

149 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Public Utility District No. 1 of Snohomish County, Washington	Project Nos. 12690-007 12690-009
	Docket No. EL14-47-001

ORDER DENYING REHEARING

(Issued December 5, 2014)

1. Pending before us are requests for rehearing of two Commission orders involving the Admiralty Inlet Pilot Tidal Project No. 12690, an experimental tidal energy hydroelectric project. In a March 20, 2014 order (the license order), the Commission issued a 10-year license for the project to the Public Utility District No. 1 of Snohomish County, Washington (District).¹ The 600-kilowatt (kW) project will be located on the east side of Admiralty Inlet in Puget Sound, Washington, about 0.6 miles west of Whidbey Island in Island County, Washington. PC Landing Corp. (PC Landing) and the Tulalip Tribes of Washington (Tulalip or Tribes), intervenors in the licensing proceeding, filed requests for rehearing of the license order, and the Tribes also filed a motion for a stay of the license. PC Landing argues that the project poses an unacceptable risk to its international fiber optic telecommunications system. Tulalip maintains that the project would significantly interfere with its access to tribal fishing grounds.

2. After the license was issued, the District filed a petition asking the Commission to declare that the Federal Power Act (FPA) preempts Washington State's regulatory authority under its Shoreline Management Act (Shoreline Act) and that, as a result, the District is not required to obtain the state's approval in the form of a shoreline use permit. In a June 19, 2014 order (the preemption order), the Commission granted the District's petition and denied the Tribes' motion for a stay.² PC Landing and the Tribes filed

¹ *Pub. Util. Dist. No. 1 of Snohomish Co., Washington*, 146 FERC ¶ 61,197 (2014) License Order.

² *Pub. Util. Dist. No. 1 of Snohomish Co., Washington*, 147 FERC ¶ 61,215 (2014) Preemption Order.

requests for rehearing of the preemption order, arguing that it is premature, unnecessary, and inconsistent with law and Commission policy.

3. For the reasons discussed below, we deny rehearing of both orders and affirm that the Admiralty Inlet Project can proceed without posing a significant risk to PC Landing's telecommunications system or adversely affecting the Tribes' access to their traditional fishing grounds. We further affirm that, in this case, the FPA preempts Washington's Shoreline Act authority and a state permit is not required.

Background

4. The District filed a license application for the Admiralty Inlet Project on March 1, 2012. The applicant proposed to install and operate two 300-kW hydrokinetic turbines over a ten-year period to study the potential for developing tidal power in Puget Sound. In response to the Commission's public notice of the application, a number of parties intervened, including Tulalip and PC Landing. Tulalip objected to the proposed project on the grounds that it would affect the Tribes' access to tribal fishing grounds. PC Landing argued that the project would pose an unacceptable risk to its fiber optic submarine cable system, which provides an international telecommunications link between the United States and Japan.

5. Commission staff issued a draft Environmental Assessment (EA) on January 15, 2013, analyzing the potential environmental impacts of the proposed project and alternatives. Various federal and state agencies, Indian tribes, non-governmental organizations, and others, including Tulalip and PC Landing, filed comments on the draft EA. Staff issued a final EA for the project on August 9, 2013. The EA addressed a range of environmental issues and comments, including Tulalip's and PC Landing's concerns, and found that the proposed project with staff's recommended measures would not significantly affect the environment.³

6. On December 3, 2013, the National Marine Fisheries Service concluded formal consultation with the Commission under section 7(a)(2) of the Endangered Species Act⁴ and issued a biological opinion on the project's effects on species listed as threatened or endangered under that act. The biological opinion included reasonable and prudent measures to minimize incidental take of those species.

³ Final Environmental Assessment for the Admiralty Inlet Pilot Tidal Project No. 12690-005 (issued Aug. 9, 2013).

⁴ 16 U.S.C. § 1536(a)(2) (2012).

7. Also on December 3, 2013, the Washington State Department of Ecology (Ecology) issued a water quality certification for the project under section 401 of the Clean Water Act.⁵ No one filed a timely appeal of the certification.
8. By letter dated January 30, 2014, Ecology informed the Commission that it had waived its Coastal Zone Management Act (CZMA) certification authority over the project.⁶ PC Landing filed a notice of appeal of Ecology's waiver with the Washington State Pollution Control Hearings Board (Pollution Hearings Board) on February 26, 2014.⁷ The Pollution Hearings Board subsequently dismissed the appeal, concluding that it lacked jurisdiction to decide the validity of Ecology's waiver.⁸
9. On March 20, 2014, the Commission issued the license order. The license limits construction to a specified work window to protect listed fish species and other aquatic resources. On April 18, 2014, Tulalip and PC Landing filed timely requests for rehearing, and Tulalip filed a motion for a stay of the license order.
10. On May 6, 2014, the District filed its petition for a declaratory order. The Commission issued notice of the District's petition on May 8, 2014, and established a deadline of June 5, 2014, for comments, protests, and interventions. On June 4, 2014, PC Landing and the Tribes filed timely motions to intervene in response to the Commission's notice.
11. Meanwhile, on May 12, 2014, Ecology issued a decision approving Island County's issuance of a Shoreline Permit to the District and incorporating all of the County's conditions.⁹ Among other things, Ecology's decision stated that activities

⁵ Wash. State Dept. of Ecology, Issuance of Water Quality Certification to Snohomish County PUD No. 1, Project No. 12690-005 (filed Dec. 5, 2013).

⁶ Letter from Erik Stockdale, Ecology, to David Turned, FERC (filed Feb. 10, 2014).

⁷ *See* PC Landing's Notice of Appeal (filed Feb. 26, 2014).

⁸ *See* letter from Michael Swiger, counsel for the District, to Kimberly Bose, Commission Secretary (filed May 27, 2014), attaching a copy of the Pollution Hearings Board's May 21, 2014 decision.

⁹ *See* letter from Michael Swiger, counsel for the District, to Kimberly Bose, Commission Secretary (filed May 20, 2014), attaching a copy of Ecology's May 12, 2014 decision.

authorized by the permit are stayed until 21 days from the date of filing (i.e., until June 2, 2014) or, if an appeal is filed, until after the appeal is concluded.¹⁰ Shortly thereafter, PC Landing and the Tribes filed petitions for review of Ecology's decision with the Shorelines Hearings Board.¹¹

12. On June 5, 2014, Tulalip and PC Landing filed answers opposing the District's petition. PC Landing also filed a protest. On June 13, 2014, PC Landing filed a motion to lodge documents in support of its request for rehearing of the license order. On June 12, 2014, the District filed a motion for leave to answer and an answer to the Tribes' and PC Landing's responses.

13. On June 19, 2014, the Commission issued the preemption order. The Commission also denied the District's motion for leave to file an answer, and deferred action on PC Landing's motion to lodge documents in support of its rehearing request. On July 18, 2014, Tulalip and PC Landing filed timely requests for rehearing of the preemption order.

14. On September 19, 2014, PC Landing filed a second motion to lodge documents in support of its request for rehearing of the license order. On November 7, 2014, PC Landing filed a third motion to lodge documents in support of its request for rehearing of that order. On November 24, 2014, the District filed an objection and answer to PC Landing's third motion to lodge documents.

Discussion

A. Rehearing of the March 20, 2014 License Order

15. On rehearing, PC Landing argues that by failing to adequately consider the serious risk that the project turbines pose to its underwater communications cable, the license order violates the National Environmental Policy Act (NEPA), the FPA, the Commission's hydrokinetic pilot project guidelines, and the CZMA. Tulalip argues that, by impairing access to its tribal fishing grounds, the license order violates its treaty rights and the Commission's trust responsibility to the Tribes. Tulalip also argues that the order violates the FPA and NEPA, as well as the Commission's pilot project guidelines. We address these issues below.

¹⁰ *Id.*

¹¹ See letter from Michael Swiger, counsel for the District, to Kimberly Bose, Commission Secretary (filed June 3, 2014), attaching a copies of PC Landing's and the Tribes' petitions for review of Ecology's May 12, 2014 decision.

1. PC Landing's Motions to Lodge Documents

16. PC Landing filed three motions to lodge documents in support of its request for rehearing of the license order. The first motion, filed on June 13, 2014, concerns emails and handwritten notes that PC Landing obtained from Ecology in response to a public records request. The second motion, filed on September 19, 2014, concerns a Freedom of Information Act (FOIA) request filed with the Commission regarding the CZMA waiver issue and the Commission's reply that it had no documents responsive to the request. The third motion concerns documents with information regarding the District's plans for the Admiralty Inlet Project. PC Landing argues that all of these documents are relevant to issues raised in its April 18, 2014 request for rehearing and could not have been filed earlier because they were not obtained until after the rehearing request was filed.

17. PC Landing contends that the documents included in its first motion show that Ecology's CZMA waiver was arbitrary, capricious, and contrary to law. Specifically, PC Landing maintains that the documents "reveal that Ecology was not comfortable issuing a consistency certification, and believed that the [Shoreline Act] compliance analysis was weak, yet after requests from the [District] and discussions between Ecology and the office of the Governor of the State of Washington, Ecology departed from its usual procedures and asserted that it had 'unintentionally waived' its CZMA compliance review authority."¹² PC Landing contends that the documents included in its second motion show that there is no basis in the record for the Commission's finding that the National Oceanic and Atmospheric Administration (NOAA), which administers the CZMA program, determined that Ecology's extension of the time to complete its consistency review did not comply with the CZMA and implementing regulations.

18. We deny these motions. PC Landing's treatment of Ecology's CZMA waiver in its April 18 rehearing request is inadequate to preserve the issue.¹³ We therefore deny the company's request to use these documents to supplement its rehearing request. As PC Landing acknowledges, however, the documents included in its first motion to lodge are already filed in the record in support of PC Landing's protest of the District's petition.¹⁴

¹² PC Landing's motion to lodge at 3 (filed June 13, 2014).

¹³ PC Landing maintains that the license order relies on an unlawful and invalid CZMA process, but the company's treatment of this issue in its April 18 rehearing request consists of a single paragraph of conclusory statements without supporting arguments. *See* PC Landing's April 18 request for rehearing at 51-52. This is not sufficient to preserve the issue for purposes of rehearing of the license order. *See OMYA, Inc.*, 111 F.3d 179 (D.C. Cir. 1997).

¹⁴ *Id.* at 3; *see* PC Landing's protest with attachments (filed June 5, 2014).

They also form part of the basis for PC Landing's request for rehearing of the preemption order, which raises similar arguments and discusses them in more detail. As a result, we consider the significance of these documents later in this order, as appropriate, in connection with PC Landing's request for rehearing of the preemption order.

19. The documents included in PC Landing's second motion to lodge simply reflect the fact that PC Landing filed a FOIA request with the Commission for documents concerning Ecology's determination that it had waived its CZMA authority and the Commission replied that it had no responsive documents. We can take official notice of the existence of these documents and there is no need to include them in the record. We consider PC Landing's arguments about the significance of these documents below in connection with its request for rehearing of the preemption order.

20. The documents included in PC Landing's third motion to lodge concern the possibility that the District may not move forward with developing its project. They consist of the District's press release of September 30, 2014, two related news articles, and minutes of the District's Board of Commissioners meeting of October 6, 2014. PC Landing argues that these documents demonstrate that the District no longer intends to pursue the project because of increased costs and has removed the project from its 2015 budget. PC Landing further maintains that, in light of this information, the Commission must find that the project is no longer economically viable and is not in the public interest, and must therefore deny the license.

21. The District responds that it does not object to including this information in the record, but it does object to PC Landing's mischaracterization of the District's plans for the project. The District acknowledges that, as indicated in the September 30 press release, its research partner's decision not to provide additional funding prompted the District to suspend further development of the project. However, the press release also states that the District believes the project "remains worthwhile to pursue on behalf of the nation to further the potential development of marine renewable energy" and that the District would move the project forward with "additional research partner funds."¹⁵ The District notes that the license does not require it to begin constructing the project until March 20, 2016, and explains that while it is exploring the possibility of additional funding, it is also defending the project in state administrative appeals and complying

¹⁵ See Press Releases, "Snohomish PUD Tidal Power Project Not to Advance," at 1-2 (Sept. 30, 2014), available at: http://www.snopud.com/newsroom.ashx?p+1102&173_na+276.

with the license,¹⁶ which it does not intend to surrender. Finally, the District argues that the focus of the project is testing new hydrokinetic technology and gathering information about its siting and effects, not its economic value for power generation. As a result, the District maintains that the recent developments regarding project funding do not warrant a reevaluation of whether the project is in the public interest, or require the Commission to deny or vacate the license on rehearing.

22. We deny the motion to lodge these documents because they are not relevant to our decision. The District is pursuing the possibility of additional research partner funds and its license remains in effect. We decline to speculate about whether additional funds might be available or whether the District might seek to surrender its license at some future point. Similarly, our economic analysis recognized that the project would generate power at a cost that is considerably higher than the cost of replacement power, and this information about increased cost would not affect our determination that licensing the project is in the public interest. The possibility that the District ultimately may not be able to develop the project does not vitiate our finding that the project as licensed will be best adapted to a comprehensive plan for improving or developing Puget Sound.

