

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

PUGET SOUND ENERGY, INC.,)	
)	PL05-0294
Appellant,)	
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW
)	AND DECISION
SKAGIT COUNTY (DEPARTMENT)	
OF PLANNING AND DEVELOPMENT)	
SERVICES),)	
)	
Respondent.)	

This matter came on regularly for hearing before the Skagit County Hearing Examiner in Conference Room C of the Skagit County Administration Building, Mount Vernon, Washington on September 9 and September 12, 2005.

Appellant Puget Sound Energy, Inc. was represented by Pamela Krueger and Kristine Wilson. Respondent Skagit County was represented by Dennis Reynolds and Charles Maduell.

Witnesses were examined. Exhibits were admitted. Argument was made. From the record made, the Examiner enters the following:

FINDINGS OF FACT

1. On March 15, 2005, Puget Sound Energy, Inc. (PSE) submitted to Skagit County (County) an application for a shoreline permit exemption. Additional information was submitted on March 30, 2005.
2. On May 5, 2005, the County administratively denied the application. The denial was appealed to the Hearing Examiner on May 20, 2005.
3. The exemption request related to the Baker River Hydroelectric Project. PSE is seeking a new license for this project from the Federal Energy Regulatory Commission (FERC).
4. In the context of the re-licensing effort, a number of federal and state entities entered into a Settlement Agreement on November 30, 2004. In a series of Articles, the Settlement Agreement spelled out a detailed set of understandings about the operation of

the project. These included a flow regime that was considered to represent conditions that would be beneficial to the fish resources of the affected streams. Skagit County was a party to the settlement and one of the 24 signatories of the Settlement Agreement.

5. As a requirement of the Federal Coastal Zone Management Act (CZMA), the State of Washington must certify to FERC that the proposed power project is consistent with the provisions of the state's coastal zone management program. Such consistency includes as its principal component a determination that the project is consistent with the state's Shoreline Management Act (SMA).

6. The SMA regulates development on shorelines of the state through a series of locally written and locally administered Shoreline Master Programs (SMP's). The State Department of Ecology exercises a supervisory role over both the creation and the implementation of the local SMP's.

7. One role of Department of Ecology is to provide the CZMA consistency determination for the state. In doing this, Ecology receives input from local governments as to the consistency of the project with the individual SMP's of each affected jurisdiction. This local consistency determination can take the form of a shoreline development permit or shoreline variance or shoreline permit exemption, as may be appropriate.

8. PSE hoped that Skagit County would provide its consistency determination in connection with approval of the shoreline permit exemption sought in this case. The County has insisted that PSE must apply for a Shoreline Conditional Use Permit and that the consistency determination cannot be completed until the project has been analyzed through the local conditional use permitting process.

9. The Baker River Project consists of two components, Upper Baker and Lower Baker. The Upper Baker portion is within Whatcom County. Lower Baker is in the Town of Concrete and unincorporated Skagit County. In total, the project comprises about 8,5000 acres. About 5,939 acres are in the Upper Baker Development. Approximately 2,587 acres encompass the Lower Baker Development.

10. The portion of the project within unincorporated Skagit County is a part of Lake Shannon behind Lower Baker Dam. This area lies within a shoreline environment designated as Conservancy. A small portion of the lower Baker River just above its confluence with the Skagit River is also in Skagit County.

11. The Baker River Project dates from the 1920's. It was in existence long before the adoption of the state's (and the County's) shoreline management program. Skagit County's SMP, originally adopted in the 1970's, was amended in 1995 to include a section on the regulation of hydropower facilities. Under the provisions of this amendment "hydropower," as defined, is subject to a Shoreline Conditional Use Permit

within the Conservancy shoreline environment. No such permit has ever been issued by the County for the Baker River Project.

12. “Hydropower” is defined by the SMP as “the generation of electricity from the energy of flowing water by means of diversion structures, flowlines, powerhouses, and associated facilities.”

13. The project involves the reconstruction of power house facilities within the Town of Concrete. No project features within the definition of “hydropower” that are affected by the re-licensing are located in Skagit County.

14. If the hydropower facilities were within Skagit County’s jurisdiction, they would represent a pre-existing non-conforming use under the County’s SMP. A non-conforming use may continue to operate forever without benefit of any authorization from the County unless it is significantly enlarged, increased, expanded, or moved.

