

UNITED STATES OF AMERICA 123 FERC ¶ 62,252
FEDERAL ENERGY REGULATORY COMMISSION

Maine Tidal Energy Company

Project No. 12666-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued June 24, 2008)

On March 27, 2006, Maine Tidal Energy Company (METidal) filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the hydrokinetic Kennebec Tidal Energy Hydroelectric Project. The project would be located on the Kennebec River between Chops Point and West Chops Point in Sagadahoc County, Maine. The project uses no dam or impoundment.

The proposed project would consist of: (1) 50 Tidal In Stream Energy Conversion (TISEC) devices, (2) rotating propeller blades, (3) integrated generators with a capacity of 0.5 to 2.0 megawatts (MW), for a total installed capacity 100 MW, (4) anchoring systems, (5) mooring lines, (6) a submerged cable; and (7) interconnection transmission lines. The project is estimated to have an annual generation of 438 gigawatt-hours per-unit per-year, which would be sold to a local utility.

Background

The Commission issued public notice of the application on May 2, 2006. The Town of Woolwich, Maine, the City of Bath, Maine, the Maine Office of the Governor on behalf of the Maine State Resource Agencies, Mark and Karyn Caron, and Friends of Merrymeeting Bay (FOMB) filed motions to intervene as parties in the proceeding.² Verdant Power, LLC (Verdant) filed an opposed motion to intervene and protest in the proceeding. Since METidal opposed Verdant's motion to intervene and protest in a timely fashion and the motion to intervene is in the public interest, we grant Verdant's motion to intervene in the proceeding.³ The Maine Historic Preservation Commission (MEHPC), the United States Department of the Interior (Interior), the West Chops Homeowner Association (WCHA), the National Marine Fisheries Service Northeast Regional Office (NMFS), and Senator Orrin G. Hatch filed comments in the proceeding.

¹ 16 U.S.C. § 797(f) (2000).

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Regulations. *Id.* § 385.214(a)(3) (2007).

³ *See Id.* § 385.214(c)(2) (2007).

The Maine Office of the Governor on behalf of the Maine State Planning Office (MESPO), Maine Department of Environmental Protection (MEDEP), Maine Land Use Regulation Commission (MELURC), Maine Department of Marine Resources (MEDMR), Atlantic Salmon Commission (ASC), and the Maine Department of Conservation (MEDOC) comments that, in general, the State of Maine encourages the development of renewable power; however, it has some concerns with the fact that the lower Kennebec River was listed as an "A" River in 1982 in the Maine Resources Study. An "A" River is defined as a river that possesses a composite natural and recreational resource value with greater than state significance. The significant resource values include unique riverine geologic, hydrologic, ecologic features and critical areas, including significant bald eagle habitat, scenic character, anadromous fisheries, and National Historic Landmarks and Register Sites. The Maine Office of Governor also suggests the applicant consult with its resource agencies.

Mark and Karyn Caron comment that they neither support nor oppose the preliminary permit application but are opposed to any use of river in front of their property that will have an environmental or historical impact on the Merrymeeting Bay. FOMB object to the issuance of a preliminary permit for this project because it supports an unspecified new technology for which limited impact data exists and the project is proposed in an area that contains significant resources.

Verdant comments that it is concerned that METidal is site-banking, and therefore the preliminary permit application should be rejected. MEHPO comments that the applicant should seek early consultation with its office as the Chops area contains several terrestrial archeological sites of 18th century age that may be eligible for listing in the National Register, including underwater landforms or sites that are buried on the land surface.

Although Interior does not object to the issuance of a preliminary permit for the Kennebec Tidal Energy Project, it states that the project could have significant adverse impacts on fish and other aquatic resources including resident and migratory fish in the Kennebec, some of which are endangered, and therefore the proposed project could have an impact on the success of the fish restoration efforts on the Kennebec. Consequently, Interior requests that the applicant consult with the United States Fish and Wildlife Service early in the planning process.

Comments filed by the WCHA state concerns such as the impact on recreational industries, the construction and its impact on the surrounding communities, the unknown impact on valuable and protected endangered fish and mammalian species, and the impact of electromagnetic inference (EMI) on homes that directly abut the right-of-way.

NMFS comments that the proposed project could adversely affect fish populations and marine mammals through the disturbance and alteration of habitat and interaction with generating facilities, and request that they are consulted during the planning phase. Senator Orrin G. Hatch filed comments in support of the development of the hydrokinetic project.

Discussion

Section 4(f) of the FPA authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by FPA section 9,⁴ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁵ Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.⁶

The majority of the comments filed are related to the construction of the project. As noted, a preliminary permit does not authorize a permittee to undertake any construction or to enter onto lands owned by others. Furthermore, Interior's motion to intervene incorrectly states that a preliminary permit would authorize the installation of a pilot hydrokinetic unit. As noted, a preliminary permit does not authorize a permittee to undertake any construction or to enter onto lands owned by others. However, activities such as placement of test units for study purposes would be subject to other federal and state laws.