2. Risks to the Communications Cable and Need for an EIS

23. PC Landing argues that the order violates NEPA by failing to analyze the significant inherent risks to the underwater cable from marine operations around the cable, geologic unknowns, and interference with cable maintenance and repair. The company asserts that the order and EA failed to analyze information and evidence that it presented on these significant threats to the cable, and that therefore, an environmental impact statement (EIS) is required. We address PC Landing's specific arguments about risks to the cable below. We consider the general issue of need for an EIS later in this order.

a. Risk of Marine Operations

24. PC Landing argues that the order fails to analyze the significant inherent risks to the underwater cable from dozens of planned marine operations around the cable that are necessary to install and maintain the project. In support, PC Landing asserts that the order authorizes dozens of complex marine operations over a course of years, involving several vessels, less than 200 meters from the cable, including installing, inspecting, maintaining, repairing, and removing the turbines and monitoring equipment. PC

¹⁶ On November 17, 2014, Commission staff approved the District's Interpretation and Education Plan required by Article 413 of the license. *Pub. Util. Dist. No. 1 of Snohomish Co., Wash.*, 149 FERC ¶ 62,113 (2014).

Landing estimates that, over the life of the project, there could be between 50 and 100 planned marine operations around the turbines. PC Landing adds that the order identifies several types of unplanned operations that could arise, including unscheduled maintenance in the event of failure of environmental monitoring equipment, emergency shutdown of the turbines, removal and reinstallation of the turbines, freeing or recovery of snagged fishing gear, righting a toppled turbine, or mitigating seafloor scouring.

25. PC Landing points out that the order acknowledges staff's finding in the EA that dropping a turbine or an anchor on the cable has the potential to damage the cable and that increasing the distance between the cable and turbines would provide an increased margin of safety.¹⁷ PC Landing maintains that all of these planned and unplanned operations present a tangible and serious risk of "anchor incursions" that could damage the cable, and that the order and the EA fail to "consider or analyze the sheer number of marine operations associated with the Project, both planned and unplanned, and consider the efficacy of the conditions in practical terms, when faced with frequent and repeated operations, over the course of the license term."¹⁸ The company contends that the failure to quantify this risk violates NEPA's requirements to examine direct and indirect impacts for significance and to prepare an EIS addressing significant impacts.

26. We find no basis for PC Landing's argument. The license order and EA considered the possible risks of the project to the cable from both planned and unplanned marine operations and found them insignificant.¹⁹ In response to PC Landing's concerns, Article 411 of the license requires a hazard identification and risk assessment plan to minimize potential hazards to the cable. Among other things, the plan must include procedures for installing, maintaining, and removing the project turbines that uses "live boat" techniques (those that do not require the use of anchoring) for all marine operations. The only exception is for operations during the horizontal directional drilling and connection of the trunk cables, which will occur more than a mile away from the cable. The plan must include criteria for weather and wave conditions, redundancy in the use of equipment and vessels, criteria for aborting the operations, and establishment of a "port of refuge" located at least two kilometers away from the cable in the event of adverse weather or other events. These measures make it highly unlikely that marine operations associated with the project would result in damage to the cable.

¹⁷ PC Landing's April 18, 2014 request for rehearing at 9.

¹⁸ *Id.*

¹⁹ *See* License Order, 146 FERC ¶ 61,197 at PP 25-28; EA at 129-31.

27. PC Landing acknowledges the order's reliance on the no-anchor, live boat, and hazard identification and risk assessment plan conditions, but maintains that the "failure to quantify the risk posed by numerous planned and unplanned marine operations violates NEPA's requirements that direct and indirect impacts be examined for significance and an [EIS] be prepared addressing significant impacts."²⁰

28. Initially, it is not clear that the potential risk of damage to the cable that might result from these operations would be considered an environmental impact that must be analyzed under NEPA. The Supreme Court has observed that NEPA requires "a reasonably close causal relationship between a change in the physical environment and the effect at issue," and has stated that "a *risk* of an accident is not an effect on the physical environment."²¹ In any event, contrary to PC Landing's assertion, NEPA does not require the Commission to attempt to quantify the risk of damage to the cable that might result from the project. NEPA requires a federal agency to identify and consider the environmental impacts of a proposed action, and allows the agency to require measures that would reduce those impacts to a level that is considered insignificant.²² Unplanned operations could include unscheduled maintenance triggered by failure of environmental monitoring equipment, emergency shutdown, removal and reinstallation of the turbines, actions related to seafloor scour, removal of derelict fishing gear, and actions related to the possibility that turbines may tilt or topple. PC Landing estimates that between 50 and 100 unplanned operations could occur over a ten-year license term. If correct, this would result on average, in 10 or fewer operations per year, which does not strike us as numerous or significant. The risks associated with such operations are addressed in the EA and the order. The measures required in the license minimize those risks.

29. PC Landing further maintains that the license order and EA do not consider that these operations would take place in the "high-current and turbulent environment of

²⁰ PC Landing's April 18, 2014 request for rehearing at 10.

²¹ *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983) (emphasis in original).

²² See *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (wetlands mitigation plan for loss of wetlands adequately supported Army Corps' determination that wetlands would not be significantly affected); Question 40, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026 at 18038 (March 23, 1981) (where mitigation measures are an integral part of the proposed action, an agency may rely on them in determining that the overall effects would not be significant).

Admiralty Inlet, which was chosen for a tidal energy experiment precisely because of its energetic currents.”²³ In essence, PC Landing argues that because of this environment, the “no-anchor condition will not prevent action in an emergency,” and “compliance cannot be reasonably assured.”²⁴ PC Landing argues that, as a result, the order “cannot reasonably rely upon the no-anchor condition to fully mitigate the potential risks” to the cable.²⁵

30. The EA specifically describes Admiralty Inlet as “a constricted channel in Puget Sound [that] by its nature, experiences strong tidal currents and significant vertical mixing.”²⁶ The license order states that the project’s OpenHydro system is designed to generate electricity using both ebb and flow tides, and provides specific information on the range of flows that will allow the turbines to operate about 70 percent of the time.²⁷ Thus, PC Landing is incorrect in its assertion that the order and EA failed to consider the tidal conditions under which project operations would occur. Nor does it follow that compliance cannot reasonably be assured. PC Landing’s argument is actually nothing more than an acknowledgement that a vessel might drop anchor in an emergency. The fact remains that the District is required to comply with the conditions of its license and these conditions are sufficient to minimize risk to the cable. There is no requirement in NEPA or the FPA that all risks be completely eliminated before a project can be authorized.

31. PC Landing argues that the order and EA “appear to assume that all marine operations over the course of the ten-year license term can occur ‘only under the most favorable weather and tidal conditions’ without apparent exception.”²⁸ PC Landing maintains that this assumption is not substantiated or realistic, is not backed up with analysis of real-world conditions, meteorological data, or tidal analysis demonstrating that operations can occur on the required schedule under favorable weather and tidal conditions. PC Landing adds that the order and EA do not explain how emergency or

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ EA at 27.

²⁷ License Order, 146 FERC ¶ 61,197 at P 15.

²⁸ PC Landing’s April 18, 2014 request for rehearing at 12, citing License Order, 146 FERC ¶ 61,197 at P 111.

urgent project operations would be harmonized with unpredictable ocean and atmospheric conditions. PC Landing concludes that the end result is “inherent uncertainties in required license conditions and the potential for increased risk” to its cable that the order and EA do not analyze.²⁹

32. PC Landing misunderstands the order and the license requirements. The order does not assume that conditions will always be favorable; rather, it relies on the license requirement that operations may not be undertaken unless the specified weather and tidal conditions are present. If conditions are unfavorable, operations must be deferred until they improve. As a result, there is no need for an analysis of possible weather and tidal conditions.

33. PC Landing argues that the order and EA failed to consider or analyze a 2009 anchor incident in Admiralty Inlet, just west of the project location. PC Landing asserts that, as reflected in its comments, a U.S. Coast Guard vessel based in Seattle, the Polar Sea, dropped anchor in a marked no anchor zone after an incident with the rigging on a small passenger launch, dragged the anchor across the sea bottom, and snagged a segment of a submarine cable, causing a fault.³⁰ PC Landing claims that this incident demonstrates that even well-prepared and experienced mariners experience mishaps necessitating anchor use that threatens cables, and that the failure to acknowledge or analyze this incident in the order and EA violate NEPA.

34. We disagree. As discussed in the license order, the EA analyzed the actions that would be required if a cable fault occurred near the location of the turbines.³¹ Therefore, it was not necessary to analyze this particular incident involving a cable fault in Admiralty Inlet. In addition, the order discusses the EA’s finding that it is highly unlikely that a cable fault would occur at the turbine location for reasons not related to the project.³² Specifically, the EA estimates that the expected fault rate of the cable in the vicinity of the turbines is 0.1 percent, or 0.001 faults per year.³³ The order and EA further conclude that if such a repair was needed, PC Landing could complete it.³⁴ Thus,

²⁹ *Id.* at 13.

³⁰ *Id.*, citing PC Landing’s comments at 21-22 (filed Aug. 1, 2012).

³¹ License Order, 146 FERC ¶ 61,197 at P-83; citing EA at 130-31.

³² License Order, 146 FERC ¶ 61,197 at P 84.

³³ EA at 130 n. 84.

³⁴ *Id.*

the order and EA adequately considered the risk of a cable fault near the location of the turbines, and a discussion of the Polar Sea incident was not required.

35. PC Landing asserts, without elaboration, that the Commission failed to consider the fact that neither the District nor OpenHydro (the turbine manufacturer) has experience with installing marine hydrokinetic turbines near an active submarine communications cable, as this is the first known proposed siting in the world.³⁵ As discussed in the EA, however, OpenHydro has successfully deployed undersea turbines on three occasions, two of which involved larger turbines and heavier subsea bases than would be installed at Admiralty Inlet.³⁶ Without more, PC Landing's assertion does not provide a basis for us to reconsider our finding that the conditions of the license are adequate to ensure that installing, maintaining, and removing the project will not present a material risk to the cable.³⁷

36. PC Landing argues that the EA and license order fail to address the "extensive evidence" it provided "demonstrating the inherent risks involved in marine operations," or the importance of evidence regarding the "documented and extensive difficulties the [District's] contractors have experienced with marine operations in Admiralty Inlet."³⁸ In support, PC Landing states that the order fails to address the reports of Thomas F. Brenneman, a "representative of cable owners with over 30 years of experience in offshore construction, particularly as to submarine fiber optic cables."³⁹ Mr. Brenneman states that unanticipated events frequently occur, resulting in injury and significant property damage, and that it is important to allow an adequate separation distance between the planned infrastructure and an existing undersea cable. Among other things, Mr. Brenneman discusses the International Cable Protection Committee (ICPC) recommendations and the need for greater separation between the cable and the turbines.

³⁵ PC Landing's April 18, 2014 request for rehearing at 14.

³⁶ EA at 129.

³⁷ License Order, 146 FERC ¶ 61,197 at PP 40, 131.

³⁸ PC Landing's April 18, 2014 request for rehearing at 14.

³⁹ *Id.* PC Landing refers to one of these reports as "Brenneman I" but provides no citation or date of filing for this or any other report by Mr. Brenneman. *Id.* at 15, notes 53-56. We presume the referenced document is the one that appears as Appendix A to PC Landing's August 1, 2012 response to Commission staff's request for additional information, although it is possible that the company intended to reference a different filing.

Both the license order and the EA address these issues and conclude that the risk to the cable is not significant.⁴⁰ Therefore, PC Landing's assertion is incorrect.

37. PC Landing further asserts that the license order fails to address the analysis of Captain Richard P. Fiske, U.S.N. (Ret.), who opined that a no-anchor plan "presents a not-insignificant challenge," is "implausible" and "seems to be overly optimistic," thus failing to mitigate the risks to the cable.⁴¹ However, Captain Fiske did not provide any information that would cause us to conclude that the plan could not be used. Both the order and the EA discuss the techniques that will allow the District to install and remove the turbines without the use of anchors and concluded that these measures would adequately minimize the risk to the cable.⁴²

38. PC Landing adds that the order fails to address Captain Fiske's statement that the District has already caused substantial risk to the cable "in several failed operations on the sea bottom attempting to investigate the geology of the Project side, despite knowledge of the presence of the cable."⁴³ In support, PC Landing cites a consultant's report stating that anchor dragging could risk disturbing or damaging the cable, and notes that the District subsequently attempted to obtain a seafloor sample by dragging a four-bladed anchor across the seabed adjacent to the cable. Captain Fiske concluded that this "is most disturbing and is cause for extra caution in approval of any further operations" near the cable.⁴⁴ PC Landing does not indicate the distance from the cable where the sampling occurred, and does not suggest that the sampling activity disturbed or damaged the cable. We find no basis for accepting PC Landing's assertion that this information "confirms that the Project creates a potential for significant adverse impacts" to the cable.⁴⁵

39. PC Landing argues that the District has experienced significant difficulties in marine operations in Admiralty Inlet during its investigations for preparing a license application, and maintains that these operations are analogous to the operations that are

⁴⁰ See License Order, 146 FERC ¶ 61,197 at PP 77-81, EA at 126-30.