15. The rehabilitation of the power generating facilities will permit the project to meet the flow regime changes dictated by the Settlement Agreement. However, no increase in the power production of the Project is contemplated.

16. The re-licensing application includes some minor actions, planned and potential, that are not directly related to power production. These include the installation of some wildlife enhancement features in Lake Shannon – an artificial osprey nest platform and the installation of several common loon floating nest platforms. PSE has applied for and obtained Hydraulic Project Approvals (HPAs) from the State Department of Fish and Wildlife for these facilities.

17. Large woody debris (LWD) is removed from the intake gates by PSE and stored on shore. Under the Settlement Agreement, this LWD will be made available to others at secure, stockpiled upland locations.

18. There is currently a rather primitive boat launching site on Lake Shannon. A new or improved recreational boat access for the lake may be constructed, but plans have not been finalized as to either the location or the precise physical configuration.

19. Other possible but not fully defined future activities are shoreline erosion control measures and gravel augmentation. The former would likely take place on Federal lands within Whatcom County. The latter would occur in the Baker River within the Town of Concrete. Tentative plans for trail building within Skagit County shorelines have not yet been located on the ground.

20. Public testimony offered at the appeal hearing was all critical of PSE for failing to provide significant additional flood storage in connection with this re-licensing process. Flood storage behind Lower Baker Dam is a subject currently under consideration by the U.S. Army Corps of Engineers in its assessment of flood control

within the Skagit River Basin as a whole. Thus, such storage is not a part of the proposal before the County in the exemption application. Whatever may ultimately be decided about flood storage will be decided in a separate process.

21. The County's administrative decision denying PSE's exemption application contained the following "Explanation:"

The Shoreline Management Act ("SMA") regulates both developments and uses. Amendments to the Skagit County Shoreline Master Program ("SMP") adopted in 1995 explicitly address regulation of hydropower development and use. *See* SMP, Sec. 7.19. Section 7.19 of the SMP declares hydropower use, including expansion of existing facilities, a conditional use in the environmental designation applicable to the Baker Project. Although such policies encourage the development and operation of hydropower facilities, the hydropower regulations do not permit hydropower development that would measurably and adversely affect flow regimes and flood storage requirements outside of the impoundment area. *See* SMP Sec. 7.19(1)(B)(3).

The proposed development and use requires a conditional use permit based on the material impacts associated with changed flow regimes described in the applicant's presentation, such as the provision for significantly altered new minimum flows. In this regard, the proposed development does not represent a preexisting, non-conforming use exempt from permit procedures under the SMP as proposed in the applicant's shoreline exemption application. The SMA and the County's SMP do not exempt from the permit system alterations or expansions of pre-existing developments, uses or activities. SMA regulations specifically dictate that substantial development undertaken prior to the SMA shall not continue without permit if the pre-existing uses are enlarged or expanded. *See* WAC 173-27-070 TO -080, *see* 7.19(1)(A)(4).

The SMA is to be liberally construed to effectuate its purposes, including "to provide for the management of the shorelines of the state by planning and fostering all reasonable and appropriate uses." RCW 90.58.900; 020. Shoreline exemption applications are to be narrowly interpreted. WAC 173-27-040(1)(a). If any portion of a project is not exempt, none of the proposal is exempt. Concerning the applicant's submission, where other project uses or components require a shoreline permit (e.g. construction of new generating units) the entire project requires a shoreline permit. *See* WAC 173-27-040(1)(d).

22. Any conclusion herein which may be deemed a finding is hereby adopted as such.

DISCUSSION

I. Cause and Effect

The core of this case is a conceptual problem. Skagit County takes the position that the changes in flow regime in the Baker and Skagit Rivers that will occur as the result of the re-licensed project constitute either substantial development or a regulated use, subject to the permit requirement. This is a confusion of cause and effect. The County's permitting authority is limited to activities that may result in impacts. The permits are about controlling those impacts. The impacts themselves are not the regulated activity. They are consequences of activity. Consequences are regulated by controlling the activities that produce them. The terms development or use apply to the source of effects, not to effects themselves in isolation.