The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts the project might have on fish and wildlife, recreational resources, and historic landmarks. Furthermore, Verdant's protest and motion to dismiss METidal's

⁴ 16 U.S.C. § 802 (2000).

⁵ See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

⁶ Thus, a permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. See, e.g., *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); see also *Town of Summersville, W. Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits). Placement of test devices is not authorized by the issuance of a permit pursuant to the FPA; however, such activities would be subject to other federal and state laws. For these reasons, issuance of this preliminary permit is not a major federal action significantly affecting the quality of the human environment.

preliminary permit application because it believes METidal is site-banking is somewhat addressed under the Commission's strict scrutiny policy stated below.

On February 15, 2007, the Commission issued a notice of inquiry seeking comments on how it should treat applications for preliminary permits to study hydropower projects involving proposals to utilize wave, current, and instream new technology methods.⁷ In the notice of inquiry, the Commission posed three possible alternatives and stated that, pending the outcome of the notice of inquiry proceeding, it is adopting in the interim a "strict scrutiny" approach. Under that approach, the Commission will process new technology preliminary permit applications with a view toward limiting the boundaries of the permits, to prevent site-banking and to promote competition. Further, to ensure that permit holders are actively pursuing project exploration, the Commission will carefully scrutinize the reports that permit holders are required to file on a semi-annual basis,⁸ and would, where sufficient progress was not shown, consider canceling the permit. Stricter scrutiny could entail requirements such as reports on public outreach and agency consultation, development of study plans, and deadlines for filing a Notice of Intent to file a license application and a Pre-Application Document.

During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's Regulations.⁹ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹⁰ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of permittees, this permit will

⁷ See *Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,112 (2007).

⁸ As a standard condition in all preliminary permits, the Commission requires the permit holder to file progress reports every six months.

⁹ 18 C.F.R. §§ 5.5 and 5.6 (2007).

¹⁰ See *id.* § 5.3 (2007).

also require the permittee to file, within 45 days of the issuance date, a schedule of activities to be carried out under the permit and target dates for completion of these activities. At a minimum, this should include the filing of the NOI and PAD within one year of permit issuance, along with any request to use the traditional or alternative licensing process, or an NOI and Draft Application within two years of permit issuance for a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD must also include the time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and a preliminary list of issues identified and necessary studies related to these issues. If the periodic progress reports required by Article 4 of this permit do not show significant progress, or if the permittee fails to comply with any other conditions, the permit may be cancelled.

A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.¹¹

The Director orders:

(A) A preliminary permit is issued for this project to Maine Tidal Energy Company for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) The permittee, in addition to the six-month progress reports required under Article 4, shall file the following:

Within 45 days of the issuance date of the permit, a schedule of activities proposed by the permittee during the three-year permit term, leading to the filing of a development application. At a minimum, this shall include filing,

¹¹ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

within one year of the date of this permit, a notice of intent to file a license application (NOI) and pre-application document (PAD), accompanied by, if desired, a request to use the Traditional Licensing Process or Alternative Licensing Process, or the filing of an NOI and Draft Application no later than two years from permit issuance for development of a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD shall include a time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and for developing and filing a preliminary list of issues identified and studies related to these issues needed to develop a license application.

(D) On July 3, 2006, Verdant Power, LLC filed a motion to intervene. Granting the motion to intervene will not unduly delay or disrupt the proceeding or prejudice other parties to it. Therefore, pursuant to Rule 214,¹² the motion to intervene filed in this proceeding by the Verdant Power, LLC is granted, subject to the Commission's rules and regulations.

(E) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

William Guey-Lee
Chief, Engineering and Jurisdiction Branch
Division of Hydropower Administration
and Compliance

¹² 18 C.F.R. § 385.214 (2007).

FEDERAL ENERGY REGULATORY COMMISSION**TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the Permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if said project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the Permittee undertakes, the Permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. All test sites shall be restored as closely as possible to their original condition and to the satisfaction of the Commission's authorized representative or, where federal lands are affected, to the satisfaction of the agency administering such lands.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the Permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the Permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. At the close of each six-month period from the effective date of this permit, the Permittee shall file four copies of a progress report with the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; and shall serve a copy on the interveners in this proceeding. The report shall describe, for that report period, the nature and timing of what the Permittee has done under the pre-filing requirements of 18 CFR sections 4.38 and 5 and other applicable regulations; and, where studies require access to and use of land not owned by the Permittee, the status of the Permittee's efforts to obtain permission.

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