

125 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Maine Tidal Energy Company

Project No. 12666-001

ORDER DENYING REHEARING

(Issued October 16, 2008)

1. On June 24, 2008, Commission staff issued a preliminary permit to Maine Tidal Energy Company (Maine Tidal) for the Kennebec Tidal Energy Hydroelectric Project No. 12666-000 (Kennebec Project).¹ On July 24, 2008, Friends of Merrymeeting Bay (Friends), an intervenor in the Kennebec Project preliminary permit proceeding, filed a request for rehearing. For the reasons discussed below, the Commission denies rehearing.

Background

2. On March 27, 2006, Maine Tidal filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),² to reserve priority of application while it conducts studies to determine the feasibility of the proposed Kennebec Project.

3. The Kennebec Project would be located on the Kennebec River between Chops Point and West Chops Point in Sagadahoc County, Maine. The proposed project would consist of: (1) 50 Tidal In Stream Energy Conversion devices; (2) rotating propeller blades; (3) integrated generators with a capacity of 0.5 to 2.0 megawatts (MW), for a total installed capacity of 100 MW; (4) anchoring systems; (5) mooring lines; (6) a submerged cable; and (7) transmission lines. The proposed project uses no dam or impoundment,

¹ *Maine Tidal Energy Co.*, 123 FERC ¶ 62,252 (2008).

² 16 U.S.C. § 797(f) (2006).

and is estimated to have an annual generation capacity of 438 gigawatt-hours per unit per year.

4. On May 2, 2006, the Commission issued public notice of the preliminary permit application. Friends filed a motion to intervene and comments in the proceeding. Friends objected to the issuance of a preliminary permit for the Kennebec Project because the organization believes the permit supports the use of an unspecified new technology for which limited impact data exists, and the project is proposed in an area that contains significant environmental resources.

5. On June 24, 2008, the Commission issued a preliminary permit to Maine Tidal for three years, subject to terms and conditions. In response to Friends' concerns, the order explained that because a permit is issued only to allow the permit holder to investigate the feasibility of a project, the permit authorizes no land-disturbing activities or placement of test devices, and does not grant any property rights.³

6. On July 24, 2008, Friends filed a request for rehearing.

Discussion

7. In its rehearing request, Friends argues that Commission staff made three errors in issuing a preliminary permit to Maine Tidal: (1) Commission staff did not give equal consideration to environmental factors such as fish passage, as required by the FPA; (2) the language of the preliminary permit is confusing and ambiguous, especially as it relates to the type of technology to be tested; and (3) the project conflicts with federal and state statutes.

8. To support the argument that the Commission did not give equal consideration to environmental factors in issuing Maine Tidal a preliminary permit, Friends cites FPA sections 4(e), 10(a), and 10(j).⁴ However, it is clear on the face of these sections of the

³ 123 FERC at 64,579.

⁴ 16 U.S.C. §§ 797(e), 803(a), and 803(j) (2006), respectively. Section 4(e) of the FPA directs the Commission to give equal consideration to the purposes of power and development, energy conservation, fish and wildlife, recreational opportunities, and preservation of environmental quality "in deciding whether to issue a *license*." Similarly, sections 10(a) and 10(j) are prefaced with the direction that "all *licenses* issued under this subchapter" shall include the conditions required by sections 10(a) and 10(j).

FPA that they apply specifically to licenses, and not to preliminary permits. The requirements for preliminary permit applications can be found at FPA sections 4(f) and 5.⁵

9. Anticipating the Commission's rejection of Friends' argument that sections 4(e), 10(a), and 10(j) apply to both licensing and preliminary permits, Friends asserts the courts have stated that a preliminary permit is an integral part of the licensing process.⁶ Friends argues that the licensing requirements of 10(a) and 10(j) must be applicable to preliminary permits; therefore, the preliminary permit order needed to discuss the cumulative impacts from the addition of the Kennebec Project to existing dams on the river, the consistency of the project with the existing comprehensive plan, and uniform standards for baseline studies.⁷

10. Friends' assertions misunderstand the full holding of *National Wildlife Federation*, and contradict the clear meaning of FPA sections 4(e), 10(a), and 10(j). *National Wildlife Federation* does not stand for the proposition that the Commission must discuss cumulative impacts, assess consistency with a comprehensive plan, or decide on uniform standards for baseline studies when issuing a preliminary permit.⁸ Rather, the case holds that the Commission must adequately explain its reasons for rejecting requests for a comprehensive plan and uniform study guidelines where over 50 traditional hydropower projects had been proposed for study in one river basin.⁹

⁵ 16 U.S.C. §§ 797(f) and 798 (2006).