⁴¹ PC Landing's April 18, 2014 request for rehearing at 16.

⁴² See License Order, 146 FERC ¶ 61,197 at PP 78-79; EA at 127-29.

⁴³ PC Landing's April 18 request for rehearing at 17.

⁴⁴ *Id.* at 18.

⁴⁵ *Id.*

proposed for installing, monitoring, and maintaining the project. In support, PC Landing does not discuss these difficulties in any detail, but maintains that they include failed seafloor sampling, failed surveys, inability to navigate remotely operated vehicles due to high currents, lines becoming entangled with boulders, and problems with visibility at distances of more than a meter.⁴⁶ PC Landing contends that these experiences demonstrate the “real-world” operational risk that the order and EA failed to consider in determining whether the conditions adopted will be effective.

40. Simply listing difficulties alleged to have been encountered during the applicant’s pre-application sediment sampling and video surveys to characterize the seafloor and habitat, without more, is insufficient to cause us to conclude that the project cannot be safely installed, operated, and removed.⁴⁷ As discussed in the EA, OpenHydro has successfully deployed turbines using the “live-boat” techniques on three occasions, with an accuracy of between 2 and 3.4 meters. Two of those occasions involved larger turbines and heavier subsea bases than those that would be installed at Admiralty Inlet, in areas of much stronger currents.⁴⁸ Staff concluded that installing the turbines using the “live-boat” techniques and under the most favorable weather and tidal conditions (wind speed less than 20 miles per hour, waves less than 2 meters, with a tidal velocity window of less than 1.5 knots, and during a running tide) would further ensure historical accuracy in installing the turbines and minimizing any potential for inadvertently dropping the turbines on the cable. In addition, each turbine can be installed in less than two hours.⁴⁹

41. PC Landing argues that in an emergency, “protection of life, a vessel, or the turbines would supersede a prior assurance not to utilize an anchor.”⁵⁰ In support, PC Landing cites the conclusion of its cable industry expert, Mr. Davis, that “despite any restrictions of a permit the captain of a vessel will use an anchor if it is necessary and

⁴⁶ *Id.*, citing Appendix C of PC Landing’s August 1, 2012 response to staff’s August 16, 2012 request for additional information.

⁴⁷ Except for seafloor sampling, PC Landing provides no discussion or argument concerning the significance of these difficulties. Arguments concerning failed surveys, inability to navigate in high currents, entangled lines, and visibility problems are therefore waived. *See OMYA, Inc.*, 111 F.3d at 179.

⁴⁸ EA at 129.

⁴⁹ *Id.*

⁵⁰ PC Landing’s April 18 request for rehearing at 19.

required to avert an incident affecting the ship, its crew, or others.”⁵¹ PC Landing contends that the only effective protection of the cable is siting the project an adequate distance from the cable and that the order fails to counter Captain Fiske’s conclusion that “an assertion that anchors will not be used under any circumstances ‘is simply not credible.’”⁵² PC Landing maintains that, as a result, the order and EA failed to evaluate scope and extent of these significant impacts as required by NEPA.

42. We recognize that there is no guarantee that anchors will never be used or that the cable will never be disturbed or damaged. However, NEPA does not require such a guarantee. Rather, it requires sufficient information and analysis to determine what the environmental effects of a proposed action will be, and whether or not they will be significant. In this case, while the license conditions (including the use of “live-boat” techniques that do not require anchoring) will not eliminate all conceivable risk, they are sufficient to mitigate the potential risk to the cable and reduce it to a level that is not significant. Nothing further is required and there is no need for an EIS.

b. Risk of Geologic Unknowns

43. PC Landing argues that the order fails to properly address the impact of significant geological unknowns on the project’s risks. In support, the company states that its geologist, Mr. Fader, reviewed the seabed data in the District’s application and concluded that the sub-gravel sediments in Admiralty Inlet and their properties are unknown. Mr. Fader further concluded that this could make the site more vulnerable to differential settling and seabed scour that may require relocating, removing, or leveling the turbines, resulting in increased vessel traffic.⁵³ PC Landing acknowledges that the order addresses the potential for scour to affect the cable, but contends that the Commission misconstrues its concerns regarding the geologic substrate. Instead, PC Landing asserts that the order fails to address its “fundamentally different” concern “that geologic unknowns will result in turbine tilting, toppling, or differential settlement, resulting in more unplanned, unknown, risky marine operations to address that situation.”⁵⁴

44. As we discussed in the license order, staff reviewed the available data and determined that relocating the turbines farther away from the cable was not necessary,

⁵¹ *Id.*, citing Appendix C to PC Landing’s filing of October 15, 2012.

⁵² PC Landing’s April 18 request for rehearing at 20.

⁵³ *Id.* at 21.

⁵⁴ *Id.*

because the potential for scour around the turbines' foundation will be limited and the rate of erosion will be gradual and unlikely to reach the cable.⁵⁵ In addition, the turbine footings will be designed to prevent penetration of the cobble-pavement seabed, and tilt sensors and monitoring measures will be used to ensure that any scouring that may occur around the turbine foundation is measured and monitored and can be corrected before it affects the cable. Given these findings and protective measures, there is no basis for PC Landing's assumption that geological unknowns will lead to increased marine operations that will present a significant risk to the cable.

45. PC Landing argues that, by requiring that tilt meters be installed, the order acknowledges the possibility of tilt and settling, and notes that the EA also acknowledges the possibility of uneven settling and tilt.⁵⁶ PC Landing adds that the EA states that if scour is found to be a problem, scour protection measures (such as scour skirts or scour-resistant materials) could be installed. PC Landing contends that, contrary to the order's assessment, it is not seeking a "worst case" analysis but rather an evaluation of the "foreseeable (yet unknown) marine operations to respond to such an event."⁵⁷

46. As discussed above, the license includes conditions to reduce the risk to the cable from planned marine operations to install, monitor, maintain, and remove the turbines. These conditions would apply to unplanned marine operations as well, in the unlikely event that they might be needed to address issues related to tilt, settling, or scour. As we explained in the license order, NEPA requires the Commission to consider the direct, indirect, and cumulative effects of a proposed action that are reasonably foreseeable; it does not require a detailed analysis of the possibility that speculative, unknown and unplanned marine operations might be needed to address a risk that is not significant.⁵⁸

c. Risk to Cable Maintenance and Repair

47. PC Landing argues that the project turbines will substantially interfere with its operations to repair the cable in the event of a cable break or fault. The company notes that the order acknowledges that a "non-standard" repair would be required, increasing cost and outage time and degrading the signal transmitted on the cable, but maintains that the order fails to account for the increased likelihood that a fault will occur or the risks of

⁵⁵ License Order, 146 FERC ¶ 61,197 at P 73; EA at 32-34.

⁵⁶ PC Landing's April 18 request for rehearing at 23.

⁵⁷ *Id.* at 23; *see also* pp. 24-25.

⁵⁸ License Order, 146 FERC ¶ 197 at P 117.

the non-standard cable repair close to the turbines.⁵⁹ PC Landing contends that the order fails to address the significant risk that, according to Mr. Brenneman, any direct recovery operation by a remotely operated vehicle would be too difficult to perform and the repair would have to be done outside of the area.

48. This is incorrect. As PC Landing acknowledges, the order specifically acknowledges the possibility that, if a break or fault occurs near the turbines, the repair would have to be done outside of the area using two cuts and an additional length of spliced cable, increasing the cost of repairs and the time of cable outage.⁶⁰ The order also discusses staff's findings in the EA regarding this non-standard type of repair.⁶¹ Thus, the order and the EA did address this risk. We find no basis for PC Landing's contention that the order "minimizes the burden and hardship" of these repairs⁶² or that the only acceptable solution is to remove all risk by relocating the turbines farther away from the cable.⁶³

3. Separation Distance from the Project to the Cable

49. PC Landing maintains that the license order fails to reconcile the approval of the project with available guidelines, recommendations, and analyses on separation distances between submarine cables and marine energy projects, all of which provide for significantly greater separation than 170 meters in order to protect the cable and allow for

⁵⁹ PC Landing's April 18 request for rehearing at 26.

⁶⁰ License Order, 146 FERC ¶ 61,197 at PP 83-84.

⁶¹ *Id.*, citing EA at 130-31.

⁶² PC Landing's April 18 request for rehearing at 27.

⁶³ PC Landing argues that the logic of the license order is that there is "no risk to the cable" because repairs "can always be performed by doing the repair away from the cable." *Id.* PC Landing then states that the "necessary implication of this logic is that separation is irrelevant and no location is too close." *Id.* This is incorrect. We did not state in the license order that there was "no risk" to the cable; rather, we found that needed repairs to the cable are "unlikely, but are not prohibited by the installation and operation of the project" and that "staff adequately considered the repair-related effects" to the cable. License Order, 146 FERC ¶ 61,197 at P 84. There is nothing in the order to support PC Landing's suggestion any location would be acceptable, no matter how close. To the contrary; in that order we approved the District's proposal to move the turbines farther away from the cable in response to PC Landing's concerns.

repairs in the event of a fault or break. PC Landing maintains that the failure of the order and EA to analyze this relevant expert and scientific information violates NEPA.⁶⁴

50. PC Landing states that it provided a total of six relevant resources analyzing safe separation distance both nationally and internationally, and that all of them endorse separation of at least 500 meters. They include the International Cable Protection Committee (ICPC) Recommendation 13.2, the UK Crown Estate Guideline Number 6 and its supporting Proximity Study, the North American Submarine Cable Association's endorsement of Guideline No. 6, a UK Marine Management Organization planning document, and the State of Oregon's Territorial Sea Plan. PC Landing maintains that the license order "errs outright" in stating that these guidelines are "transferred from other industries and locations,"⁶⁵ and that the Commission's "failure to apply and grapple with the substance" of this guidance violates NEPA.⁶⁶

51. This is incorrect. The sources cited by PC Landing are guidelines, not requirements, with varying degrees of applicability or relevance. As noted in PC Landing's rehearing request, ICPC Recommendation 13.2 states that it was "developed specifically for offshore wind projects," but adds that "the process for stakeholder consultation and consideration for safety zones can apply equally well to other renewable energy projects (e.g. tidal, wave) and other seabed infrastructure projects."⁶⁷ As PC Landing also acknowledges, the UK Guideline 6 "applies by its terms to wind farms," although the North American Marine Cable Association "has endorsed its application to tidal turbine installations."⁶⁸ Similarly, the UK Proximity Study for Guideline 6 "focused on wind energy" but "says it would also apply to tidal energy installations."⁶⁹ The UK Marine Management Organization planning document appears to apply generally to "all seabed uses" for marine planning in England.⁷⁰ Oregon's Territorial Sea Plan concerns projects in Oregon, not Washington. In short, a detailed analysis of these guidelines is

⁶⁴ PC Landing's April 18 request for rehearing at 27-28.

⁶⁵ *Id.* at 30, citing License Order, 146 FERC ¶ 61,197 at P 114.

⁶⁶ *Id.* at 31.

⁶⁷ *Id.* at 29.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

not required in this case because they are not directly applicable. Nonetheless, as the Commission explained, the recommendations contained in these guidelines assisted Commission staff in assessing the risks to PC Landing's cable.⁷¹ Based on that site-specific assessment, which included consultations with the FCC's Public Safety and Homeland Security Bureau and the Naval Seafloor Cable Protection Office, the Commission found that installation and operation of the project in accordance with the conditions of the license would not present a material risk to PC Landing's cable.⁷²

52. PC Landing argues that the order fails to properly account for a federal advisory committee process currently underway to develop standards for separation between marine hydrokinetic projects and submarine cables. PC Landing acknowledges that, as noted in the EA, a FERC representative is participating in this process.⁷³ However, PC Landing maintains that “[w]ithout the necessary expert guidance, the Commission should not rely on a site-specific determination that risks are adequately mitigated, because, as the FCC has made clear, the expert guidance to make such a decision does not exist with either agency.”⁷⁴ In support, PC Landing relies on the FCC's letter to the Commission of April 22, 2013, which states that “neither FERC nor the FCC currently has sufficient expert guidance available to resolve the important issue of appropriate separation distance between undersea communication cables . . . and undersea renewable energy projects.”⁷⁵ PC Landing contends that this letter “directly undermines any site-specific or systemic decision on separation” that the Commission might make before the committee's work is done or in reliance on the FCC's earlier statements.

53. PC Landing misinterprets the FCC's letter. The FCC invited the Commission to nominate a representative for the committee, noted the increasing importance of the separation issue, and stated its expectation that the committee work would develop clearer advance guidance for both agencies. The FCC did not mention its earlier correspondence regarding the Admiralty Inlet project or suggest that a decision on the application should await the committee's work. PC Landing's argument to the contrary is without merit.

