Pacific Fishery Management Council

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Donald K. Hansen, Chairman Donald O. McIsaac, Executive Director

November 1, 2007

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

Re: Hydrokinetic Pilot Project Licensing Process proposal Docket No. AD07-14-000

Dear Secretary Bose:

These comments on the Federal Energy Regulatory Commission's (FERC) "Pilot Project Licensing Process for Hydrokinetic Energy Projects" are being submitted on behalf of the Pacific Fishery Management Council in fulfillment of the Council's federal statutory mandates and prerogatives.

The Pacific Fishery Management Council (Council) is one of eight regional fishery management councils established by the Magnuson-Stevens Fishery Conservation and Management Act (MSA) of 1976, 16 USC 1801et seq. The Council manages fisheries in the Exclusive Economic Zone off the States of California, Oregon, and Washington, working closely with relevant state and tribal governments to coordinate sound fisheries and habitat management practices. Off the Pacific Coast, the Council operates under federal fishery management plans for salmon (five species); groundfish (more than 80 species), coastal pelagic species (eight species); and highly migratory species (12 species). These fishery management plans have been implemented through federal regulations issued by the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), and U.S. Department of Commerce.

Fisheries managed by the Council may be directly affected by pilot hydrokinetic projects. Therefore, we ask that FERC work closely with the Council before issuing any pilot project licenses to ensure that the Council's concerns are addressed.

The Council supports efforts to develop alternative energy sources that are as environmentally benign as possible, and that may add to or replace current fossil fuel energy sources. However, the Council is concerned that current environmental review processes are not diminished in the development of an expedited FERC permitting process for hydrokinetic pilot projects.

Under the MSA, each fishery management plan prepared by the Council must describe and identify essential fish habitat (EFH), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the

conservation and enhancement of such habitat. EFH is defined as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." Furthermore, the MSA *requires* the Council to comment on and make recommendations to FERC concerning any activity that, in the Council's view, is likely to substantially affect the habitat, including the EFH, of an anadromous fishery resource under its authority. The Council *may* comment and make recommendations to FERC on actions that may affect the habitat, including EFH, of any non-anadromous fishery resource under its authority. To help fulfill these statutory responsibilities, the Council relies on its Habitat Committee, which consists of representatives from the U.S. Fish and Wildlife Service, the Pacific States Marine Fisheries Commission, the National Marine Sanctuaries Program, the National Marine Fisheries Service, the States of California, Oregon, Washington, and Idaho, as well as representatives from Indian tribes, the fishing industry, environmental organizations, and the public at-large.

Under the Federal Power Act (FPA) and its implementing regulations for hydropower projects, FERC has proposed a policy that would allow it to issue licenses for hydrokinetic energy projects (including projects off California, Oregon, and Washington, in waters managed by the Pacific Council), in as little as six months. At FERC's Hydrokinetic Technologies Pilot Project Workshop on October 2, 2007, John Katz, from FERC's Office of General Counsel, stated that applications are already being accepted for pilot project proposals. Other speakers from FERC indicated that the conditions of the policy—such as the five-year term of the license, the initial size limitation to five megawatts, and the definition of "adverse environmental effects" that would cause a project to be terminated—were flexible and might be varied according to the needs of the applicants. FERC has not, and apparently does not intend to, conduct a rulemaking on the policy under the Administrative Procedures Act.

The Pacific Council understands that the hydrokinetic pilot process is intended to apply to wave energy, tidal energy, and in-river hydrokinetic projects; that there are a number of applicants interested in such a process; and that projects being explored include at least one in-river project on the Columbia River, several tidal projects in Puget Sound and San Francisco Bay, and a number of wave energy projects along the coast of Oregon or Northern California. While the Council understands FERC's desire to provide applicants with a flexible, quick process, the new process raises a number of important questions that the Council believes need to be answered before FERC proceeds further.

The Council's primary concerns fall into five categories: timeframe, process, environmental effects, location, and socioeconomic impacts. Please consider the following stated problems, rationale, comments and recommendations

Timeframe concerns:

- **Process too short**. The purpose of the pilot project licensing process is to "develop a ... process that can be completed in as few as six months." This timeframe is too short to allow meaningful participation by the Council in the decision making process. The Council meets five times a year and the proposed

licensing schedule will not allow meaningful input on the application, recommended conditions, or environmental assessment.

- Similarly, this timeframe is inadequate to allow our federal, state, and tribal partners enough time for meaningful consultation to reduce impacts. The timeframe must be extended to accommodate this input.

Proposed pilot process concerns:

- **Policy vague**. Too many of the details of the new FERC policy remain vague, uncertain, and subject to change, including initial project size, definition of adverse environmental effects that would require project termination, definition of sensitive areas that would be closed to energy projects, and requirements for project decommissioning (including bonding).

- **Lack of rulemaking**. FERC is not conducting rulemaking under the Administrative Procedures Act to determine basic license conditions. FERC has used this public process for its other alternative licensing procedures, to good effect, and should use the same approach here. A rulemaking could also serve as the vehicle for a comprehensive plan and environmental analysis of the cumulative environmental impacts of placing the ocean energy projects up and down the West Coast.

- **Include 10(j) recommendations**. Under Section l0(j) of the FPA, FERC receives recommendations from the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies on measures for the protection, mitigation of damages to, and enhancement of fish and wildlife resources affected by the project. FERC is to include these measures as license conditions unless it finds them inconsistent with the FPA or other applicable law. These requirements should be expressly included in the pilot project process.

