



UNITED STATES DEPARTMENT OF COMMERCE  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
1201 NE Lloyd Boulevard, Suite 1100  
PORTLAND, OREGON 97232-1274

F/NWR5

VIA ELECTRONIC FILING

March 16, 2007

Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

RE: Request for Rehearing of Orders Issuing Preliminary Permits for Tidal Energy Projects in Washington (FERC Nos. P-12688, P-12689, P-12690, P-12691, P-12692, and P-12698).

Dear Secretary Salas:

Enclosed for filing, please find the National Marine Fisheries Service's (NMFS) request for rehearing on preliminary permits issued to the Public Utility District No. 1 of Snohomish County, Washington to study the feasibility of the subject tidal energy projects at various locations in Puget Sound. NMFS is seeking clarity on the particular preliminary permit orders.

200703165100 Received FERC OSEC 03/16/2007 04:29:44 PM Docket# P-12688-001 ET AL  
Please contact Christopher Pontecchio at (206) 526-6153 (email: [Chris.Pontecchio@noaa.gov](mailto:Chris.Pontecchio@noaa.gov)) or myself at (503) 230-5431 (email: [Keith.Kirkendall@noaa.gov](mailto:Keith.Kirkendall@noaa.gov)) if you have any questions regarding this filing.

Sincerely,

Keith Kirkendall, Chief  
FERC & Water Diversion Branch  
Hydropower Division

Enclosure

cc: Service List



**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

Public Utility District No. 1	)	Rich Pass Project, P-12688
of Snohomish County, Washington	)	Spieden Channel Project, P-12689
	)	Admiralty Inlet Project, P-12690
	)	Agate Passage Project, P-12691
	)	San Juan Channel Project, P-12692
	)	Guemes Channel Project, P-12698

---

**NATIONAL MARINE FISHERIES SERVICE’S REQUEST FOR REHEARING  
OF ORDERS ISSUING PRELIMINARY PERMITS FOR TIDAL ENERGY  
PROJECTS IN WASHINGTON**

In accordance with Section 313 of the Federal Power Act (FPA), 16 U.S.C 825I; and Rules 212 and 713, 18 C.F.R. 385.212 and 385.713, of the Federal Energy Regulatory Commission’s (FERC) regulations, the National Marine Fisheries Service (NMFS) requests rehearing of the orders issuing preliminary permits for the following tidal power projects in Washington: Rich Pass Project, P-12688; Spieden Channel Project, P-12689; Admiralty Channel Project, P-12690; Agate Passage Project, P-12691; San Juan Channel Project, P-12692; and Guemes Channel Project, P-12698.

Each of these preliminary permit orders is for an individual project, but NMFS is submitting this single combined request for rehearing for all six projects because the issues are substantially the same for each order. These preliminary permits were all issued to the Public Utility District No. 1 of Snohomish County, Washington (Snohomish County PUD) to study the feasibility of tidal energy projects in locations in Puget Sound. FERC issued the preliminary permits in conjunction with its recent Statement of Policy/Notice of Inquiry (announced February 15, 2007), which is currently inviting public comment on three options for how to treat applications for preliminary permits to study wave, current, and instream technology. FERC is handling these preliminary

permits under the “stricter scrutiny approach” announced in the Notice of Inquiry. NMFS will be providing comments on FERC’s Statement of Policy/Notice of Inquiry that will address broader concerns related to the current usage of preliminary permits, such as what actions are appropriate for preliminary permits, the level of scrutiny to be given preliminary permit applications, and how to ensure that installation and operation of demonstration tidal power generating facilities receive appropriate environmental review. For this filing, however, NMFS focuses on its concerns regarding the lack of clarity as to these particular preliminary permit orders.

NMFS has concerns with these orders issuing preliminary permits for tidal energy projects. Generally, our concerns relate to the ambiguity as to whether FERC is permitting actual installation of pilot power generators and how FERC will ensure that it is complying with the Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), Magnuson-Stevens Fishery Conservation and Management Act (MSA), Coastal Zone Management Act (CZMA), National Environmental Protection Act (NEPA), and other applicable requirements if pilot generators are installed.

