

**The Passamaquoddy Tribe at Pleasant Point Reservation**  
Sakom Road, Route 190  
Perry, Maine 04667-0343

April 30, 2007

Honorable Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE, Room 1-A  
Washington, DC 20426

**RE: Docket number RM07-8-000 Comment on Notice of Inquiry and Interim Statement of Policy for Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects**

Dear Ms. Bose:

Please accept these comments by the Passamaquoddy Tribe at Pleasant Point Reservation ("Tribe") to the Notice of Inquiry and Interim Statement of Policy filed in the Federal Register by the Federal Energy Regulatory Commission ("Commission"). 72 Fed. Reg. 9281-9284 (March 1, 2007). We appreciate the opportunity to comment on this important possible change in policy.

The Tribe is encouraged by the Commission's desire to encourage new sources of hydropower, such as tidal energy. The Tribe also appreciates the Commission's recognition that its policies and regulatory requirements can either stymie or foster new energy sources.

A. Tribe Has Significant Stake in Commission Policy on Tidal Energy Regulation

Hydropower does not pollute the air, create long term waste problems, require dependence on foreign carbon sources, or have costs that fluctuate based on international events. Proposed tidal power technology adds to the many benefits of traditional hydropower in that it does not require permanent structures that stop or dramatically alter current flow. Tidal power generators, located below the water line, do not present "not-in-my-backyard" problems associated with some wind or other generation facilities.

The Tribe's historical lands and waters are located in a region with enormous potential for tidal energy generation. For over 12,000 years, the Tribe's traditional waters have included the Bay of Fundy and surrounding water. The potential energy in these remarkable waters is clear to us as the Tribe has fished, hunted, and navigated these waters for so long. The strength of the tide of this region is without parallel. Indeed, more water comes in and out of the Bay of Fundy each day than is contained in all the freshwater rivers in the entire planet. Sadly, it is also a region

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that is economically challenged and in need of the economic development that this type of cheap and clean energy may foster in Eastern Maine. Thus, few entities have a greater interest in seeing the success of these ventures than the Tribe. For all these reasons, the Tribe encourages the Commission to use this Notice of Inquiry to make tidal power permitting and licensing quicker and easier.

B. Preliminary Permits Are an Important Tool to Encourage Tidal Energy Development and Should Continue With Some Modification

Federal statute 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 to prepare an application for a license. 16 U.S.C. § 797 (2000). 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 being studied. *See, e.g., Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006). In the Notice of Inquiry, the Commission suggests that one alternative is to decline to issue preliminary permits for new technology projects. *See Notice of Inquiry and Interim Statement of Policy*, at p. 10. The Tribe believes that adoption of this alternative would be a mistake. Instead, it encourages modification of the preliminary permit process instead of complete revocation.

We appreciate the Commission's recognition that some aspects of the existing policy for processing preliminary permit applications for traditional hydropower projects may not be the most appropriate policy for tidal projects. This is particularly true in regards to site permitting. For example, to locate a dam, an initial inquiry must include detailed and fixed site coordinates. This is because the permitting process may ultimately require the use of eminent domain proceedings to secure specific properties. This is a reasonable application request for a traditional dam because the basic technology behind locating, building and operating a hydropower facility is based on many years of practice. Conversely, tidal power site development is nascent. While technology exists that can convert the changing tide to electricity, practical experience to guide selection of a site location in vast ocean waters is still developing. Indeed, locating the exact site for a tidal project is the type of inquiry that should be conducted following issuance of the preliminary permit as part of the permitting process. Therefore, we encourage the Commission to develop a preliminary permit policy with flexibility to modify the exact coordinates of a site during the permitting process without triggering a "fundamental or significant change" that constitutes a material amendment and could cost a permitting preference. 18 C.F.R. § 4.35(4)(f).

The Tribe shares the concerns expressed by the Commission that some entities seeking preliminary permits are clearly trying to "bank" sites or to lock up potential sites, perhaps for future sale. The Commission should provide incentives to develop a particular site secured by issuance of a preliminary permit and the rights of first development that come with it; but this should be done without the squelching of competition that comes with giving all development rights for large bodies of water to just one entity. The Tribe is encouraged by the Commission's

use of the strict scrutiny method to require seemingly competing applications to limit their proposals to reasonably-sized and non-competing bodies of water. *See New Hampshire Tidal Energy Company*, 119 ¶ FERC 62,043 (2007).

