



United States Department of the Interior

OFFICE OF THE SECRETARY
Office of Environmental Policy and Compliance
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IN REPLY REFER TO:

ER06/0684

Electronically Filed

August 28, 2006

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

Subject: **COMMENTS AND RECOMMENDATIONS FOR TERMS AND CONDITIONS** - Notice of Application for Preliminary Permit for the Agate Passage Tidal Energy Hydroelectric Project, FERC Project No. 12691-000; Kitsap County, Washington

Dear Ms. Salas:

The Department of the Interior (Department) has reviewed the subject document. The following comments reflect our concerns about the environmental impacts related to the issuance and exercise of the requested preliminary permit, and for potential project-related impacts should a license for project construction and operation eventually be pursued. If the requested preliminary permit is issued, we recommend that the applicant devote special attention to the following areas of concern.

GENERAL COMMENTS

The proposed project has the potential to adversely impact trust resources and areas of special interest to the Department. The applicant should be made aware that the Department's overall goal is to restore and protect Federal trust resources supported by the Puget Sound ecosystem. Without the development and implementation of appropriate planning and avoidance measures, we believe this project could threaten the basic resource values of the estuarine and marine environment. Thus, the Department will be considering whether the project can be successfully planned as an integral component of a self-sustaining ecosystem. Based on this ecosystem approach, the Department plans to seek information about the chemical, physical, and biological relationships, processes, and linkages necessary to enhance and maintain a healthy, biologically diverse ecosystem in concert with the proposed construction, operation, and maintenance of this project.

If a preliminary permit is issued for this project, we recommend the applicant consult with the U.S. Fish and Wildlife Service (Service), the U.S. National Park Service (NPS), the U.S. Bureau of Indian Affairs (BIA), the National Oceanic Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries), the Washington Department of Fish and Wildlife, the Washington Department of Natural Resources, and any Indian Tribe or Nation whose treaty rights may be affected by the project. These agencies can provide guidance in developing the project in a manner that seeks to preserve, protect, and enhance fish and wildlife resources and other environmental values in the project area. It is especially important for the applicant to initiate consultation early so that studies may begin in a timely fashion and delays may be avoided. This correspondence does not constitute consultation pursuant to the Federal Energy Regulatory Commission's (Commission) regulations.

Fish and Wildlife Resources

The issuance and exercise of the requested preliminary permit has the potential to adversely impact fish and wildlife resources and habitats of special interest to the Service. Fish and wildlife resources that may be affected include, but are not limited to, seabirds, including marbled murrelets (*Brachyramphus marmoratus*) and pigeon guillemots (*Cephus columba*); raptors, including peregrine falcon (*Falco peregrine*) and bald eagle (*Haliaeetus leucocephalus*); fish, including bull trout (*Salvelinus confluentus*), coastal cutthroat trout (*Onocorhynchus clarki clarki*), forage fish, bottom fish, salmon, and steelhead; and marine mammals. The project is located within bull trout foraging, migration, and overwintering habitat and designated Critical Habitat.

Orcas (*Orcinus orca*) are also an integral part of the marine environment in Puget Sound. Orcas primarily feed on salmon, and spend most of their time following this food source. The orca is listed as endangered under the Endangered Species Act of 1973 (ESA) and is under the jurisdiction of the NOAA Fisheries. We recommend the applicant coordinate with NOAA Fisheries regarding impacts to listed orcas.

Threatened and Endangered Species

The Service has determined that listed species may be present within the project area. Any Federal agency, currently or in the future, that provides funding, permitting, licensing, or other authorization for this project must assure that its responsibilities under section 7(a)(2) of the ESA, as amended, are met. The Federal agency is responsible for making a determination of the effects of the project on federally listed species and/or critical habitat. Upon a conclusion that an endangered or threatened species may be affected (adversely or beneficially), the Commission must initiate consultation with the Service to determine if the proposed actions would jeopardize the continued existence of the listed species or destroy or modify critical habitat. For a "not likely to adversely affect" determination, the Commission should request the Service's concurrence through the informal consultation process. For a "no effect" determination, the Service would appreciate receiving a copy of any substantiating documentation. Because the requested preliminary permit would authorize the construction and operation of a pilot project and other in-water activities, we recommend that the Commission enter into consultation with the Service and NOAA Fisheries to ensure the proposed action does not jeopardize listed species or adversely modify critical habitat

and, where appropriate, address anticipated take associated with the pilot project and related investigations. The applicant should refrain from disturbing the project area (e.g., road construction, mooring and anchoring platforms, installing and operating demonstration units) until consultations are completed.

Recreation Resources

Regulations created pursuant to the Federal Power Act, as amended, require consultation with the NPS and other resource agencies (18 C.F.R. § 4.38(a) and 18 C.F.R. § 5.1(d)). The NPS provides technical assistance about outdoor recreation resources pursuant to the Outdoor Recreation Act of 1963 (16 U.S.C. § 4601-1), the NPS Organic Act (16 U.S.C. § 1 *et seq.*), the Wild and Scenic Rivers Act of 1968 (Public Law 90-542), and the National Trails System Act of 1968 (16 U.S.C. § 1246(a)). In addition, the NPS is required under the NPS's Organic Act to preserve unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this generation and future generations.

