

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In re Snohomish County PUD No. 1

Applications for Preliminary
Permits for Tidal Energy Projects

**TULALIP TRIBES' REQUEST FOR
CLARIFICATION OR REHEARING OF
ORDERS ISSUING PRELIMINARY
PERMITS FOR TIDAL ENERGY
PROJECTS IN WASHINGTON**

No. P-12688 - Rich Passage
No. P-12689 - Spieden Channel
No. P-12690 - Admiralty Inlet
No. P-12691 - Agate Passage
No. P-12692 - San Juan Channel
No. P-12698 - Guemes Channel
No. P-12687 - Deception Pass

1. STATEMENT OF ISSUE

There is one issue presented in this Request: whether FERC should clarify or otherwise modify in all study permits issued to Snohomish PUD #1 (SnoPUD), that SnoPUD must file a development application before proceeding with its announced intention to include as part of its feasibility studies the in-water installation and testing of electrical generating equipment in Puget Sound, whether or not such activity involves a connection to the regional energy grid.

This Request complies with the issue identification requirements of 18 C.F.R. § 385.713(c)(2) (2006) and the Commission's Revision of Rules of Practice and Procedure Regarding Issue Identification, Order No. 663, 70 FR 55,723 (September 23, 2005). The Tulalip Tribes (Tribe) is an intervenor party in all 7 dockets.

2. BACKGROUND STATEMENT

In mid-2006, SnoPUD filed several applications with FERC for preliminary permits to study tidal energy production, including one study location at Rich Passage in Puget Sound.¹ Application for Preliminary Permit, Dkt. No. P-12688 (June 15, 2006) (“Rich Passage Application”).

In Exhibit 1 to that application, SnoPUD proposed to conduct its permitted feasibility studies in two phases. *Id.*, Exh. 1, at 1. Phase I feasibility studies are technical in nature. Phase II feasibility studies will include among other things the installation of “a demonstration unit(s)” – in other words, one or more pilot generators, to test different technologies at that location in a real world environment:

During the test period the operation of the selected unit(s), the optimal placement within Rich Passage, the effects on marine traffic, and the potential effects on marine aquatic species and their habitat will be evaluated. Only after the successful completion of the testing period will a final go/no go decision to proceed with the project be made.

Rich Passage Application, Exh. 1, at 1 (emphasis added). SnoPUD has expressly stated that its decision whether to proceed with project development is expressly contingent on the outcome of demonstration testing. *Id.*

FERC received public and agency comments on the application, including those of the U.S. Interior Department’s Portland (OR) regional Office of Environmental Policy and Compliance (“Interior”). In its August 21, 2006 comments, Interior expressed concern over the possible ecosystem-wide effects of tidal energy projects generally, and in-water installation and testing of pilot generators in particular. Interior recommended that, because the environmental

¹ SnoPUD’s Rich Passage application and FERC’s Order Issuing Preliminary Permit in No. P-12688 are illustrative of the issue presented in all 7 dockets in which SnoPUD proposes pilot level installation and testing of tidal energy generating facilities.

effects of these emerging technologies are not fully known, FERC should require the applicant to consult early and often with state and federal resource agencies, as well as with “any Indian Tribe or Nation whose treaty rights may be affected by the project.” *Id.* at 1-2. Interior asked that these consultations be completed before the applicant conducts any in-water (or other ground disturbing) testing activities. *Id.* at 2-3. Interior concluded, based on these concerns, that FERC should require the SnoPUD to revise its application, and should not allow more than four Tidal In-Stream Energy Conversion Devices “during the term of the permit.” *Id.* at 4, ¶ 4.

Since February 22, 2007, FERC has issued 7 study permits to SnoPUD. In its Order Issuing Preliminary Permit, Dkt. # P-12688 (February 22, 2007) (“Order Issuing Permit”), FERC considered Interior’s DOI’s concerns “misplaced” in regard to FERC permit jurisdiction over “construction” activities:

As noted, a preliminary permit does not authorize a permittee to undertake any construction or to enter onto lands owned by others. Therefore, Interior's impression that the Commission might allow the placement of test units under the preliminary permit is misplaced. Placement of test units is not authorized by the issuance of a permit pursuant to the FPA; however, such activities would be subject to other federal and state laws.