- **Need for programmatic analysis**. Council and other federal agencies conduct comprehensive programmatic analyses to address suites of similar actions and address adverse effects, including potential cumulative effects. We recommend that a programmatic analysis be performed prior to any issuance of pilot permits. Cumulative effects of these pilot projects may be very significant, and FERC needs to analyze these effects.

- **Transition to long-term license unclear**. We are concerned that after the pilot project period has passed, a 30-50 year license may be granted without rigorous review of the impacts of the pilot phase of these projects. The Council recommends that a) site-specific baseline information be collected up front; b) environmental assessments based on this baseline information be conducted throughout the lifecycle of the five-year pilot project; c) a decommissioning plan be part of the license process from the beginning; and d) if environmental impacts

are unacceptable, or if the project is not financially viable, then the project be decommissioned and the facilities removed.

- **Status during relicensing unclear**. The Council is concerned about the status of the pilot project while a determination on the longer-term license is made. If experience with FERC's dam relicensing process is applicable here, it seems unlikely that FERC will require the pilot project to be decommissioned while a determination on the longer-term license is made and the project is operated under terms of the original license. This could undermine the short-term purpose of a pilot project. Many hydropower projects operate under annual licenses for several years while relicensing is completed.

- **Unacceptable level of environmental effect unclear**. The pilot project license requires "project alteration or shutdown in the event that monitoring reveals an unacceptable level of environmental effect." However, there is no definition of what constitutes an unacceptable level of effect. Clearly defined indicators are needed before project placement.

Environmental concerns:

- **Baseline information needed**. The pilot project process does not appear to require adequate site-specific baseline information or the establishment of comparative control sites before a project is licensed. Information on habitats and species in a proposed area is necessary for evaluation of environmental effects.

- **Need to understand cumulative impacts**. The scale at which wave energy projects are being considered in the Pacific Northwest, with essentially no knowledge of their effects on marine species and the environment, is of great concern to the Council. Not enough testing of wave energy technology has occurred to allow us to understand the impacts of even a single project; yet several entities have submitted preliminary permit applications encompassing a large percentage of the nearshore marine environment. The cumulative effects of multiple projects on marine animals and habitats are unknown and of great concern to the Council. For example, wave projects distributed along the coast could disrupt movement patterns of species that migrate from shallow to deeper water habitats as they mature. The scale and magnitude of multiple wave energy projects could compromise healthy ecosystems and must be evaluated at a regional ecosystem scale *prior* to any installations.

- **Consider sensitive species**. In addition to ESA-listed species, other species are of concern to the Council. Special consideration should be given to overfished stocks and to other sensitive species. Hydrokinetic projects need to clearly demonstrate how they intend to minimize impacts on all species.

- **Consider size criteria for pilot projects**. The process is meant for projects up to 5 MW in size. Environmental (and social/ economic) effects are more likely to be

linked to such factors as number and size of turbine units, anchors, and overall footprint (including electromagnetic and acoustic output) rather than energy generating capacity.

- **Limits on number of pilot projects**. The Council is concerned that the pilot process does not provide for any limits on the total number of potential pilot projects or their spacing or distribution, and believes that such limits should be set. Without such limits, cumulative impacts cannot be analyzed.

- **Best environmental practices needed**. Best environmental practices must be followed for all service equipment and vessels to avoid water and other forms of pollution, and high efficiency standards must be established to minimize the environmental footprint of proposed technologies. In addition, standards should be set to reduce noise, electromagnetic, and heat and light pollution.

Location concerns:

- **"Sensitivity" designation unclear**. Pilot projects are to be located in areas that are not designated as "sensitive." However, since FERC may already be processing applications, there is no time to complete state or federal planning processes that would result in "sensitive" designations. The whole issue of "sensitive" areas needs further examination. Will FERC defer to federal, state, or tribal designation of sensitive areas? How will FERC account for ongoing state and federal marine protected area processes? FERC should consider EFH designations, habitat areas of particular concern, and areas closed to fishing when designating sensitive areas that are not suitable for pilot projects.

- **Consider sites individually**. Ocean energy projects to date have required soft, sandy bottom to operate their equipment. Some soft bottom habitats are of concern even though they may not be in areas formally designated as "sensitive." Site-specific concerns should therefore be taken into account.

- **Rivers with listed species**. Without a more comprehensive permitting process which includes the ESA, Fish and Wildlife Coordination Act, and federal and state environmental quality act procedures, the pilot process should not be allowed for projects in rivers with listed species.

Socioeconomic impacts:

- **Conflicts with sport and commercial fishing**. Baseline social and economic information should be evaluated so that pilot projects are not placed in areas where there is a high level of existing sport and commercial fishing activity. Applicants should be required to consult with local ports and fishing community representatives to collect information and thoroughly evaluate all socioeconomic effects.

- **Displacement of fishing effort**. Hydrokinetic projects will close areas to fishing and therefore can displace or eliminate fishing. Displacement of fishing effort typically causes additional, related impacts on species and habitats that should be considered.

- **Consider cumulative economic impacts**. The cumulative economic impacts of these projects need to be evaluated with other ongoing marine management planning efforts such as marine protected areas.

We thank you for your consideration of these concerns and recommendations, and invite you to contact us with any questions.

Sincerely,

D. O. McIsaac, Ph.D.
Executive Director

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cc: Pacific Fishery Management Council Members
Pacific Fishery Management Council Habitat Committee
Pacific Fishery Management Council Staff