**1. FERC should clarify whether the preliminary permits include authorization for installation and operation of demonstration tidal power generating facilities.**

NMFS seeks clarification from FERC on whether the preliminary permits issued to Snohomish County PUD regarding these tidal projects authorize installation and operation of demonstration tidal power generating facilities. While FERC’s permit states that it does not authorize “any construction,” there is nonetheless uncertainty because the

permit applications explicitly include installation and operation of pilot generators. We therefore respectfully request clarification of this matter.

As we previously stated, all the above-mentioned preliminary permits are similar enough that NMFS' concerns hold true for all. However, for sake of illustration, we will use Agate Passage, FERC No. P-12691. In the discussion section of the order, FERC stated that a preliminary permit does not authorize a permittee "to undertake any construction." Furthermore, in the discussion section of the order, FERC stated that "[p]lacement of test units is not authorized by issuance of a permit pursuant to the FPA; however, such activities would be subject to other Federal and state laws." Thus, it would seem that the preliminary permit does not authorize installation and operation of any test or pilot tidal power facilities. This implies that no test units would be placed in the water during the preliminary permit stage.

However, Snohomish PUD's application for the preliminary permit for Agate Passage, P-12691, states in Exhibit 1, page 1:

Following the completion of Phase I, the feasibility of proceeding with a permanent installation of a tidal energy generating array will be tested by the placement of a demonstration unit(s). During the test period of the operation of the selected unit(s), the optimal placement within Agate Passage, the effects on marine traffic, and the potential effects on marine aquatic species and their habitats will be evaluated.

If one reads the permit as authorizing the plans contained in the permit application, then it appears that FERC has indeed authorized placement of test units in Agate Passage.

Typically an application provides the information on the activity, and the permit approves

the activity described in the application unless otherwise stated. Therefore, it appears that the preliminary permit could include authorization of the test units.

Our confusion is deepened by FERC's statement that such activities would be subject to other Federal and state laws. This seems to say that demonstration turbines could be installed and operated, but are not subject to FERC jurisdiction. It defies logic for FERC to consider that it has statutory authority to license powerhouses or turbines on land and in the water, except when they are installed as a demonstration project. A turbine that generates power, whether on land or in the water, is a turbine or powerhouse that is subject to FERC's authority. See *Aqua Energy Group*, 102 FERC ¶61,242, at p. 8-9 (Feb. 28, 2003) (buoys are powerhouses because they contain equipment for the generation of power). They are generating power, with the purpose of gathering information to determine whether the company will apply for a license for a tidal power project. Their operation is the first step in possible connection to the power grid. Installing a demonstration unit is thus installation of a "power house, or other works incidental thereto" for "the *purpose of developing electric power,*" which places the activity squarely within the jurisdiction of FERC under Section 23(b) of the FPA. See 16 U.S.C. § 871(1) (emphasis added). The installation of demonstration facilities is inextricably tied to the preliminary permit and license application and should not be viewed and permitted independently. It is unreasonable for FERC to exert authority over tidal power generating facilities, except for the installation and operation of demonstration power generators.

In summary, we request that FERC clarify whether Snohomish PUD may install and operate tidal power generating facilities as part of its preliminary permits.

**2. If the preliminary permit includes authorization of installation and operation of demonstration tidal power generating facilities, then FERC must comply with applicable laws, including the ESA, MMPA, MSA, CZMA and NEPA.**

If a preliminary permit authorizes test power generating units (which, to avoid ambiguity, it should either expressly permit or expressly prohibit), then FERC would be required to comply with various environmental laws governing such a facility. For example, placement of test facilities in Agate Passage may be likely to adversely affect Puget Sound Chinook salmon which are listed as threatened under the ESA. This area is also designated critical habitat for listed Southern Resident Killer Whales, as well as essential fish habitat (EFH) for Pacific Salmon and Pacific Groundfish. Other marine mammals may also be affected.