The Tribe also encourages the Commission to require preliminary permit holders to make progress towards actual utilization of the resource. In simple terms, preliminary permit holders should be required to “fish or cut bait.” Therefore, the Tribe supports the notion of progress reports contained in the “strict scrutiny” approach, but urges the Commission not to overburden preliminary permit holders with unreasonable reporting expectations. The demonstration of progress is a worthy objective, but excessive requirements may serve only to stymie the Commission’s goal of encouraging prompt development of this exciting new energy source.<sup>1</sup>

A useful metric in which to gauge the long-term viability of a proposed project should be an evaluation of the applicant *vis-à-vis* its demonstrated commitment to the region in which the proposed project is located. For example, as noted above, the Tribe has harvested from and otherwise worked the waters of Eastern Maine for over 12,000 years. Our commitment to the long-term viability of energy development projects in Eastern Maine is unparalleled in the region. This type of interest and commitment should be considered by the Commission when looking at applicants who may be seeking to simply bank, and then “flip,” a permitted site for a profit.

C. Preliminary Permitting Process Should Take Into Account That the Tribe Has a Unique Status.

In a recent contested preliminary permitting application, an applicant attempted to mischaracterize Commission policy and precedent to prohibit the Tribe from receiving the municipal preference to which it was entitled under state and federal law.<sup>2</sup> While the Tribe responded directly to that specific filing, it is important that the Commission appreciate the particular status of the Tribe under state and federal law.

The Maine Indian Claims Settlement Act established a unique relationship between the Tribe and other governmental entities. *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574, 581 (Me. 2001) (recognizing that the Tribe “gained the legal capacity of a municipality”). While the Tribe retained enumerated sovereign rights for internal Tribal affairs, it is indisputable that “when the Tribes communicate with the state or federal government, file documents relating to the dispute of authority at issue, and provide the other governments with information regarding

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<sup>1</sup> The Tribe is aware of the long time frames for permitting some energy projects. See LNG licensure process. It is far too easy for development projects to become stuck in the quagmire of agency consultation and study, which can result in a project with great potential being subjected to a death by a thousand regulatory bodies.

<sup>2</sup> See ORPC Maine, *Answer in Opposition to Late Motion to Intervene of the Passamaquoddy Tribe*, October 31, 2006.

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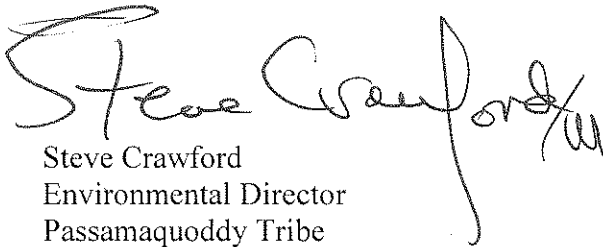
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their requests, they are not engaged in ‘internal tribal matters’” and, therefore, are acting as a municipality. *Id.* at 590. The Settlement Act makes “state laws regarding natural resources generally applicable to tribal lands.” *Id.* For example, in water quality matters, the Maine Supreme Court has found that in communications between the Tribe and the federal government regarding water quality the Tribes were “unquestionably” acting as a municipality and must be treated as such. *Id.* at 590.

Any new policy adopted by the Commission should maintain a municipal preference for preliminary permits, which would ensure recognition of the Tribe’s municipal status pursuant to the Maine Indian Claims Settlement Act, unlike most Indian tribes that may come before the Commission. Since the Tribe is treated like a municipality for virtually every regulatory requirement when dealing with state and federal agencies, equity mandates that the Tribe both accept the burdens and receive the benefits, such as municipal preference, entailed with the regulatory scheme.

We appreciate the opportunity to provide these comments, and please do not hesitate to contact us if you require additional information or have any questions.

Respectfully yours,



Steve Crawford  
Environmental Director  
Passamaquoddy Tribe