II. Development or Use

Shoreline permits are required for "substantial developments." RCW 90.58.140(2). A "development," means "a use" consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level." RCW 90.58.030(3)(d). (emphasis added). Clearly the changes in flow are not covered by any of the specific items listed in the definition. Under the "*eusdem generis*" principle, the "project which interferes" should be the same type of thing described in the listing of specific items. This means the "project" must be some sort of activity. In this sense, the changes in flows are not a "project." They are the result of a project.

It is true that conditional use permits may also be required for "uses" that are not "developments," under the SMA. Clam Shacks v. Skagit County, 109 Wn.2d 91, 743 P.2d 265 (1987). However, as noted in the above definition, a "development" is a type of "use." The SMA does not define "use," but as used in the Act "development" and use" unquestionably relate to activities of some sort, not to the impacts of activities. Thus, the altered flow regimes are not accurately characterized as either a development or a use.

III. Territorial Jurisdiction

Inextricably connected to the cause and effect problem is the problem of territorial jurisdiction. Skagit County's permit jurisdiction under the Shoreline Management Act (SMA) reaches only those activities that occur within the boundaries of unincorporated Skagit County. Activities that occur elsewhere that have effects in Skagit County are not within the County's permit issuing authority. The County might be able to seek an

injunction or damages for consequences that emanate from outside its jurisdictional boundaries, but it has no direct power over the authorization of such activity in the first place.

SEPA allows extraterritorial jurisdiction in the sense that the permitting authority may condition or deny a project based on effects it will have outside of the permitting jurisdiction. This substantive power however relates to controlling activity which has its source within the permitting jurisdiction. Substantive SEPA does not expand the reach of the SMA so that an affected area outside of the jurisdiction where the source of a problem is located can exercise permit authority over the source.

The flow regime of concern in this matter is produced by power houses within the Town of Concrete. Thus, the permitting authority regarding the power houses in this case is with Concrete. The County could intervene in the Concrete's permit process and participate as a party. But it has no power to issue a permit regarding the creation or the operation of those power houses.

As an analogy, if a pulp mill were proposed to be built in Concrete and it could be shown that air pollution from that mill would cause harm in the County, there are various methods that the County might employ to control the problem. But these would be in the nature of post-hoc enforcement. The direct authorization of the mill itself and the control of its operations through permit conditions would be beyond the County's jurisdiction.

IV. Projects that are Partly Exempt and Partly Non-Exempt

The County argues that various aspects of the subject hydropower project that are within the County are not exempt from permit. From this it seeks to take advantage of the rule that if any part of a proposed development is not eligible for exemption, a permit is required for the entire project. Again, this rule applies only to the reach of the SMA within the permitting jurisdiction. Within Skagit County, the exempt features of an otherwise non-exempt project are subject to the permit process. However, no principle in law or logic can cause this concept to expand the County's territorial jurisdiction. If there are non-exempt features of a project in the County, this does not somehow extend the County's permit jurisdiction to project features located beyond its borders.

V. Projects Partly In and Partly Outside the Shoreline

The coverage of the SMA may reach into the adjacent uplands where a part of a project having shoreline impacts lies beyond the 200-foot strip abutting the line of ordinary high water. This is a matter of interpretation of the geographic coverage of the Act within territory where a particular entity has governmental authority. It has nothing to do with expanding the authority of the entity beyond its own boundaries. The upland-shoreland connection is completely unrelated to the question of inter-jurisdictional power

The Baker River Hydroelectric Project has aspects in several jurisdictions – Whatcom County, Concrete, Skagit County. That some features will occur within Skagit County and some will not does not create a situation analogous to having some features of a project within the shoreline and some that are not. Again, Skagit County’s permit power under the SMA is limited to activities within its borders

VI. Piecemeal Development

The SMA calls for planning and coordination among all levels of government to prevent piecemeal development of the state’s shorelines. What is established however, is not a universally applicable state plan. Rather there is a network of individually developed plans, implemented locally in a process overseen by the State Department of Ecology. RCW 90.58.050. That one project might involve three jurisdictions exercising permitting authority each in its own area, does not violate the letter or spirit of the SMA. Prevention of piecemeal development is to be accomplished by cooperation and communication between various jurisdictions, not by abolishing jurisdictional boundaries and turning inter-jurisdictional projects over to a single entity. .

