidance as to what process is used through this Stricter Scrutiny Approach, but what is most important is that questions are answered a timely, efficient, and effective manner. From this, standards can be set for future projects.

Thank you for this opportunity to comment,



Rich Doenges, Division Manager  
Aquatic Resources Division