⁷¹ License Order at P 80.

⁷² *See* License Order at PP 71-93; EA at 126-131.

⁷³ *Id.* at 34.

⁷⁴ *Id.* at 35.

⁷⁵ Letter from David Turetsky, FCC, to Jeff Wright, FERC, at 2 (filed May 28, 2014).

54. PC Landing maintains that a Commission decision before the committee process is complete risks setting an adverse precedent, either legally or in practice, that 170 meters will be perceived “as a potentially safe, acceptable distance for future projects.”⁷⁶ The company adds that NEPA requires the Commission to consider the precedential value of its decision in determining whether potential impacts are significant. PC Landing argues that, by stating that the license order “does not necessarily set precedent” for future proposals, the Commission “leav[es] open the reality that this Project will set a future precedent,” yet fails to properly analyze this issue.⁷⁷

55. As explained in the license order, the Commission analyzes proposed projects on a site-specific basis to establish appropriate license conditions. Any future project would also be subject to a site-specific analysis. Without knowing the facts of a future case, it is difficult to assess whether the license order for the Admiralty Inlet Project could be used as precedent. In any event, we find no basis for concluding that the possible precedential value of this case could lead to significant environmental impacts so as to require an EIS. As noted in the license order, there is currently only one tidal energy project in Alaska being studied under a preliminary permit, and the Commission’s experience is that most preliminary permits do not result in the development of a license application.⁷⁸ Moreover, we agree with staff’s determination that, although it is possible that additional hydrokinetic devices might be installed adjacent to undersea communication cables, their

⁷⁶ *Id.*

⁷⁷ *Id.* at 36, citing License Order, 146 FERC ¶ 61,197 at P 80.

⁷⁸ License Order, 146 FERC ¶ 61,197 at P 127 and n. 111. In addition to the preliminary permit for the tidal energy project in Alaska noted in the license order (the East Foreland Tidal Energy Project No. 13821), there are three issued preliminary permits for the study of potential wave energy projects in Pacific coastal waters; one off the coast of Alaska (the Yakutat Alaska Wave Energy Project No. 14438, issued on Jan. 30, 2013), and two off the coast of California (the Point Estero Wave Park No. 14584 and the Estero Bay Wave Park No. 14585, both issued on Oct. 28, 2014). There is also one applicant pursuing a license from the Commission and a lease from the Bureau of Ocean Energy Management (of the Department of the Interior) for a wave energy project off the coast of Oregon (the Pacific Marine Energy Test Center Project No. 14616; *see* notice of intent and pre-application document filed April 15, 2014). Wave energy projects use different technology from tidal energy projects.

development is not sufficiently well defined to be reasonably foreseeable at this time.⁷⁹ In these circumstances, there is no need for an EIS.⁸⁰

4. Tribal Treaty Rights

56. Tulalip argues that the Commission erred in concluding that the Admiralty Inlet Project will not adversely affect the Tribes' treaty rights, and that this conclusion is not supported by substantial evidence. Tulalip states that the Tribes have treaty-reserved rights under the Treaty of Point Elliot,⁸¹ reserving their right to take fish in usual and accustomed fishing areas. They maintain that because Admiralty Inlet is an adjudicated usual and accustomed fishing area, the Tribes' right of access to these fishing grounds may not be infringed.⁸² They argue that, as a result "the Commission simply may not approve a project that limits Tulalip's access to fish at any usual and accustomed area reserved by treaty."⁸³ They contend that the project would violate their treaty rights

⁷⁹ License Order, 146 FERC ¶ 61,197 at P 127; EA at 84.

⁸⁰ PC Landing points out that the Commission recently issued an order directing the filing of standards to address physical risks to the bulk-power transmission system, and suggests that it was arbitrary for the Commission to require that standards be adopted to protect the electric grid while "dismiss[ing] the applicability of available guidelines and recommendations and refus[ing] to await the outcome of the [FCC advisory committee] process." PC Landing's April 18 request for rehearing at 36; *see Reliability Standards for Physical Security Measures*, 146 FERC ¶ 61,166 (2014). This is incorrect. As we have seen, the available guidelines are not directly applicable, and there is no reason why the Commission cannot authorize the testing of experimental hydrokinetic technology on a case-by-case basis while separation standards for communications cables are being considered. Moreover, the Commission's recognition of the need for reliability standards to address physical vulnerabilities to the nation's power grid does not affect that conclusion. The nation's power grid continues to operate while proposed reliability standards are being developed and considered for Commission approval in a rulemaking proceeding.

⁸¹ *See* 12 Stat. 927 (1855); and *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978).

⁸² Tribes' April 18, 2014 request for rehearing at 7, *citing United States v. Washington*, 384 F. Supp 312, 401 (W.D. Wash. 1974).

⁸³ *Id.*, *citing Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

because the potential for fishing gear or anchor lines getting caught in the project's turbines would effectively close this area for fishing.

57. In the license order, we noted that the known fishing areas in Admiralty Inlet are located several kilometers or more from the proposed turbine sites and the license contains no prohibitions on the right to fish in and around project waters. We also considered the fact that the project will be short-term, will occupy an extremely small portion of Admiralty Inlet, and no travel or navigational restrictions on project waters were needed. We therefore found that the license would not restrict the Tribes' right to access their treaty-reserved fishing areas.⁸⁴

58. The Tribes take issue with this finding, pointing out that ceremonial and subsistence fishing for salmon do occur in the project area, and that ceremonial, subsistence, and commercial fishing for a variety of other species occur in Admiralty Inlet almost year round. They state that they are co-managers of fisheries in Admiralty Inlet with federal and state resource agencies, and argue that their voluntary management-based agreement to curtail commercial salmon harvesting in Admiralty Inlet is not a relinquishment of their treaty rights. They add that with advances in harvest management, there have been ongoing discussions over opening commercial salmon harvesting in Admiralty Inlet and state that they expect this will occur in the future. They contend that the Commission's conclusion that treaty-fishing does not occur in the project area is not supported by substantial evidence.

59. We accept the Tribes' clarification that subsistence and ceremonial fishing for salmon occur in Admiralty Inlet, and that subsistence, ceremonial, and commercial fishing for other fish species occur in Admiralty Inlet almost year round. The Tribes do not indicate at what point in the future they expect commercial salmon harvesting in Admiralty Inlet might resume. However, as noted in the license order the project will be short-term, will be removed at the end of the license, and will occupy an extremely small portion of Admiralty Inlet. Also as stated in the license order, there will be no restrictions on travel or navigation in the project area and the license does not restrict the Tribes' right to fish in and around project waters. Thus, the project will not impair the Tribes' access to their usual and accustomed fishing grounds.

60. The Tribes nevertheless contend that, because the project will interfere with their use of long-line fishing in the project area, it will effectively eliminate access to a usual and accustomed fishing area and will significantly interfere with their reserved treaty rights. They note that they provided comments in 2013 stating that Tulalip fishermen currently deploy long-line gear for halibut and other ground fish in the vicinity of the

⁸⁴ License Order, 146 FERC ¶ 61,197 at PP 96, 100.

project. According to the Tribes, this involves laying half a mile of longline with up to 500 hooks on the bottom, and the line drifts with the current on deployment and also on retrieval. They add that future salmon fisheries will employ gear which will conflict with the turbines. They point out that, in the EA, staff recognized that Tribal and other fishermen would not likely want to anchor or use nets, dredging, or long-line fishing in the immediate area of the turbines and power cables to avoid losing the valuable gear.⁸⁵ Based on their comments and the EA's conclusion, the Tribes argue that their treaty rights will be significantly and adversely affected, and the Commission's conclusion to the contrary is not supported by substantial evidence.

61. Contrary to the Tribes' assertion, the project does not eliminate access to the project area for any type of fishing. Rather, it presents some risk to the Tribes and others of loss of fishing gear if long-line fishing is used in the immediate area of the project. In essence, the Tribes maintain that in order for their reserved treaty rights to be protected, there can be no effect of any kind, however small, on their right to fish everywhere in Admiralty Inlet using any and all available methods. In our view, this goes beyond their reserved rights under the treaty, which is "the right of taking fish at usual and accustomed grounds and stations."⁸⁶ In this case, the Tribes' right of access to the area has not been restricted and they remain free to take fish in project waters.

62. Relying on *Muckleshoot Indian Tribe v. Hall*,⁸⁷ the Tribes argue that it is not permissible to take a small portion of a tribal usual and accustomed fishing ground, as opposed to a large portion, or to limit access to a tribal fishing place, without express Congressional authority. They point out that in that case, the court issued a preliminary injunction enjoining construction of a marina and ordering the U.S. Army Corps of Engineers to suspend any permit or approval for the project on the ground that it would eliminate a portion of a tribal treaty fishing area. The project would occupy one-eighth of one square mile of Puget Sound and would occupy less than one percent of the Tribes' usual and accustomed fishing areas in Puget Sound, but the court found no basis for concluding that the marina would not preclude meaningful use of the fishing area. Similarly, they point out that in *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*,⁸⁸ the court upheld a Corps decision to reject a permit for a fish farm that would have required about 0.84 acres in total surface area within usual and accustomed

⁸⁵ EA at 126.

⁸⁶ Article V, Treaty of Point Elliot, 12 Stat. 927 (1855).

⁸⁷ 698 F. Supp. 1504 (W.D. Wash. 1988).

⁸⁸ 931 F. Supp. 1515 (W.D. Wash. 1996).

fishing areas of the Lummi Nation, rejecting the proponent's argument that the effect on treaty right fishing would be de minimis. The Tribes conclude that based on these cases, the Commission's decision to approve the Admiralty Inlet project "will effectively eliminate access to a tribal usual and accustomed fishing area" in violation of the Treaty of Point Elliott.⁸⁹

63. We disagree. Although the marina and fish farm at issue in those cases would occupy only a relatively small part of the Tribes' usual and accustomed fishing areas, they were both surface installations that would have precluded use of the waters where those structures were to be located. In contrast, the Admiralty Inlet Project is located on the ocean floor and does not restrict navigation or fishing in and around project waters. The only effect on tribal fishing that the Tribes have identified is a potential loss of fishing gear if long-line fishing occurs in the immediate area of the turbines. This does not constitute a loss of access to the fishing area. We therefore reaffirm that the project will not significantly affect the Tribes' reserved fishing rights.

5. Trust Responsibility to the Tribes

64. The Tribes argue that the Commission erred in failing to consider its trust responsibility to the Tribes. They point out that the Commission has acknowledged this responsibility through section 2.1c of its regulations,⁹⁰ and the U.S. Court of Appeals for the Ninth Circuit has affirmed its applicability to the Commission.⁹¹ They maintain that the Commission violated this trust responsibility because it did not act in the Tribes' interests, but instead "has brushed aside Tulalip's documented concerns regarding impacts to species and access to treaty fishing rights."⁹² They add that, at a minimum, the Commission erred by failing to consider whether the project is consistent with its trust obligation. They contend that, on rehearing, the Commission should protect the Tribes' treaty rights and trust resources by denying the license application.

65. Contrary to the Tribes' assertion, we have carefully considered their concerns in this proceeding. As we explained in the license order, the FPA gives Indian tribes a

⁸⁹ Tribes' April 18 request for rehearing at 13.

⁹⁰ See Policy statement on consultation with Indian Tribes in Commission proceedings, 18 C.F.R. § 2.1c (2014).

⁹¹ See *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990).

⁹² Tribes' April 18 request for rehearing at 15.

special status in the licensing process parallel to that of resource agencies.⁹³ In addition, as we have acknowledged in previous cases, the Commission is “subject to the United States’ fiduciary responsibility towards Indian tribes, which, in essence, consists of acting in the interests of the tribes.”⁹⁴ However, we exercise this responsibility in the context of the FPA, and we are not required to “afford Indian tribes greater rights than they would otherwise have under the FPA and its implementing regulations.”⁹⁵ We have considered the Tribes’ arguments and concerns regarding its reserved treaty rights and the effects of the project on fish, marine mammals, and threatened and endangered species throughout this proceeding, as part of our environmental review under NEPA and our licensing determination under the FPA. As a result, we have not considered it necessary to include a specific discussion of this trust responsibility in the EA or the license order. In any event, we find no basis for the Tribes’ assertion that the trust responsibility would require us to deny a license in this case.

6. Monitoring and Mitigation Plans

66. Tulalip argues that the impacts on fish and marine mammals from the project are uncertain, and the Commission erred in relying on “speculative and untested monitoring plans as mitigation” for those effects.⁹⁶ The Tribes contend that the “near-turbine monitoring plan appears to have been developed primarily for monitoring marine mammals” and “is not capable of detecting behavior changes of fish.”⁹⁷ They add that “sonar would be set up for monitoring large marine mammals limiting its usefulness for monitoring fish species which are much smaller.”⁹⁸ They maintain that “test fishing” is needed to verify which species the sonar are detecting, “low visibility” will limit video monitoring, and “turbulence from the turbine will prevent acoustic monitoring of any fish

⁹³ License Order, 146 FERC ¶ 61,197 at P 95.