VII. Expansion of Non-Conforming Use

In general developments that pre-existed the SMA are exempt from the permit procedures of the Act. However, under SMP 2.04(2), if any existing developments “significantly expand or initiate new forms of activity,” such expansion or activity shall adhere to the permit procedure of the master program.

Under SMP 12.02, a non-conforming use or structure may be continued provided that (1) it is not “enlarged, or increased, or extended to occupy a greater area than was occupied on the date of adoption of this program, or applicable amendments thereto,” or (2) it is not moved in whole or in part to any other portion of the lot, parcel, or shoreline area..” If a use or structure is to be enlarged, increased, extended or moved, the change must be authorized by permit as though a new development or use were proposed.

The principal project facilities that are involved in the re-licensing process are beyond the County’s boundaries. As such they are beyond the reach of the provisions of the SMP that apply to non-conforming uses. The aspects of the project that are within the territorial jurisdiction of Skagit County do not “significantly expand” the Project.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the subject matter and the persons of this appeal.

2. The County has acquired no extra-territorial jurisdiction even though parts of the subject project are within the County and parts are outside its boundaries.

3. That some project-related features are exempt from permit and other are not does nothing to expand the territorial jurisdiction of the County.

4. No “hydropower” as defined by the SMP is being proposed within the boundaries of Skagit County. The “associated facilities” referred to in the definition are facilities associated with the generation of electricity.

5. The alteration of flow regimes called for by the Settlement Agreement and made possible by the reconstruction of power house facilities is not a “development” as that term is used in the SMA. The flows are an impact of development. Therefore, it is irrelevant that a consequence of the change of flows may be to interfere with normal public use of the surface of the affected rivers.

6. The alteration of flow regimes is also not a “use” as that term is used in the SMA, as interpreted in the Clam Shacks case. The “uses” contemplated are activities that produce consequences, not the consequences themselves.

7. Skagit County’s permit jurisdiction under the SMA is limited to those facilities that are placed within unincorporated Skagit County. Among other things, this means that the County may not apply its non-conforming use regulations to project changes outside its boundaries.

8. Even if the county’s non-conforming use regulations were applied, the project changes would need to be “significant” for a permit to be required and the changes contemplated here are not “significant.”

9. The clearly identified project facilities that will occur within Skagit County are the osprey nest platform and the common loon floating nest platforms. These features are probably exempt from the permit requirements of the SMA as wildlife habitat improvements, under RCW 90.58.147. They raise no obvious shoreline management concerns. Nonetheless the referenced statutory exemption requires a determination by the local government that the structures are substantially consistent with the local shoreline master program, and this has not occurred.

10. If the osprey nest platform and common loon floating nest platforms are not exempt, they should be evaluated separately under the standards for shoreline substantial developments.

11. The other project-related features within the County discussed in these proceeding (LWD handling, erosion control, boat launch facilities, recreational trails, gravel augmentation) are either not sufficiently defined to be considered for permitting at this time or will occur outside County boundaries.

12. There is no nexus between the subject of flood control and the project-related features that will or may occur within Skagit County. Accordingly, considerations relating to flood control are beyond the scope of the exemption application.

13. There is no evidence that the re-licensed project would measurably and adversely affect flow regimes and flood storage requirements outside of the impoundment area. Even if there were such evidence, it would be irrelevant to the question of permit exemption. The permit requirement is a question of substantive law independent of any consequences an activity may have.

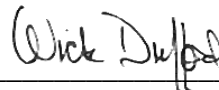
14. The County's "explanation" for its denial of the exemption application is erroneous as a matter of law. The record does not support requiring a permit on the basis of theories presented by the County.

15. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The appeal is granted. The denial of the shoreline permit exemption is reversed. The matter is remanded to Skagit County to make the consistency determination required by the CZMA in the context of issuing a permit exemption for the hydropower project. Any project-related developments or uses within the unincorporated County boundaries that are not deemed exempt shall be subjected to substantial development permit processing at such time as the details thereof become clear enough for such evaluation.

DONE this 5th, day of October, 2005



Wick Dufford, Hearing Examiner

RECONSIDERATION/APPEAL

As provided in the Skagit County Shoreline Master Program, Section 13.01, a request for reconsideration may be filed with Planning and Development Services within five (5) days after the date of this decision. The decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and Development Services within five (5) days after the date of decision or decision on reconsideration, if applicable.