As discussed below, the Commission expects the permittee to engage in prefiling consultation, including consultation with FWS during the permit term. While the Commission expects the permittee to investigate whether endangered species might be affected by the proposed project and to discuss such matters in its prefiling consultation, it would be premature for the Commission to begin ESA consultation with FWS prior to a development application being filed. Before that time, there would be no proposed federal action regarding which to consult.

Id., at 2-3. FERC’s orders in the 6 other dockets in this Request are identical, or substantially so.

On March 16, 2007, NMFS added itself to the list of federal and tribal agencies concerned over SnoPUD’s proposal to conduct in-water installations and testing. Request for Rehearing or Appeal of Feb. 22 and Mar. 9, 2007 Orders Granting Preliminary Permits, Dkt. Nos. P-12688-001, P-12689-001, P-12690-001, P-12691-001, P-12692-001, P-12698-001

(March 17, 2007). NMFS sought clarification or alternatively rehearing on whether SnoPUD's permit included authority for these in-water activities. Yesterday, FERC dismissed NMFS' request on procedural grounds, explaining in any case that the question had already been answered. See Order Dismissing Rehearing,

In response to NMFS' request, FERC reiterated yesterday that a study permit grants no "construction" authority. Notice Dismissing Filing as Deficient re Public Utility District #1 of Snohomish County, Dkt. Nos. P-12688-001, P-12689-001, P-12690-001, P-12691-001, P-12692-001, P-12698-001 (March 22, 2007) ("Order Dismissing Rehearing") at p. 2.

Respectfully, we seek clarification on a related but different issue – not whether SnoPUD is permitted to undertake construction activities, but whether SnoPUD will be required to file a development application before installing and testing pilot generators and related equipment in the Tribe's usual and accustomed fishing areas. These are different questions, because while it is quite clear that construction activities are not authorized in a study permit, FERC has not consistently regulated in-water pilot testing of hydrokinetic energy projects, and in the absence of such regulation the Tribe cannot expect meaningful consultation over impacts from such testing to the Tribe's treaty reserved rights.

3. DISCUSSION

a. Generally

SnoPUD expressly states in its permit applications that its "go/no go" decision on full project development is contingent on successful testing of pilot tidal generators in real-world conditions. This is understandable.

Considering that the permit authorizes no construction, will SnoPUD conduct its Phase I

feasibility studies under a study permit, and conduct Phase II feasibility testing of tidal generators on a pilot basis under a development application? We doubt it.

We believe it is more likely that SnoPUD will, toward the end of its permit term, seek relief from FERC licensing requirements for “experimental” in-water testing of tidal generators. If such an exemption is granted, SnoPUD will not have been required to engage in any meaningful tribal consultation before SnoPUD conducts feasibility level field installation and testing of pilot generators in the Tribe’s usual and accustomed fishing grounds. The Tribe in such a case will effectively have been frozen out of a process to evaluate the effects of such testing on the fishery and fishery resources.

The Tribe is co-manager of a fishery that is potentially at risk from this activity, and has treaty fishing rights in each of the study areas. FERC should and state clearly now that pilot testing of tidal generators must be licensed, be conducted with the Tribe as a full partner in consultations, so that all federal² and state laws are be complied with before the utility conducts any in-water installation or testing of pilot generators in Puget Sound.

b. FERC’s Short History With Ocean and In-Stream Energy Pilot Projects

Recent industry interest in hydrokinetic energy has led FERC to consider new policies within existing forms of regulation. *See* Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,112 (2007) (“Interim Policy Statement”). Across the country, several studies of proposed hydrokinetic energy projects are underway – some involving wave energy, and others involving tidal or in-stream energy technologies. New technologies and variations on existing

² These would include without limitation ESA, CWA, the Sustainable Fisheries Act, and other laws respecting the treaty-reserved rights of the Tribe.

technologies are emerging. New locations are being studied, each with its unique land forms, aquatic characteristics, habitats and uses. Some locations have already been studied for their hydrokinetic energy potential. Some technologies have already been studied. Some projects will study existing technologies in new locations. Others, vice versa. Some projects propose no in-water placement or testing of generators, or connections to the regional power grid.