⁹⁴ *Minnesota Power & Light Co.*, 75 FERC ¶ 61,131 (1996).

⁹⁵ *City of Tacoma, Washington*, 71 FERC ¶ 61,381, at pp. 61,492-61,493 (1995), *aff’d sub nom. Skokomish Indian Tribe v. FERC*, 121 F.3rd 1303, 1308-1309 (9th Cir. 1997); *see Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990 (affirming Commission’s denial of tribe’s late intervention petition).

⁹⁶ Tribes’ April 18 request for rehearing at 20.

⁹⁷ *Id.*

⁹⁸ *Id.*

when they get close to the turbine.”⁹⁹ They criticize the monitoring as an “experiment” using “equipment and techniques that have not been previously tested in actual studies.” They further maintain that the turbines are unscreened and the monitoring equipment is “unlikely to detect any blade strikes, making it impossible to identify the actual take of each species or even develop a realistic estimate of take needed for enforcing a take permit issued under the ESA.”¹⁰⁰

67. The Tribes’ assertions are unsupported. As discussed in the license order, the Commission consulted with NMFS under section 7(a)(2) of the ESA regarding the project’s effects on ESA-listed fish and marine mammal species. That section requires the Commission to ensure that its actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of their designated critical habitat. NMFS concluded that, although the project may adversely affect some listed fish and marine mammal species, it would not jeopardize their continued existence or adversely modify their designated critical habitat. NMFS provided its biological opinion including an incidental take statement, measures to minimize incidental take, and conditions to implement those measures. These measures require that the licensee: (1) monitor and evaluate sound levels and mitigate adverse sound effects according to the Acoustic Monitoring and Mitigation Plan, (2) monitor and evaluate the risk of blade strike and mitigate for any effects according to the Near-Turbine Monitoring and Mitigation Plan, and (3) monitor and report on level of take.¹⁰¹

68. The terms and conditions to minimize incidental take require the District to: (1) cease operating and obtain NMFS approval to resume operations if specified sound levels are exceeded, (2) provide preliminary results on sound level monitoring within 120 days of beginning operation, (3) collect data on fish passing through the plane of the turbines sufficient to identify the number and type of at least half of the individual fish passing during operation, (4) provide preliminary monitoring results within 14 days if salmon, steelhead, or rockfish are visibly injured, killed, or seen passing between the turbine blades instead of through the hole in the center of the turbine rotor, (5) contact NMFS within 48 hours if it is reasonably foreseeable that the number of fish crossing the plane of the turbines will exceed the number authorized for take in the biological opinion,

⁹⁹ *Id.* at 20-21.

¹⁰⁰ *Id.* at 21.

¹⁰¹ License Order, 146 FERC ¶ 61,197 at PP 54-55.

and (6) obtain NMFS approval for all changes to the Adaptive Management Framework or the monitoring and mitigation plans affecting ESA-listed species.¹⁰²

69. We find no basis for the Tribes' assertion that these measures rely on speculative or untested monitoring techniques, or that they will not adequately monitor and report on project effects or level of incidental take. As noted in the EA, the District's monitoring plans combine optical and acoustic imaging and sonar based on the latest studies and evaluation of environmental monitoring used for tidal energy projects elsewhere in the United States and the world.¹⁰³ In addition, these plans contain detailed monitoring and reporting requirements and are subject to adaptive management. Finally, if unforeseen problems arise that risk unauthorized injury of threatened and endangered species or marine mammals, the license requires the District to implement procedures to shut down the project.

7. Pilot Licensing Process

70. PC Landing maintains that the Admiralty Inlet Project is not eligible for processing under the Commission's pilot licensing procedures for hydrokinetic projects because is located in a sensitive area as a result of its proximity to the cable and the significant risks to the cable that it poses. The Tribes make a similar argument, contending that Admiralty Inlet is a sensitive marine area because of the multiple ESA-listed species of fish and marine mammals that transit the waterway, making it inappropriate for a pilot project.

71. We disagree. Under the Commission's white paper for licensing pilot hydrokinetic projects, a pilot project should be small, short term, not located in sensitive areas (based on the Commission's review of the record), removable and able to be shut down on short notice, removed, with the site restored, before the end of the license term (unless a new license is granted), and initiated by a draft application in a form sufficient to support environmental analysis.¹⁰⁴ These criteria are guidelines and do not bind the Commission. Moreover, as we explained in the license order, a pilot project's proximity to what might be considered a sensitive resource (developmental or environmental) does

¹⁰² *Id.* P 56.

¹⁰³ EA at 61, 68.

¹⁰⁴ See Licensing Hydrokinetic Pilot Projects at 18, *available at* http://www.ferc.gov/industries/hydropower/gen-info/licensing/hydrokinetics/pdf/white_paper.pdf (issued April 14, 2008, with staff modifications of February 4, 2009, and February 19, 2010).

not mean that the area is “sensitive” unless the project’s effects on that resource are significant and cannot be mitigated.¹⁰⁵

72. In this case, the license includes safeguards that should adequately protect the PC Landing’s cable, including the use of “live-boat” techniques, consultation with PC Landing on specific procedures to avoid conflicts, and adaptive management and monitoring requirements. In addition, the project presents little risk to individual fish and almost no risk to fish populations or fisheries.¹⁰⁶ The license includes monitoring and mitigation requirements to protect fish, and conditions in NMFS’s biological opinion to protect against noise-related effects, turbine strike, and incidental take of ESA-listed species.¹⁰⁷ As discussed throughout this order, there is no basis in the record to support PC Landing’s or the Tribes’ assertions that the project will have significant environmental impacts so as to require an EIS. Finally, the Admiralty Inlet project has been developed over several years, rather than in the expedited time frame envisioned in the pilot process white paper. Additional time was required for the applicant to develop a much larger and more detailed record of pre-license information on the potential effects of the new technology than envisioned in the pilot process guidelines. Therefore, the criteria designed for a shorter process are not directly applicable and need not be strictly applied in this case.

73. Tulalip argues that the Commission must first determine whether an area is sensitive and then, if it is, require that a pilot project be located elsewhere. This is not a correct application of the pilot licensing criteria. As discussed in the license order, these criteria are guidelines, not requirements, and they would not preclude the use of the pilot licensing process in this case.

74. PC Landing argues that, because the District failed to provide it with timely notice of the draft license application, PC Landing was deprived of an opportunity to participate in the pre-filing process and air its concerns regarding the project’s siting. PC Landing adds that this precluded the Commission from considering this conflict with the cable in making its initial determination that the project was eligible for a pilot license. PC Landing argues that, as a result, the Commission’s approval of the District’s request for waivers of the integrated licensing process and expedited processing was based on an incomplete record arising from the District’s failure to comply with the Commission’s

¹⁰⁵ License Order, 146 FERC ¶ 61,197 at P 26.

¹⁰⁶ *Id.* P 96.

¹⁰⁷ *Id.* PP 97-98.

notice requirements, and the Commission should have dismissed the license application and required the District to pursue the project through the standard licensing process.

75. As noted, the licensing process was not expedited in this case. The Commission published notice of the initial preliminary permit application in the Federal Register in June 2006 and issued a notice requesting comments on the District's draft license application on December 30, 2009. Although PC Landing did not respond to those notices, it is clear in this case that the company has had actual notice of the proceeding since it first filed comments in June 2011. Moreover, PC Landing has taken full advantage of multiple opportunities to raise its siting concerns and have them considered in this proceeding. Among other things, Commission staff held a technical meeting on August 6, 2012, focusing almost exclusively on issues that PC Landing raised. In addition, the District determined that it could move the turbines farther away from the cable than originally proposed in response to PC Landing's concerns. While it is desirable to have all interested stakeholders engaged in the pre-filing process as early as possible, we find no basis for PC Landing's assertion that its opportunity to influence the siting of the turbines was foreclosed in this case.¹⁰⁸

8. Consideration of Alternatives

76. PC Landing argues that the EA's analysis of alternatives was "fundamentally flawed because it failed to properly consider all reasonable alternatives."¹⁰⁹ In support, PC Landing maintains that the District and the EA "artificially constrained" the choice of sites by eliminating those with a tidal energy density lower than 1.5 kilowatts per square meter (kW/m²), which "foreclosed the consideration of sites with greater separation" from the cable.¹¹⁰ PC Landing adds that this value is contradicted by the District's consultant, Dr. Polagye, who they claim has "endorsed 1.0 kW/m² as the threshold for a commercially viable project."¹¹¹

¹⁰⁸ PC Landing also maintains, without elaboration, that the District failed to comply with the Commission's regulations regarding notice of the application. *See* PC Landing's April 18 request for rehearing at 46. This argument is not briefed and is therefore waived.

¹⁰⁹ PC Landing's April 18 request for rehearing at 37.

¹¹⁰ *Id.* Kilowatts per square meter is a measure of the amount of energy in a square meter of water as it moves through tidal or other action, such as stream flow.

¹¹¹ *Id.*

77. PC Landing overlooks the record on this issue, which establishes that the District and Commission staff acted reasonably in eliminating sites with lower tidal energy density from further study. As a result, there was no need to include these sites as alternatives in the EA. PC Landing first raised issues about the project's proximity to the cable in its motion to intervene and protest, filed on May 23, 2012. On July 16, 2012, Commission staff informed the parties that it would hold a technical conference on August 6, 2012 to discuss these issues and requested the District to provide additional information related to PC Landing's concerns, including information to assist staff in evaluating "whether there are feasible alternatives to the project site."¹¹² Among other things, staff requested that the District identify potential alternative sites within a 2000 meter radius of the proposed site that would meet specified siting criteria (for depth, slope, substrate, minimum and maximum tidal energy conditions, monitoring, and navigation) and would provide a separation from the cable of 2300 meters, 500 meters, 750 meters, and 1,000 meters. For these potential alternative sites, staff requested an analysis of any resulting changes in generation, cost, environmental effects, and monitoring and safeguard plans.

78. The District provided its response on August 1, 2012, explaining the factors that influenced its site choice and its reasons for rejecting alternative sites.¹¹³ Staff discussed this issue with the parties at the technical conference on August 6, 2012, and requested that the District and PC Landing continue to consider alternative sites and file any information on their viability.¹¹⁴ Staff noted the District's conclusion that an energy level of 1.7 kW/m² would be ideal, but 1.5 kW/m² would work, because the turbines would operate about 74 percent of the time. If the turbines were relocated to an area of 1.3 kW/m², the turbines would operate less than 54 percent of the time.¹¹⁵ PC Landing subsequently proposed an area for further study,¹¹⁶ and the District concluded that it was not a viable alternative.¹¹⁷ The District further concluded that, based on its review of

¹¹² Letter from Vince Yearick, FERC, to Steven Klein, District, at 2 (July 16, 2012).

¹¹³ See letter from Matthew Love, District, to Kimberly Bose, FERC, and attached response (Aug. 1, 2012).

¹¹⁴ See memo from David Turner to public files summarizing the August 6, 2012 technical conference at 4-7 (filed Aug. 22, 2012).

¹¹⁵ *Id.* at 4.

¹¹⁶ See letter from Craig Trueblood, K&L Gates, to David Turner, FERC (filed Aug. 15, 2012).

potential alternative turbine locations, it could not identify other sites that increased the separation distance from the cable while also satisfying the District's siting criteria. However, the District stated that it had reevaluated the existing location and determined that it could increase the separation of the turbines from the cable to 170 and 240 meters.¹¹⁸

79. Staff issued the draft EA for the project on January 15, 2013. By that time, staff and the parties had fully explored the issue of alternative sites, the District had proposed to move its turbines farther away from the cable and staff had determined, based on its review of the District's analysis, that alternative sites with lower tidal energy potential were not feasible.¹¹⁹ In the final EA, staff noted the limitations of possible alternative sites but did not discuss them in detail.¹²⁰ In light of the record already developed on this issue, NEPA would not require the Commission to consider alternative sites with lower tidal energy potential because those sites were not reasonable alternatives to the proposed project.¹²¹

9. Cumulative Impacts

80. PC Landing argues that “[w]hen submarine telecommunications cable breaks occur, their impacts are felt over thousands of miles and have international ramifications, as well as national security implications.”¹²² The company therefore maintains that the appropriate scope for review of cumulative impacts is the nation's telecommunications network, and the EA inappropriately constrained its review to Admiralty Inlet. In support, PC Landing asserts that the Commission should have taken into account a

¹¹⁷ See District's response to PC Landing's additional information request response at 34-35 (filed Aug. 21, 2012).

¹¹⁸ *Id.* at 35.

¹¹⁹ Draft EA at 135-36.

¹²⁰ Final EA at 127 n.78.

¹²¹ Although PC Landing maintains that the District's consultant endorsed a tidal energy value of 1.0 kW/m² in the license application, this ignores the fact that Dr. Polagye subsequently adopted 1.5 kW/m² as the minimum threshold for a commercially viable project. See District's response to PC Landing's additional information request response at 34 and Attachment G at 3 (filed Aug. 21, 2012).