⁶ *National Wildlife Federation, et al. v. Federal Energy Regulatory Commission*, 801 F.2d 1505, 1514 (9th Cir. 1986) (*National Wildlife Federation*).

⁷ *Id.* at 1507. Friends parallels the arguments made by petitioners in *National Wildlife Federation*.

⁸ *Id.* at 1512 (“We do *not* hold that the Commission must develop a comprehensive plan before issuing permits, must require permittees to collect useful data for studying cumulative impacts, must develop uniform study guidelines, or must collect baseline environmental data.”) (emphasis added). *See also Symbiotics, LLC*, 99 FERC ¶ 61,101 at p. 61,420 (2002) (distinguishing *National Wildlife Federation*).

⁹ *National Wildlife Federation*, 801 F.2d at 1512. In *National Wildlife Federation*, more than 50 preliminary permit applications were pending for developments in the Salmon River Basin. Given the potential for such a large impact on a sensitive river basin, petitioners asked the Commission to develop a comprehensive plan, to require studies of cumulative impacts, to impose uniform study guidelines, and to collect baseline environmental data. The Commission issued seven preliminary permits over petitioners' (continued...)

11. Commission staff was not required to consider environmental factors in issuing the Kennebec Project preliminary permit. As noted, the purpose of a preliminary permit is to allow a potential licensee to gather the very information about the project that Friends asks us to consider, and to conduct necessary studies, including site-specific and cumulative impact analyses.¹⁰ The information gathered by Maine Tidal will be considered by the Commission should Maine Tidal file a license application.

12. Friends' second reason for requesting rehearing is that "the language of the preliminary permit is confusing and ambiguous." Specifically, Friends alleges that although the permit states that it does not authorize construction activities, it is not clear whether "field work" includes "construction." It does not. As explained in Maine Tidal's preliminary permit, a preliminary permit only secures priority of application should the preliminary permit holder apply for a license.¹¹ A preliminary permit issued pursuant to the FPA does not authorize a permittee to undertake construction, or to enter lands owned by others, or to place test units in the water.¹² To conduct any monitoring or testing, Maine Tidal must first obtain appropriate federal, state, or local authorization.

13. Friends' third reason for requesting rehearing is that "other laws conflict with the proposed project." Friends does not explain why the "other laws" conflict with the preliminary permit, and instead provides only a list of statutes and rules.¹³ Neither the preliminary permit itself nor the authorizations provided in the permit are in violation of the statutes listed by Friends. Moreover, the cited statutes will be considered by the Commission in the context of any future licensing proceeding for the project.

objections. The court found that the Commission did not adequately explain its reasons for not preparing a comprehensive plan before issuing multiple preliminary permits to study potential projects in a single river basin.

¹⁰ See 18 C.F.R. § 4.38 (2008). See, e.g., *McKay Hydro, LLC*, 105 FERC ¶ 61,045, at P 11-14 (2003) (environmental information and analysis not required at permit stage).

¹¹ 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.").

¹² *Maine Tidal Energy Co.*, 123 FERC at 64,579.

¹³ Friends lists the Clean Water Act, Maine Water Quality Certification Rules, Maine Surface Water Classification, the Magnuson-Stevens Fishery Conservation and Management Act, the Marine Mammal Protection Act, and the Endangered Species Act.

14. For the above reasons, the Commission denies rehearing.

The Commission orders:

The request for rehearing filed by Friends of Merrymeeting Bay on July 23, 2008, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.