The only apparent commonality among these projects, is that each one proposes to study overall project feasibility of a particular technology at a particular location, for a “go/no go” decision on a larger project.

Here, SnoPUD proposes the installation and testing of emerging technologies in an environment that has never been studied for this potential. There is a fundamental difference between feasibility studies that propose the in-water pilot testing of hydrokinetic generators, and those that don’t. On whether and how to regulate the former category, FERC is not writing on a clean slate.

c. FERC Has Not Consistently Required a Development Application For Pilot Testing of New Hydropower Technology

In fact, the issue raised in this Request was considered by FERC only two years ago, in Verdant Power LLC, 111 FERC ¶ 61,024 (April 14, 2005) (“Verdant Declaratory Order”). There, as here, a local power utility applied for permit authority to evaluate the feasibility of an instream hydrokinetic energy project to be installed and tested on the bed of New York City’s East River. Three years later, the utility filed a Declaration of Intent and Petition for Relief “from the requirements of hydropower licensing under the Federal Power Act” with FERC, for in-water installation and testing of pilot generators. *Id.*, at p.1.

Comments on the request were filed including those of an industry lobbyist, who urged

FERC to develop a “pilot project program” and ultimately a limited licensing program which would reflect a policy of “light-handed regulation” of in-stream energy development projects.

Amended Comment on Filing of Carolyn Elefant re Verdant Power LLC, Dkt. No. P-12178 (March 14, 2005).

FERC carefully considered the petition, the public comments, the requirements of the Federal Power Act, and the attendant public policy questions. It responded by adopting and applying a “three part test”:

We conclude that in order to find that facilities such as those proposed by Verdant are not required to be licensed, we must make the following three findings: (1) the technology in question is experimental, (2) the proposed facilities are to be utilized for a short period for the purpose of conducting studies necessary to prepare a license application, and (3) power generated from the test project will not be transmitted into, or displace power from, the national electric energy grid. Verdant's proposal is consistent with the first two parts of this test: the six turbines that it proposes to test represent experimental, tidal-power technology, and Verdant proposes to test the turbines for 18 months, for the purpose of conducting studies that are needed for it to prepare a license application. However, Verdant's proposal calls for it to provide power to two customers, which would displace power from the national electric energy grid, and thus would fail the third part of our test. If, however, Verdant does not transmit power into the grid, or displace power from it, Verdant will not require a license under Part I of the FPA to conduct the proposed, short-term tests of its experimental turbines.

* * *

10. This holding is limited to the facts of this case. * * *

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18. While we agree that it is important to encourage innovative energy technology, we are not prepared at this time to create blanket exemptions or a limited licensing program, which could raise significant legal, policy, and regulatory issues. We believe that the limited action we have taken here, recognizing that a specific project, under a specific set of facts, is not required to be licensed, is the appropriate response to Verdant's petition.

Verdant Declaratory Order, at pp. 2-4 (footnotes omitted). The light handed regulation reflected in this ruling has now been institutionalized in FERC's Interim Policy Statement, supra, at fn.3.

d. FERC Has Committed To Conducting Meaningful Consultation With Tribes In All Program Areas

In 2003, FERC adopted a three-pronged approach to fulfilling its trust obligations to tribes and to the protection of Indian trust resources when exercising its authorities under the Federal Power Act:

273. In light of these comments, we have decided to take a three-pronged approach to better fulfill our trust responsibility. The first prong is to publish in our regulations a policy statement on tribal consultation. The policy statement was developed from our review of the written policies of other Federal agencies concerning the trust responsibility and government-to-government consultation. The policy statement is being issued contemporaneous with this final rule in a separate docket and will appear in Part 2 of the Commission's regulations, "General Policy and Interpretations." The policy statement will apply to all of the Commission's program areas and, for hydroelectric licensing, to all licensing proceedings, regardless of which process is used.