The NPS is concerned with potential impacts to the aesthetics and recreation resources of Puget Sound of which orcas, in particular, are an integral part. Part of the NPS's core mission is to educate the public on important aspects of natural, cultural, and environmental life systems. The orca whale is a prominent and recurring theme in the NPS's interpretive programs for national park unites within the Pacific Northwest. The area is also heavily used for non-motorized and motorized boating, fishing, whale and wildlife watching, and diving. The Cascadia Marine trail, a non-motorized water trail, is also in the vicinity of the project and the NPS is specifically concerned about impacts to the experience provided by this trail.

Recommendations for Terms and Conditions for the Preliminary Permit

1. The Department recommends that the permittee be directed to coordinate with the Service prior to undertaking any scientific study, investigation, or other work authorized by the preliminary permit. While performing project feasibility studies during the term of the permit, the permittee should ensure that damage to habitat and resources, particularly aquatic habitat, wetlands, and riparian vegetation, is avoided or minimized.
2. The Department recommends that the Commission issue the preliminary permit to authorize the requested pilot project and the associated studies only, and to not include more than four pilot Tidal In-Stream Energy Conversion devices. At the end of the term of the preliminary permit, all such devices and related infrastructure should be shut down and/or removed from the waterway pending initiation and completion of the Commission's licensing process. If the permittee elects to not proceed with a license application for a full scale project, then the permittee should be required to remove the pilot project and all related infrastructure from the waterway, restore the project area, and repair all environmental damage caused by the pilot project.
3. The Department recommends that the permittee be directed to consult with the Service's Western Washington Fish and Wildlife Office, the NPS, and the BIA throughout the term of the preliminary permit. While the Department generally supports the proposed study

concepts listed in the application, further consultation is needed to determine the details of these studies and any additional appropriate studies. In addition to the studies listed, the permittee should be directed to evaluate potential impacts related to ground disturbance that might occur in connecting the tidal energy project to the grid, including any related construction staging, and recreational use in the project area including, but not limited to, impacts to the use and recreational appeal of the Cascadia Marine Trail.

4. The Department recommends that a cumulative impact analysis be performed for the pilot project. The applicant has submitted at least seven preliminary permits for tidal energy projects in the Puget Sound area. The implementation of several or all of these projects could significantly impact the vitality of aquatic resources and wildlife (and consequently, the viewing opportunity of various species), quality of aesthetics, and quality and availability of other recreation resources.
5. The Department recommends that the Commission require the applicant to revise the application to reflect the effects of the proposal. Specifically, Item 3 of Exhibit 2 of the Application for Preliminary Permit requires the applicant to state whether or not the proposal would “alter or disturb lands or waters.” The applicant is requesting authorization to install and operate one or more Tidal In-Stream Energy Conversion devices during the term of the permit. This installation along with associated infrastructure, including but not limited to transmission cables, moored platforms, and anchoring systems, would clearly “alter or disturb lands or waters” as stated in Item 3; however, the response provided in the application makes no mention of these activities and actions.

While the Department is supportive of the development of environmentally-sound, alternative energy technologies, we are concerned by the potential direct and cumulative effects of these tidal energy projects on the Puget Sound ecosystem. Therefore, the applicant should understand that the Department is interested in seeing the aforementioned environmental and recreational issues addressed during the term of the preliminary permit to prevent unnecessary delays and to assist in the creation of an environmentally acceptable project.

After issuance of the preliminary permit, the applicant should contact the Western Washington Fish and Wildlife Office to discuss these concerns in more detail. Consultation and technical assistance requests, questions, comments, documents, and required progress reports should be directed to Mr. Ken Berg, Manager, U.S. Fish and Wildlife Service, Western Washington Fish and Wildlife Office, 510 Desmond Dr. SE, Suite 102, Lacey, Washington 98503, Telephone: (360)-753-9440. The contact for the NPS is Ms. Kelly Powell, Environmental Compliance Reviewer, National Park Service, 168 South Jackson St., Seattle, Washington 98104, Telephone: (206) 220-4106. Technical assistance requests related to the interests of Indian Tribes should be directed to Ms. Jennifer Frozena, Hydropower Policy Specialist, U.S. Bureau of Indian Affairs, Portland Area Office, Portland, Oregon 97232, Telephone: (503) 231-6750. If you have any questions, please contact me at (503) 231-6157.

The Department appreciates the opportunity to review this application for preliminary permit. We have no objection to issuance of the requested permit provided the applicant is directed to consult with the Department.

Sincerely

A handwritten signature in blue ink, appearing to read "Preston Sleeper". The signature is stylized with a large initial "P" and "S".

Preston A. Sleeper
Regional Environmental Officer

cc:

OEPC, Washington, DC (Rai)
FWS, Washington, DC (Stavrakas)
FWS, Portland, OR (Mead)
FWS, Lacey, WA (Berg)
NPS, Seattle, WA (Powell)
BIA, Portland, OR (Frozena)
Service List

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