¹²² PC Landing's April 18 request for rehearing at 42.

pending application for a tidal project adjacent to a submarine cable for the East Foreland Project in Alaska. PC Landing maintains that this permit application demonstrates that it is “foreseeable that other tidal projects will be placed in proximity to submarine cables.”¹²³

81. This is incorrect. As noted in the license order, there is currently only one tidal energy project in Alaska being studied under a preliminary permit.¹²⁴ In the Commission’s experience, most preliminary permits do not result in the development of a license application. Therefore, the possibility that this project might eventually contribute to cumulative impacts is speculative. We find no basis for using a nationwide scope for our cumulative effects analysis in this case.

82. The Tribes argue that the EA failed to properly analyze cumulative effects to affected fish and marine mammal species. They contend that fish and marine mammals that could experience direct and indirect effects within Admiralty Inlet are subject to cumulative effects from other projects and activities outside of Admiralty Inlet and that at a minimum, the appropriate geographic area for consideration of cumulative effects is the Puget Sound waterway.¹²⁵ They claim that in light of the migratory nature of salmon and other marine species, it is arbitrary and capricious to limit a cumulative effects analysis to a small area within Puget Sound.

83. This is incorrect. As explained in the EA, the geographic scope of the analysis for cumulatively affected resources is defined by the physical limits of the proposed action’s effects on the resources and contributing effects from other projects or activities. In this case, the effects of project operations are primarily limited to Admiralty Inlet, where project construction and operation may directly and indirectly affect these resources. Commission staff found in the EA that marine fish and mammals have the potential to be cumulatively affected by the proposed project in combination with other activities in the proposed project area, such as commercial fishing and vessel traffic. However, the possibility of developing additional hydrokinetic devices in Admiralty Inlet is not sufficiently well defined to be considered reasonably foreseeable.¹²⁶ Because the effects of the project are limited to Admiralty Inlet, it would not be appropriate to consider them cumulatively with effects from other projects and activities located elsewhere. The EA’s

¹²³ *Id.* at 43.

¹²⁴ License Order, 146 FERC ¶ 61,197 at P 127 and n.111.

¹²⁵ Tribes’ April 18 request for rehearing at 23-24.

¹²⁶ EA at 26.

choice of geographic scope was reasonable, and the Tribes' contention that a larger geographic scope is required is without basis.

84. The Tribes further maintain that, even if Admiralty Inlet were the appropriate geographic area, the EA's analysis of cumulative effects is "woefully inadequate."¹²⁷ This is not the case. Staff examined the potential for cumulative effects on marine resources and found that, in light of the project's small scale, short term of operation, design features, and site restoration following removal, any cumulative adverse effects from the project are either not expected or would be insignificant.¹²⁸ Similarly, staff examined the potential for cumulative effects on rare, threatened, and endangered species and found that, when the effects of the project are considered cumulatively with commercial fishing and crabbing and maritime, commercial, and recreational craft transiting through Admiralty Inlet, there may be a small negligible effect on federally listed fish and marine mammals and designated critical habitat. However, staff concluded that the District's proposed monitoring, adaptive management, and consultation with resource agencies would ensure these effects are timely addressed.¹²⁹ We agree with this analysis and find that the Tribes' contentions are without merit.

10. Need for an Environmental Impact Statement

85. PC Landing argues that, because the project presents significant risks to the cable from planned and unplanned marine operations, geologic unknowns, and cable maintenance and repair, the Commission must make a finding of significant impact and prepare an EIS. This is incorrect. We addressed PC Landing's specific arguments about the need for an EIS earlier in this order and found them without merit.¹³⁰

86. The Tribes maintain that an EIS is generally required if the environmental effects of a proposed action are "highly uncertain."¹³¹ They argue that an EIS is required in this

¹²⁷ Tribes' April 18 request for rehearing at 24.

¹²⁸ EA at 84.

¹²⁹ *Id.* at 111-112.

¹³⁰ See paragraphs 23-46, *supra*.

¹³¹ Tribes' April 18 request for rehearing at 26, citing *National Parks and Conservation Association v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001). In that case, the court found that the "high degree of uncertainty and the substantial controversy regarding the effects" of increasing the number of cruise ships permitted to enter Glacier Bay National Park required an EIS. In contrast, in this case staff analyzed the potential

(continued ...)

case because of the novelty of the pilot project, its location in a sensitive environment, the lack of information about adverse effects, and the speculative nature of proposed monitoring and mitigation measures.

87. We disagree. As discussed earlier in this order, we considered the Tribes' arguments concerning these matters and found them without merit.¹³² As contemplated by NEPA and its implementing regulations, staff prepared an EA in this case to assist in determining whether to prepare an EIS.¹³³ In the EA, staff analyzed the potential impacts of licensing the project on all potentially affected resources, including marine mammals, fish, fishing, benthic communities, threatened and endangered species, navigation, submerged cables, terrestrial vegetation, water quality, aquatic species, wildlife, and recreation. Staff found that although there are potential effects to some resources, the impacts are minor and short term.¹³⁴ As we explained in the license order, the context for this project involves a very small portion of Admiralty Inlet for a short time period, and the intensity of the impacts is low, especially because of the monitoring and adaptive management procedures associated with the project.¹³⁵ We find no basis in this case for concluding that the project would have a significant effect on the environment or that an EIS was required.

11. Response to Comments

88. PC Landing argues that the EA and license order “undertake a cursory review and response to several key comments” that the company submitted and that these responses were insufficient because they failed to “provide any additional substantive environmental impact analysis” or “mitigate the continued risks” to the cable.¹³⁶ In support, PC Landing reiterates its comments in four areas (risk of new marine operations

impacts of licensing the project on all potentially affected resources and found that the impacts are minor and short term. License Order, 146 FERC ¶ 61,197 at P 119.

¹³² See paragraphs 66-69, *supra*.

¹³³ See 40 C.F.R. § 1501.4(c) (2013).

¹³⁴ License Order, 146 FERC ¶ 61,197 at P 119.

¹³⁵ *Id.* P 121, discussing factors for determining environmental significance in the Council of Environmental Quality's regulations implementing NEPA, 40 C.F.R. § 1508.27(b) (2013).

¹³⁶ PC Landing's April 18 request for rehearing at 40.

from the use of a mechanical brake, need for an EIS in light of substantial unknowns, failure to specify what level of scour would be significant, and failure to consider alternative sites). PC Landing claims that the response to these issues in the EA and the license order is inadequate, but does not otherwise brief these issues or discuss them in detail. This is insufficient to preserve these issues on rehearing.¹³⁷

89. In any event, these arguments are without merit. The District's decision to use a mechanical brake instead of a remote braking system arose after the draft EA was published. Commission staff held a technical conference on April 18, 2013, to discuss the District's revised emergency shutdown procedures. As noted in the final EA and the license order, the likelihood of engaging the mechanical brake is low, and operations to remove a turbine would not require the use of anchors.¹³⁸ As a result, there was no need to undertake an analysis of the risk of new marine operations from the use of a mechanical brake.

90. Because the potential for scour around the turbines will be limited and the rate of erosion will be gradual, there was no need to specify what level of scouring might be considered significant.¹³⁹ Nor was there a need to prepare an EIS. Finally, as we have seen, the District and Commission staff analyzed a number of potential alternative sites and determined that they were not reasonable alternatives to the proposed project.¹⁴⁰ As a result, there was no need to include them in the EA.

12. Federal Power Act

91. PC Landing argues that the license order erred in finding, without substantial evidence, that the Admiralty Inlet Project is in the public interest, as required by section 10(a) of the FPA. In support, PC Landing maintains that the project "threatens an existing substantial public interest in protecting a component of this Nation's critical telecommunications infrastructure."¹⁴¹

¹³⁷ See *OMYA, Inc.*, 111 F.3d at 179.

¹³⁸ See EA at 84, 127; License Order, 146 FERC ¶ 61,197 at PP 111, 120.

¹³⁹ See License Order, 146 FERC ¶ 61,197 at P 72-76.

¹⁴⁰ See paragraphs 56-58 *supra*.

¹⁴¹ PC Landing's April 18 request for rehearing at 48.

92. As we have seen, PC Landing’s arguments concerning the risk to its cable are without merit. In determining whether to issue a license for the project and on what conditions, the Commission considered all aspects of the public interest, including the interest in testing the generating equipment’s dependability as a source of electrical energy for the region, the generation of power from a renewable resource which will not contribute to atmospheric pollution, the recommended environmental and public safety measures that will adequately protect, mitigate, and enhance fish and wildlife and cultural resources, recreation, navigation, and other uses of Admiralty Inlet, and the required monitoring that will provide an improved understanding of the environmental effects of tidal energy projects that will be instrumental in assessing the potential effects of future projects and identifying measures to minimize adverse environmental effects.¹⁴²

93. Tulalip contends that the Admiralty Inlet Project is not in the public interest because it is located in a sensitive marine area with multiple ESA-listed fish and marine mammal species and is “grossly un-economical – at roughly 250 times the cost of alternative power.”¹⁴³ Tulalip points out that as part of its public interest analysis, the Commission is required to consider the economic benefits of the project power, and cannot ignore the fact that “the only way that tidal projects could become economical is by achieving economies of scale – that is, by having dozens if not hundreds of individual turbines strewn across Admiralty Inlet or other locations in Puget Sound.”¹⁴⁴ The Tribes maintain that, given the multiple ESA-listed species of fish and marine mammals in the waterway and the impacts that such development would cause to tribal fishing areas, this future development would not be in the public interest and would not be best adapted to a comprehensive plan for Puget Sound.

94. As discussed above in connection with the pilot licensing criteria, although ESA-listed species are present in the area, the project will not significantly affect them and the license includes conditions of NMFS’s biological opinion to ensure that these species are adequately protected. In addition, as discussed earlier in connection with cumulative effects, the project is experimental and we find no basis at this time for concluding that any additional development of tidal energy projects in Puget Sound is reasonably foreseeable.

95. Moreover, while we are required to consider project economics as one of many public interest factors that we must balance under the comprehensive development

¹⁴² License Order, 146 FERC ¶ 61,197 at P 164.

¹⁴³ Tribes’ April 18 request for rehearing at 16.

¹⁴⁴ *Id.*

standard of FPA section 10(a), there is nothing in the FPA that would preclude us from issuing a license for a project that is uneconomic. To the contrary, we use our economic analysis to provide a general estimate of the potential power benefits and costs of a project, and of reasonable alternatives to project power, to help support an informed decision concerning whether and under what conditions to license a project. However, under our judicially-approved approach to project economics, we determine what measures are needed in the license to protect all aspects of the public interest, both developmental and environmental, and allow the applicant to make the business decision of whether to accept the license as conditioned.¹⁴⁵

96. As noted, the project is experimental and is designed to test the feasibility of developing tidal energy in Admiralty Inlet. Therefore, it is not surprising that the project will generate power at a cost that exceeds the cost of replacement power from conventional sources. In addition, the public interest is served by developing and testing new hydrokinetic technologies to study their environmental and other effects to help determine whether they can be commercially feasible.

97. Tulalip further maintains that in deciding whether to approve this project, the Commission must consider now whether development of tidal energy on a larger scale would be consistent with a comprehensive plan for Puget Sound. This is incorrect. The purpose of this project is to allow testing to determine whether tidal energy is feasible. We do not yet know whether any further development may even be possible. Therefore, there is no need to consider the possible impacts of an eventuality that may never occur.

98. PC Landing contends that the Commission did not give equal consideration to other resources affected by the project, as required by section 4(e) of the FPA. This is not correct. The Commission considered both developmental and environmental values in its licensing decision, including the project's effects on power generation and new technology development, water quality, fish and wildlife resources, tribal resources, threatened and endangered species, marine mammal protection, essential fish habitat, historic preservation, navigation, and effects on PC Landing's communications cable. Equal consideration of power and non-power values does not mean that the Commission must give them equal treatment, or must elevate consideration of one aspect of the project's possible effects above all others.¹⁴⁶ Rather, it is sufficient if the Commission considers the project's possible effects on all relevant resources that may be affected.

¹⁴⁵ See *In re Mead Corp.*, 72 FERC ¶ 61,027 (1995); *City of Tacoma, Washington*, 84 FERC ¶ 61,107 at 61,570-61,572, *aff'd*, *City of Tacoma, Washington, v. FERC*, 460 F.3d 53, 74 (D.C. Cir. 2006).

¹⁴⁶ See *U.S. Dept. of the Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992).

99. PC Landing also maintains that the project is not best adapted to ensure that other beneficial uses of Admiralty Inlet will be protected, as required by section 10(a) of the FPA. In support, PC Landing contends that the project “does not include sufficient conditions to ensure that the existing beneficial use of the waterway for telecommunications infrastructure is adequately protected.”¹⁴⁷ As discussed throughout this order, this argument is without merit. The license includes conditions to ensure that the project can be installed, maintained, and removed without significantly affecting PC Landing’s communications cable.

100. For all the foregoing reasons, we affirm the findings in our March 20, 2014 License Order and deny PC Landing’s and the Tribe’s requests for rehearing.