As a Federal agency authorizing activity of this nature, FERC would need to enter into ESA Section 7 consultation prior to issuing such authorizations to assure its action – the permit issuance – does not jeopardize the continued existence of a threatened species or adversely modify critical habitat. Other prerequisites to authorizing test facilities would include, without limitation, compliance with the MMPA, MSA, CZMA and NEPA.

**3. If the preliminary permit does not include authorization of installation and operation of demonstration tidal power generating facilities, then other Federal permitting agencies must comply with applicable laws including the ESA, MMPA, MSA, CZMA and NEPA.**

If the preliminary permit contains no such authorization to place test facilities in Agate Passage, the permit should make this clear. Specifically, FERC should acknowledge the applicant's plans to place test facilities in the water but make clear that this preliminary permit does not apply to any such plans. It would be helpful to the permittee and interested agencies and tribes if FERC could give guidance as to what sort of compliance is required before such testing takes place, and require that the applicant file with FERC copies of the authorizations needed for testing prior to conducting such activities. If FERC were to take this approach, the Federal entities issuing necessary permits would have responsibility to comply with the ESA, MMPA, MSA, CZMA and NEPA, just as FERC would have if it authorized installation and operation of pilot facilities.

We believe FERC has a role in ensuring environmental and safety compliance as such tests are carried out. While it may not be FERC's duty to inform a permittee what its responsibilities are (such as, seeking a §404 permit, which in turn requires ESA consultation with the Army Corps of Engineers), we believe FERC should reach out to inform permit recipients of their potential responsibilities and, as suggested above, require prior proof of compliance. The Commission's leadership in this realm is critical at this juncture. Tidal and wave energy projects may prove to be a valuable new source of electricity generation, but the public's interest in new energy sources includes addressing

the environmental impacts of energy projects. The FERC has long served as the primary regulator of private energy development and provided a forum where applicants, agencies, tribes, non-governmental organizations, and other stakeholders can resolve their concerns and help FERC issue licenses which are best adapted to a comprehensive plan for the resource. If FERC is able to provide guidance in its issuance of preliminary permits, it will benefit all parties as they address these complex and novel issues.

#### **4. Conclusion**

NMFS requests that FERC clarify its orders issuing preliminary permits to state explicitly whether the preliminary permit includes installation and operation of demonstration tidal energy generating facilities or, conversely, prohibits those activities. Any proposed demonstration power-generating facilities would constitute power houses, or works incidental thereto, used in the course of developing or generating electric power, thus placing them within FERC's authority.

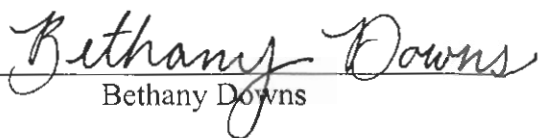
**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

Public Utility District No. 1	)	Rich Pass Project, P-12688
of Snohomish County, Washington	)	Spieden Channel Project, P-12689
	)	Admiralty Inlet Project, P-12690
	)	Agate Passage Project, P-12691
	)	San Juan Channel Project, P-12692
_____	)	Guemes Channel Project, P-12698

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served, by electronic mail, the foregoing document to Magalie R. Salas, Federal Energy Regulatory Commission, from the National Marine Fisheries Service regarding Request for Rehearing of Orders Issuing Preliminary Permits for Tidal Energy Projects in Washington and the foregoing document and this Certificate of Service have been served to each person designated on the official service list compiled by the Commission in the above captioned proceeding.

200703165100 Received FERC OSEC 03/16/2007 04:29:44 PM Docket# P-12688-001, ET AL.  
Dated on March 16, 2007.

  
Bethany Downs

Submission Contents

Request for Rehearing of Orders Issuing Preliminary Permits for Tidal Energy  
Projects in Washington  
TidalPowerRFR.pdf..... 1-9