

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Preliminary Permits for Wave, Current, and
Instream New Technology Hydropower Projects**

Docket No. RM07-8-000

COMMENTS

The Maine State Planning Office (“SPO”) offers the following comments in response to the Commission’s February 15, 2007, Notice of Inquiry (“NOI”) in the above-referenced matter:

1. SPO’s functions include coordination of Maine state agencies’ activities on matters related to hydropower development. Accordingly, SPO is providing these comments on behalf of itself and the Maine Departments of Environmental Protection, Marine Resources, Conservation, and Inland Fisheries and Wildlife, the Maine Atlantic Salmon Commission, and the Governor’s Office of Energy Independence and Security (collectively referred to hereinafter as the “Maine agencies”).
2. Through the work of its Office of Energy Independence and Security, Public Utilities Commission, and a variety of state energy programs and policies, Maine strongly supports sustainable use of the State’s renewable resources through development of alternative energy resources, including tidal power, in a manner that respects and protects other natural resources and environmental values and related economic opportunities such as commercial fishing. A recent study by the Electric Power Research Institute (“EPRI”) indicates that Maine has a promising tidal power resource.¹ In an apparent reflection of this potential, the Commission now has ten pending preliminary permit applications for tidal power projects along the Maine coast. Given its potential in Maine, these comments focus on issues related to preliminary permits for tidal power development.
3. The Commission has invited comment specifically on “the standard of review it should apply to applications for preliminary permits for ocean wave, tidal and other non-traditional hydropower projects, and how it should regulate those permits during their terms.”² For reasons outlined below, Maine agencies believe that the “stricter scrutiny approach” described in the NOI³ may best support Maine’s above-noted interest in efficient and sustainable development of the State’s tidal power resource.
4. The Commission’s current preliminary permit process appears to invite speculation without providing correspondingly strong incentive for investment in development. The current system appears to allow applicants without adequate technical capacity and

¹ *Maine Tidal In-Stream Energy Conversion (TISEC): Survey and Characterization of Potential Project Sites*, EPRI (April 7, 2006)

² NOI, p. 6, para. 10.

³ *Id.*, p. 9, para. 14.

without actual plans for development of tidal power and other alternative ocean energy resources to lock up sites with commercial potential. The NOI notes its potential for discouragement of such “site-banking” as one of the major advantages of the proposed “stricter scrutiny approach.”⁴ As the Commission is aware, the tidal power industry is in its infancy. Speculative acquisition of exclusive rights to pursue development of promising sites may drive up the cost of development in ways that could slow and hinder growth of tidal power and other emerging alternative ocean energy industries.

5. As suggested in the NOI, requiring more precise delineation of the geographic boundaries of preliminary permits may help promote competition by allowing multiple proposals in an area that would otherwise be swept within a single proposal.⁵ In addition, a more precise definition of the potential project area will facilitate consultation with resource agencies and the public on potential natural resources and environmental concerns and potential use conflicts related to project development or operation in the area. In Maine agencies’ experience, early identification and attention to such potential issues are hallmarks of an efficient and effective review process.

6. Maine agencies suggest that a number of elements are needed for the stricter scrutiny approach to be effective. These include “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 preliminary application document” as noted in the NOI.⁶ The Commission should specify that reports on consultation with the public and natural resources agencies identify issues raised and responses to those issues. Close collaboration with federal and state resources agencies will not only promote regulatory efficiency but resource protection. Such collaboration seems particularly important regarding tidal power and other emerging technologies for which there is limited or no data on effects on fisheries and other living resources and no real world experience with managing and maintaining facilities in relation to other resources and uses. Consultation requirements should be carefully tailored to avoid placing undue burdens on review agencies as well as permit holders. Revocation of a preliminary permit if meaningful progress toward submission of an application is not being made likewise seems an important tool to discourage speculative permit applications and encourage growth of alternative energy options.

7. The State of Maine holds title in fee to the submerged lands along its coast (lands from mean low water to the three mile limit). These lands are also subject to the Public Trust Doctrine as articulated by Maine’s supreme court. Tidal power projects on state-owned submerged lands would require a lease from the State’s Bureau of Parks and Lands whose leasing criteria include consideration of a project’s potential effects on fishing, navigation and other public uses. For projects located on state-owned lands, preliminary permit holders should be required to consult with the pertinent state land management agency regarding acquisition of lease or easement rights needed for development on such lands and related state requirements. In the case of submerged

⁴ *Id.*

⁵ *See id.*

⁶ *Id.*

lands subject to the Public Trust Doctrine, the Maine agencies suggest that the Commission clarify that an applicant need not seek to acquire the lands in perpetuity and may obtain sufficient interest in such lands by lease or easement for the term of the FERC license.⁷

Done this 17th day of April, 2007.

Respectfully submitted,

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⁷ These comments do not address the issue of whether the Federal Power Act authorizes the Commission to empower private parties to acquire state-owned lands subject to the Public Trust Doctrine by eminent domain. The State reserves the right to comment on that issue as appropriate at a subsequent stage of this or in any other proceeding.

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