B. Rehearing of the June 19, 2014 Preemption Order

101. As noted, in the June 19, 2014 Preemption Order the Commission granted the District’s petition for a declaratory order on federal preemption and denied the Tribes’ motion for a stay pending rehearing and judicial review.¹⁴⁸ On rehearing, the Tribes argue that the Commission erred in denying their stay request. PC Landing and the Tribes also maintain that the District’s petition was not ripe for review and the declaratory order was not necessary to prevent a conflict with the license order. PC Landing further maintains that Ecology’s waiver of its CZMA authority was unlawful. We address these issues in turn.

1. The Tribes’ Stay Request

102. The Tribes argue that the Commission denied their stay motion based on an erroneous finding that the Admiralty Inlet Project will not adversely affect their treaty rights. In support, they reiterate their arguments concerning the project’s interference with their right of access to all usual and accustomed fishing places reserved in the Treaty of Point Elliott.¹⁴⁹ For the reasons discussed above in connection with the Tribes’ request for rehearing of the license order, we deny rehearing of this issue.¹⁵⁰

103. The Tribes maintain that the Commission erred in relying on speculative and unproven monitoring plans as support for denying a stay. They reiterate their arguments

¹⁴⁷ PC Landing’s April 18 request for rehearing at 51.

¹⁴⁸ Preemption Order 147 FERC ¶ 61,215 (2014).

¹⁴⁹ Tribes’ July 18, 2014 request for rehearing at 6-11.

¹⁵⁰ See paragraphs 56-63 of this order.

that relying on “untested monitoring plans in a sensitive marine area with numerous ESA-listed species is not in the public interest and is arbitrary and capricious.”¹⁵¹ For the reasons already discussed, we deny rehearing of this issue as well.¹⁵²

104. The Tribes argue that the Commission erred in finding that the public interest does not support a stay in this case. They maintain that there is a well-established “public interest in preserving nature and avoiding irreparable injury” and that the public interest supports considering environmental impacts carefully “before major federal projects go forward.”¹⁵³ They contend that the public interest supports suspending a project until that consideration occurs.

105. As we explained in the preemption order, in acting on stay requests the Commission applies the standard set forth in the Administrative Procedure Act (APA) and will grant a stay if “justice so requires.”¹⁵⁴ Under this standard, the Commission considers a number of factors, such as whether the movant will suffer irreparable injury without a stay, whether a stay would substantially harm other parties, and where the public interest lies. We examined these factors and found no basis to support the Tribes’ claim of irreparable harm based on interference with their treaty rights. We also noted that a stay would harm the District by reducing the value of its limited-term license, and

¹⁵¹ Tribes’ July 18, 2014 request for rehearing at 12.

¹⁵² See paragraphs 65-68 of this order.

¹⁵³ Tribes’ July 18, 2014 request for rehearing at 13-14, citing *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1056 (9th Cir. 2010). In that case, the court concluded that the district court erred in not enjoining the Forest Service’s salvage logging of burned trees in advance of any administrative appeals. The case concerned the continued validity of the “serious questions” test after the Supreme Court’s decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), and the decision that the Tribes cite was withdrawn and superseded on denial of rehearing en banc. See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). The latter decision acknowledges (at 1135) that environmental injury can constitute “actual and irreparable” injury and notes (at 1138) that the public interest in “preserving nature and avoiding irreparable environmental injury” can support a preliminary injunction if it outweighs other public interests in favor of not issuing the injunction. However, in this case we are concerned with the Administrative Procedure Act standard for granting a stay, not the standard for issuing a preliminary injunction. Moreover, the Tribes have not shown in this case that the public interest requires a stay to prevent irreparable environmental injury.

¹⁵⁴ 5 U.S.C. § 705 (2012).

would delay the testing of these experimental turbines, which we have found is in the public interest. In these circumstances, where the Tribes have not shown irreparable harm, we find no basis for the Tribe's assertion that the public interest would support a stay. We therefore deny rehearing of this issue.

2. Ripeness of the District's Petition

106. The Tribes and PC Landing argue that the District's petition for a declaratory order was not ripe for review. The Tribes maintain that it was inappropriate for the Commission to rule on the petition while state proceedings are pending to determine the validity of Ecology's CZMA waiver. They argue that if Ecology did not in fact lawfully waive its CZMA authority, the state's authority to enforce its Shoreline Act would remain valid and the Commission's preemption order would be improper.

107. As discussed below in connection with the CZMA waiver issue, for federal preemption purposes the validity of Ecology's waiver is a matter of federal law. Moreover, the federal determination of the waiver issue would control, even if the state proceedings were to reach a contrary result. Therefore, we were not required to await the results of state proceedings before issuing our determination on federal preemption.¹⁵⁵

108. The Tribes and PC Landing argue that the preemption order is premature because there is no conflict between the state shoreline proceedings and the federal licensing order.¹⁵⁶ They maintain that construction of the project is not scheduled to begin until 2015, which is after the state-law stay period expires. In support, PC Landing cites a project schedule overview that the District provided to the Marine Aquatic Resources Committee.¹⁵⁷ PC Landing asserts that, according to this schedule, the District does not

¹⁵⁵ The Tribes also argue that the Commission should not make any determination on federal preemption while requests for rehearing of the license order are pending, because the results of the rehearing requests could alter or even nullify the license order. Tribes' July 18 request for rehearing at 14. As we explained in the preemption order, the filing of a request for rehearing does not operate as a stay of a Commission order unless the Commission rules otherwise, and there was no need for us to act on the pending rehearing requests before ruling on the District's petition. Preemption Order, 147 FERC ¶ 61,215 at P 20. In any event, our issuance of this order on rehearing makes this argument moot.

¹⁵⁶ Tribes' July 18 request for rehearing at 15; PC Landing's July 18 request for rehearing at 6-9.

¹⁵⁷ The Marine Aquatic Resources Committee will be composed of the District, NMFS, U.S. Fish and Wildlife Service, Washington Department of Fish and Wildlife,

(continued ...)

plan to take Board action on contracts until January 2015, horizontal directional drilling for the shore end conduits will not begin until August 2015, and in-water turbine and cable installations will not begin until July 2016.¹⁵⁸ PC Landing adds that under the state's Shoreline Management Act, appeals to the Shorelines Hearings Board must be completed and an order issued within 180 days. As a result, PC Landing and the Tribes contend that there is no conflict with the license order because the shoreline appeal would be concluded at the end of 2014, and construction is not scheduled to begin until 2015.¹⁵⁹ The Tribes assert, without elaboration, that the stay would not preclude the District from beginning the manufacture and testing of the turbines or "entering into contracts for work in 2015."¹⁶⁰

109. The District states that there is an approximately 12-month lead time for manufacture and testing of the project turbines, and it cannot award any contracts to begin any construction, including for onshore facilities, if this issue is not resolved.¹⁶¹

Ecology, Washington Department of Natural Resources, Tulalip Tribes, Suquamish Tribe, Swinomish Indian Tribal Community, and Sauk-Suiattle Tribe. Additional members may be added with the committee's unanimous agreement. Although the District's monitoring and mitigation plans provide for consultation with the committee, this is not a license requirement. *See* License Order, 146 FERC ¶ 61,197 at P 70 and n.10.

¹⁵⁸ *See* PC Landing's July 18 request for rehearing at 2 and Exhibit A at 49 (attached).

¹⁵⁹ *Id.* at 8, Tribes' July 18 request for rehearing at 15.

¹⁶⁰ Tribes' July 18 request for rehearing at 15 n. 6, citing the District's motion for leave to answer and answer to responses to petition (filed June 12, 2012).

¹⁶¹ *See* District's motion for leave to answer and answer to responses to petition at 14 (filed June 12, 2014). In the preemption order, we denied the District's motion for leave to file an answer in response to PC Landing's and the Tribes' responses to its petition, finding that the District had not shown a need for an answer in this case. *See* Preemption Order, 147 FERC ¶ 61,215 at P 15. However, because PC Landing and the Tribes have raised new arguments about the District's current schedule for the project and have made assertions about the District's ability to proceed with project-related activities during the state-required stay period, we have reconsidered the District's motion for leave to respond. To ensure a complete record on this issue, we grant the District's motion in part and consider the District's arguments in Part C on pages 12-15 of its answer.

The District adds that it had advertised a public works contract in January 2014, anticipating issuance of a license in February 2014, but had to suspend its bidding process in light of the stay associated with the appeal of the shoreline permit.

110. As provided to the Marine Aquatic Resources Committee, the District's schedule is dated May 19, 2014, and thus presumably already reflects this delay of the contract bidding process. We issued our preemption order a month later, on June 19, 2014. If we were to conclude, as PC Landing and the Tribes suggest, that the preemption order is premature because there is no conflict with the District's current schedule, this would likely result in further delay and could prevent the District from engaging in the bidding process that will be needed to allow it to take action on contracts in January 2015. This, in turn, could delay the construction that is scheduled for the 2015 work window, as currently planned. We therefore find no basis for the Tribes' and PC Landing's assertions that the issue of federal preemption is not ripe for review. In any event, as an administrative agency we have broad discretion in responding to petitions such as the one at issue, and the preemption order simply represents our general conclusions on the matters raised. Any definitive legal ruling would have to be made by an appropriate court.

3. Ecology's Waiver of CZMA Authority

111. PC Landing argues that the preemption order errs by relying on an unlawful CZMA waiver, based on a NOAA determination without any basis in the record. The company asserts that the Commission should not have found that Ecology waived its CZMA authority because the District and Ecology had entered into a written agreement to stay the six-month CZMA review period. PC Landing maintains that the Commission should not presume concurrence based on the parties' unintentional failure to specify a date when the stay would end. The company further maintains that it was arbitrary and capricious for the Commission to rely on Ecology's statement that it had inadvertently waived its CZMA authority, and to conclude that NOAA had made a determination as a matter of federal law on CZMA compliance.

112. These arguments are without merit. As explained in the preemption order, the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within six months of its receipt of the certification.¹⁶² Ecology received the District's certification on March 26, 2012. On September 21, 2012, Ecology and the District filed a joint letter informing the Commission that they had agreed to

¹⁶² 16 U.S.C. § 1456(c)(3)(A) (2012).

extend the CZMA review period. By letter dated January 30, 2014, Ecology informed the Commission that it had “recently learned from the National Oceanic and Atmospheric Administration (NOAA) that our agreed extension of the CZM review period does not comply with federal regulations” and that as a result, “the six-month CZM review period expired in September 2012, and Ecology has unintentionally waived its CZM authority for the Admiralty Inlet Pilot Tidal Project.”¹⁶³

113. PC Landing contends that we may not rely on “Ecology’s self-serving statement” and that there is no evidence in the record to support the Commission’s conclusion that NOAA, which administers the CZMA, “made a determination as a matter of federal law” regarding the project’s compliance.¹⁶⁴ PC Landing states that, as reflected in its June 5, 2014 protest and answer to the District’s petition, PC Landing has submitted public records requests and Freedom of Information Act requests to Ecology, the Commission, and NOAA in an effort to discover whether any documentation of this determination exists and that none of these requests “have revealed any communication on point.”¹⁶⁵ PC Landing contends that the Commission cannot lawfully rely on Ecology’s letter to find consistency conclusively presumed because it is “wholly unsupported by any evidence in the record.”¹⁶⁶

114. This argument is without merit. Ecology’s January 30, 2014 letter is in the record and is sufficient to support a finding that Ecology waived its CZMA authority in this case. It is a formal letter from the state agency with certification authority under the CZMA, informing the Commission of a determination of non-compliance with federal regulations made by the federal agency with responsibility for administering the CZMA and its implementing regulations. We find no reason why we cannot accept Ecology’s letter and rely on it in support of our decision on the waiver issue. Similarly, we do not consider it significant that PC Landing did not find any documents in support of NOAA’s determination. Administrative agencies may act both formally and informally, depending on the circumstances, and we are not aware of any reason why NOAA could not proceed informally with Ecology in this instance.

¹⁶³ Letter from Erik Stockdale, Ecology, to David Turner, FERC (filed Feb. 10, 2014).

¹⁶⁴ PC Landing’s July 18 request for rehearing at 11.

¹⁶⁵ *Id.* at 12.

¹⁶⁶ *Id.* at 11.