Final Rule and Tribal Policy Statement, 104 FERC 61,108 (July 23, 2003), at ¶ 273 (footnotes omitted). The heart of the new policy statement is meaningful consultation with Tribes.

e. Neither FERC nor the Applicant Will Engage in Meaningful Tribal Consultations Over Pilot Testing of Tidal Generators in Puget Sound Unless Field Testing Is Conducted Under FERC's Licensing Procedures

The Tribe cannot expect meaningful, voluntary consultation with FERC or SnoPUD over the siting and regulation of pilot generators unless FERC sets clear rules, and places SnoPUD on notice now that such testing will require a development application. Nothing in the existing record requires that consultation.

The study permits themselves do not require tribal consultation. FERC "expects" SnoPUD to engage in "prefiling consultations, including consultation with FWS during the permit term." Order Issuing Permit, quoted *supra*. There is no mention of consultation with NMFS, let alone with Indian tribes. FERC won't require it under NEPA, since the Commission does not consider the issuance of a study permit to constitute a "major federal action

significantly affecting the quality of the human environment.” Order Issuing Permit, fn.6. And FERC won’t require it under ESA, since the Commission considers “premature” any requirement for ESA consultation before a development application is filed. *Id.* at 3.

4. CONCLUSION

Significant in-water activities – whatever scope they may take under the permit – have the potential to affect fish, marine mammals, habitat and the fishing rights of the Tribe. Project feasibility is expressly stated to hinge on the outcome of SnoPUD’s real world experience with pilot generators. Unless FERC clearly asserts jurisdiction over such activities now, and requires that SnoPUD’s proposed testing be authorized under a development application, the parties and stakeholders are left guessing as to which of SnoPUD’s phased feasibility test activities will be conducted under permit authority; whether SnoPUD will avoid licensing as did Verdant Power for testing of pilot generators; whether SnoPUD will file a development application for pilot level testing (as did AquaEnergy Group, LTD, Dkt. No. DI02-3-001, for its Makah Bay wave energy pilot project), or whether SnoPUD will proceed wholly without FERC authority with in-water testing of facilities that involve no “construction” (on barges?) or “land disturbing activities” on the property of others at all.

The Tribe has treaty protected fishing rights in and around SnoPUD’s proposed study areas. Only Congress can abrogate the treaty rights of Indian tribes. There is no authority to suggest that Congress, in its enactment or amendment of the FPA, has abrogated the treaty fishing rights of the Tulalip Tribes. Absent such authority, no entity or agency may conduct or authorize any activity – denominated a “test” or “pilot” project or otherwise – that would substantially interfere with the Tribe’s treaty rights. Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers, 931 F.Supp. 1515, 1520 (USDC, W.D.Wash.,1996); Muckleshoot Indian

Tribe v. Hall, 698 F.Supp. 1504, 1511 (USDC, W.D.Wash.,1988).

FERC should not wait until the end of the permit period, but must modify the permit or otherwise place SnoPUD on notice now, that any in-water testing of any tidal energy equipment or facilities by SnoPUD as described in its study permit applications must be preceded by a development application, and must comply with all applicable state and federal laws including those respecting the treaty protected rights of the Tulalip Tribes.

RESPECTFULLY SUBMITTED this March 23, 2007.

THE TULALIP TRIBES OF WASHINGTON

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I have this date filed, by electronic mail, the following document with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission:

**TULALIP TRIBES' REQUEST FOR CLARIFICATION OR REHEARING OF
ORDERS ISSUING PRELIMINARY PERMITS FOR TIDAL ENERGY
PROJECTS IN WASHINGTON with Certificate of Service**

and further that the foregoing document has been served on each person designated on the official service list compiled by the Commission in the above captioned proceedings.

Dated this March 23, 2007

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