115. PC Landing argues that the preemption order errs in failing to consider the “numerous irregularities in Ecology’s CZMA review process that culminated in Ecology’s decision” that it had waived its CZMA authority.¹⁶⁷ PC Landing contends that, according to documents provided in response to its public record request, the District’s attorneys urged Ecology to issue its consistency determination without waiting until shoreline permit appeals had been resolved, but an internal email for Ecology’s counsel stated that Ecology’s normal process is to wait for local appeals to be completed. In addition, PC Landing notes that the agency’s attorney regarded the County’s Shoreline Act analysis as weak, but after several communications with the Governor’s office, Ecology resolved the matter “in an apparent response to timeline pressure” from the District and the Governor’s office.¹⁶⁸ PC Landing maintains that the “result of this process is an ill-considered and unlawful attempt to expedite the Project schedule, but in so doing, violating Ecology’s statutory duty to represent the interest of the people of Washington state with respect to shoreline protection, and failing to take a reasoned action with appropriate legal and factual basis.”¹⁶⁹

116. We disagree. The documents that PC Landing obtained show that the District’s attorneys contacted Ecology on behalf of their client, some pre-decisional concerns were raised about the strength of the shoreline analysis, and the Governor’s office was in contact with Ecology about this project. PC Landing has not provided any basis to support its assertion that these contacts were improper or illegal. In any event, as noted in the preemption order, we do not find anything in these communications that would preclude us from relying on Ecology’s January 30, 2014 letter.¹⁷⁰ The fact remains that, as stated in that letter, NOAA informed Ecology that the extension of the review period did not comply with federal regulations and Ecology concluded that its CZMA authority was therefore waived. We therefore deny rehearing of this issue.

4. Federal Preemption under the FPA

117. PC Landing argues that the preemption order errs in concluding that the FPA preempts state law by occupying the field of hydroelectric licensing and regulation. The company contends that the Supreme Court decisions we relied on in the preemption

¹⁶⁷ *Id.* at 12.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 12-13.

¹⁷⁰ Preemption Order, 147 FERC ¶ 61,215 at P 20 n.12.

order, *First Iowa*¹⁷¹ and *California v. FERC*,¹⁷² “characterize preemption under the FPA as conflict, rather than field, preemption.”¹⁷³ In support, PC Landing quotes selected language in these decisions concerning the FPA’s dual system of federal and state control to suggest that the FPA requires an actual conflict in order to preempt state law.¹⁷⁴

118. PC Landing misreads these cases and our interpretation of them. In *First Iowa*, the Court recognized that the FPA establishes a dual system of control which “leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States.”¹⁷⁵ Under this system, section 27 of the FPA expressly preserves state laws regarding proprietary rights as to the control, appropriation, use or distribution of water for irrigation, municipal use, or other uses of the same nature, but reserves for the federal government the comprehensive development and control of the nation’s waters for power purposes, leaving “no room or need for conflicting state controls.”¹⁷⁶ In *First Iowa*, the Court held that a state permit for a hydroelectric project was not required and there was no need for the applicant to show compliance with state permit requirements before obtaining a federal license. The Court reasoned that the possibility of a state veto power over the federal project could “destroy the effectiveness of the federal act” and “subordinate to the control of the State the ‘comprehensive planning’ which the Act provides shall depend upon the judgment of the Federal Power Commission [the Commission’s predecessor] or other representatives of the Federal Government.”¹⁷⁷

119. Similarly, in *California v. FERC*, the Court held that California’s minimum stream flow requirements were preempted by the FPA after the Commission set significantly

¹⁷¹ *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946) (*First Iowa*).

¹⁷² 495 U.S. 490 (1996).

¹⁷³ PC Landing’s July 18 request for rehearing at 14.

¹⁷⁴ *Id.* at 14-16.

¹⁷⁵ *First Iowa*, 328 U.S. at 172.

¹⁷⁶ *First Iowa*, 328 U.S. at 181-82, 164, and 175-76.

¹⁷⁷ *Id.* at 164.

lower minimum stream flow requirements.¹⁷⁸ The Court reasoned that California's stream flow requirements were not saved from supersedure under FPA section 27 because they were not state laws relating to proprietary rights for the distribution of water for irrigation or municipal use. Following *First Iowa*, the Court recognized that the comprehensive federal role in the FPA allowed no possibility of concurrent jurisdiction in matters placed in the Commission's discretion.¹⁷⁹ Although there is language in these cases regarding state laws that conflict with the federal government's comprehensive planning authority, this does not detract from the fact that the Court's decisions confirm that Congress reserved for the Commission the field of hydroelectric licensing and regulation under the FPA, leaving for the states only those matters expressly preserved for them in section 27.

120. PC Landing maintains that the CZMA and the Clean Water Act provide further evidence of Congressional intent to establish a dual system of control and contemplate "a coordinate role for state governments in licensing hydroelectric projects."¹⁸⁰ As a result, PC Landing contends that "the FPA leaves intact state laws regulating hydropower projects to the extent such laws are consistent with the FPA" and that a stay under the state's Shoreline Act "survives federal preemption because the FPA does not occupy the field."¹⁸¹

¹⁷⁸ *California v. FERC*, 495 U.S. at 506-07.

¹⁷⁹ *Id.* at 502. The Court noted that state law is "pre-empted to the extent it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress." *Id.* at 506, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (emphasis added). Significantly, in *California v. FERC* there was no actual conflict between the state and federal minimum stream flow requirements at issue. In fact, it was physically possible for the project to comply with both, because by releasing the higher state required flow the project would also be in compliance with the lower federal stream flow requirement. Thus, state law was not preempted because it conflicted with a federal requirement. Rather, state law was preempted because allowing the state to set a higher minimum flow requirement would frustrate the objective of Congress in providing for the comprehensive development of the nation's waters as determined by the Commission's exercise of its licensing authority under the FPA.

¹⁸⁰ PC Landing's July 18 request for rehearing at 16.

¹⁸¹ *Id.* at 17.

121. This argument ignores the fact that Congress enacted these statutes after the FPA. As we noted in the preemption order, an exception to the FPA's preemption of state requirements regulating hydroelectric projects can occur when later-enacted federal statutes provide for a state role in specific areas, such as the water quality certification requirement for federal projects under section 401 of the Clean Water Act, or state shoreline permits and consistency certification issued pursuant to federally approved state programs under the CZMA.¹⁸² In these cases, the state requirements are valid because federal law specifically provides for their application to federally licensed activities and does not exempt hydroelectric projects from those generally applicable requirements. However, if a state waives its Clean Water Act or CZMA certification authority, the FPA controls and compliance with state requirements under those acts is not required.

5. The District's Status as a Political Subdivision of the State

122. PC Landing argues that the preemption order is contrary to the Supreme Court's decision in *Nixon*,¹⁸³ which the company asserts is applicable here and "sharply circumscribes the ability of the federal government to interfere with a state's regulation of its political subdivisions."¹⁸⁴ PC Landing maintains that "the FPA does not contain the unmistakably clear statement that *Nixon* requires for the preemption of state laws regulating political subdivisions of the state."¹⁸⁵ The company maintains that, as a result, the FPA does not preempt Washington's Shoreline Act as applied to the District.

123. This is incorrect. As we noted in the preemption order, the Court held that a provision of the Telecommunications Act authorizing preemption of state and local laws prohibiting the ability of "any entity" to provide telecommunications services did not preempt a state statute barring its political subdivisions from providing those services. The Court reasoned that the term "any entity" was not defined and could mean different things in different settings, and there was no clear expression of Congressional intent to

¹⁸² Preemption Order, 147 FERC ¶ 61,215 at P 22. With regard to the Clean Water Act, we noted (at n. 15) that states can require flows as water quality certification conditions under section 401(d) of the Clean Water Act, citing *Pub. Dist. No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994).

¹⁸³ *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

¹⁸⁴ PC Landing's July 18 request for rehearing at 19.

¹⁸⁵ *Id.* at 20 (citation omitted).

preempt a state's decision regarding whether to authorize state and local governmental entities to provide telecommunications services.¹⁸⁶

124. We explained that in *Nixon*, the state had expressly prohibited its political subdivisions from providing telecommunications services, whereas in this case there is no question regarding the District's authority under state law to seek a license for its project and to operate and maintain it in accordance with a federal license. The FPA requires that, as a public utility district, the District must be authorized under state law "to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license" under the FPA.¹⁸⁷ The FPA by its terms expressly applies to states and municipalities, and as a political subdivision of the state, the District is a "municipality" as defined in FPA section 3(7).¹⁸⁸ Thus, the factors in *Nixon* that led the Federal Communications Commission and the Court to find no intent to preempt state laws regulating a state's political subdivisions are not present in this case.

125. More importantly, however, it is well settled that the FPA preempts state law as it applies to political subdivisions of states. In *First Iowa* (which the Court decided over 60 years ago), the license applicant was a cooperative association organized under the laws of Iowa, and the state opposed the project. Thus, the association was a political subdivision of the state (a "municipality" under section 3(7) of the FPA) and was acting contrary to the laws of its creator. The Supreme Court nevertheless found that the FPA preempted state laws that would have required a state permit for the project in order to control how the project would be constructed and operated.¹⁸⁹

126. In a case involving the City of Tacoma's application for a federal license for its Cowlitz Hydroelectric Project, the State of Washington intervened and opposed the project, arguing that it would harm fishery resources. After the Commission granted the license, the state appealed, arguing that "Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws."¹⁹⁰ Relying on *First Iowa*, the U.S. Court of Appeals for the Ninth Circuit rejected

¹⁸⁶ Preemption Order, 147 FERC ¶ 61,215 at P 27 n.20.

¹⁸⁷ FPA section 9(b), 16 U.S.C. § 802(b) (2012).

¹⁸⁸ See FPA sections 3(6) and 3(7), 16 U.S.C. §§ 796(6) and 796(7) (2012).

¹⁸⁹ *First Iowa*, 328 U.S. at 156, 170.

¹⁹⁰ *Wash. Dept. of Game v. FPC*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

this argument, holding that state laws could not prevent the Commission from issuing a license or bar the licensee from acting under it.¹⁹¹ Like the association in *First Iowa*, Tacoma was a political subdivision of the state and a “municipality” as defined in section 3(7) of the FPA.

127. Later, Tacoma sought to issue bonds for its project and the state again objected, obtaining an injunction in state court that the Supreme Court of Washington affirmed on the ground that the state had not empowered Tacoma to condemn a state-owned fish hatchery that the project would inundate.¹⁹² Tacoma sought review and the Supreme Court reversed, holding that the issue had already been decided, or should have been, in the state’s previous challenge to the license.¹⁹³ As a result, state law was preempted and the state could not prevent Tacoma from issuing bonds to finance the project or from using the federal power of eminent domain, which Tacoma had obtained with its license under the FPA, to condemn the state-owned lands.

128. In short, both the Ninth Circuit and the Supreme Court have considered and rejected the argument that preemption under the FPA cannot apply to the political subdivisions of a state. PC Landing’s argument to the contrary relies on the Supreme Court’s construction of a different statute and thus has no bearing on the preemptive effect of the FPA as applied to the District in this case.

129. PC Landing suggests that these cases are of “questionable validity” because they pre-date *Nixon* and the CZMA.¹⁹⁴ This is incorrect. As discussed above, these cases demonstrate that, in the FPA, the intent of Congress is clear that state laws that would license or regulate hydroelectric power are preempted, because they could veto a federal license or prevent the Commission from providing for the comprehensive development of a waterway. The fact that the FPA includes specific provisions for licensing political subdivisions of a state as “municipalities” provides further support for this view. PC Landing also suggests that the later enactment of federal statutes such as the CZMA or the Clean Water Act “demonstrates the peaceful coexistence between state and federal law in the hydropower context.”¹⁹⁵ We recognize that these statutes provide for a state

¹⁹¹ *Id.*

¹⁹² *City of Tacoma v. Taxpayers of Tacoma*, 49 Wash. 2d 781 (1957).

¹⁹³ *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 328 (1958) (citing *Wash. Dept. of Game*, 207 F.2d at 396).

¹⁹⁴ PC Landing’s July 18 request for rehearing at 20 n. 78.

¹⁹⁵ *Id.*

role in federal licensing through their certification of the specific matters assigned. However, there is no basis in federal law for applying these statutes to a federally-licensed hydropower project if a state has waived its certification authority.¹⁹⁶

The Commission orders:

(A) The requests for rehearing of the Commission’s March 20, 2014 order issuing a license for the Admiralty Inlet Project, filed in this proceeding by PC Landing Corporation and the Tulalip Tribes of Washington on April 18, 2014, are denied.

(B) The requests for rehearing of the Commission’s June 19, 2014 order granting the District’s petition for a declaratory order on federal preemption and denying a stay of the license for the Admiralty Inlet Project, filed in this proceeding by PC Landing Corporation and the Tulalip Tribes of Washington on July 18, 2014, are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁹⁶ PC Landing contends that, in *Nixon*, the statute at issue involved an express preemption clause and the rule would apply “with equal – if not greater – force in the context of implied preemption.” PC Landing’s July 18 request for rehearing at 21. The company notes (at 21 n.79) that “field preemption” is a form of implied preemption and points out (at 21 n. 82) that the FPA does not contain an express preemption clause. PC Landing then concludes that “the threshold for finding *preemption of state laws regulating political subdivisions* is at least as high in this case as in *Nixon* – if not higher.” *Id.* at 21 (emphasis in original). This argument seems to support our finding that preemption under the FPA is field preemption. In any event, PC Landing defines the field incorrectly. Under the FPA, the field that federal law preempts is state laws that would license and regulate hydroelectric projects, regardless of whether they are developed by private entities or states and their political subdivisions, not state laws in general that would regulate political subdivisions.