

Friends of Merrymeeting Bay  
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REQUEST for REHEARING

Kennebec Tidal Energy Hydroelectric Project Preliminary Permit

FERC Project No. P-12666-000

E-Filing

July 23, 2008

Kimberly Bose, Secretary  
Federal Energy Regulatory Commission  
888 First St. NE  
Washington, D.C. 20426

**RE: REHEARING**

Kennebec Tidal Energy Hydroelectric Project, Project No. 12666-000  
Application for Preliminary Permit  
Kennebec River, Sagadahoc County, Maine

Dear Secretary Bose:

As per 18 C.F.R. § 385.713 please consider this our request for a rehearing on the issuance of a FERC preliminary permit to Maine Tidal Energy Company for the above noted project located at the Chops in the Kennebec River, Sagadahoc County, Maine.

**CONCISE STATEMENT OF ERRORS IN THE FINAL ORDER**

FERC erred in issuing the preliminary permit because (1) FERC did not, as required by the Federal Power Act, give equal consideration to environmental factors such as fish passage; (2) the language of the preliminary permit is confusing and ambiguous; and (3) the project as thus far permitted conflicts with a variety of federal and state statutes in addition to the Federal Power Act.

**STATEMENT OF ISSUES**

1. *FERC did not, as required by the Federal Power Act, give equal consideration to environmental factors.*

We submit this permit has been issued in error since the proposed project conflicts hopelessly with several laws relating to the protection of natural resources. The project as described by the applicants is simply incompatible with this unique site and FERC is ignoring the obvious conflicts in allowing it to proceed. If FERC's sole purpose in issuing preliminary permits were to reserve a site for a technically and financially qualified applicant then environmental aspects of the project would be irrelevant.

To the contrary, FERC's enabling document, the Federal Power Act, dictates expressly that environmental factors such as fish passage must be given equal consideration.

**The Federal Power Act: (16 U.S.C. Chapter 12) [Italics added for emphasis]**

Sec. 797(e)

“In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, *shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.*

Sec. 803:

“All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, *for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses*, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title \1\ if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.”

(j) “Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) *That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)*

*affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.”*

While specific conditions for “protection, mitigation and enhancement” of fish and wildlife *shall* be based on recommendations from the various fish and wildlife agencies, in *deciding to issue any license* it is the Commission which “*shall give equal consideration* to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”

It is not acceptable for FERC in issuing even a preliminary permit to essentially discount giving equal consideration or postponing environmental analyses or just passing this responsibility on to fish and wildlife agencies at some future date. The Kennebec River has a comprehensive management plan, albeit old, [Kennebec River Resource Management Plan: Balancing Hydropower and Other Uses. State Planning Office 1993] meant to comply with "An Act to Ensure Notification and Participation by the Public in Licensing and Relicensing of Hydroelectric Dams and to Further Ensure the Equal Consideration of Fisheries and Recreational Uses in Licensing and Relicensing," codified at 12 MRSA §407. The Kennebec plan stresses the importance and uniqueness of the River and the Merrymeeting Bay area in particular where the project is proposed:

“The Edwards Dam is the first obstruction encountered by sea-run fish making their way up the Kennebec River to spawn. As such, it is the greatest obstacle to restoration of the Kennebec's fisheries resources and must be removed. It should be noted that one of the major reasons for designating the lower Kennebec and Merrymeeting Bay as an outstanding river segment is because of the diversity and uniqueness of anadromous fish resources in the lower river. These anadromous fish resources are significantly dependent upon spawning habitat above the Augusta dam.”

Edwards Dam has been removed and fish restoration continues in full swing. If the Chops Project goes through, that project can be substituted for the “Edwards Dam” and “Augusta dam” in the paragraph above and Maine will have taken a giant and illegal step backward in violation of the Clean Water Act and Maine Surface Water Classification statutes.

The courts have made clear [NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, Petitioners, and THE NEZ PERCE TRIBE, Intervenor-Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent. No. 84-7325. 801 F.2d 1505; 1986 U.S. App. LEXIS 31405; 17 ELR 20111] that a preliminary permit is an integral part of the licensing process. National Wildlife Federation v. Federal Energy Regulatory Commission, 801 F.2d (9th Cir. 1986). The court in NWF v. FERC stated, 801 F.2d at 1514:

Moreover, after holding hearings, developing a record, and soliciting further comments on the issuance of preliminary permits, the Commission can hardly argue it was not a "relevant stage" of the licensing process. As we have seen, issuance of preliminary permits and the formulation of their articles are of central importance in the process of licensing. *Northern Colorado Water Conservancy District v. FERC*, 235 U.S. App. D.C. 79, 730 F.2d 1509, 1512 (D.C. Cir. 1984).

And, that once a preliminary permit is issued, certain environmental considerations may become much more difficult to consider:

First, the grant of a preliminary permit increases the chances that a license will be granted to that applicant by eliminating the incentive for others to file competing license applications since the permittee is given a statutory priority and the right to amend.

\* \* \*

Moreover, once major expenditures have been made towards developing license applications for particular sites, which occurs upon the granting of preliminary permits, it will be much more difficult to create a plan that puts that site off-limits. *See Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979).

There is much discussion in this decision of the Northwest Power Act requirements for a basin-wide comprehensive plan for hydro development and its effects, uniform studies and cumulative impacts, which are similar to the Federal Power Act requirements:

As the Federal Power Commission has recognized, "the concept of considering a particular water-shed as a whole is the backbone of the Federal Power Act." *The California Oregon Power Co.*, 23 F.P.C. 59, 61 (1960).

\* \* \*

All of the evidence received at the hearings supported the need for development of a comprehensive plan before issuing preliminary permits, and for requiring permittees to study cumulative impacts. [FN 13:] For example, Lorraine Bodi of the U.S. National Marine Fisheries Service stated that unless a comprehensive plan were first developed, "you can't see whether the studies [conducted under the preliminary permit] are helpful to accomplish the objective." Harold Miles of Idaho Consumer Affairs, Inc. testified that development of a comprehensive plan before issuing licenses was needed to direct developers to conduct the necessary studies. Jack Griswold of the Forest Service indicated that if a comprehensive plan were not developed before issuing preliminary permits, studies conducted by developers would frequently be inadequate and would have to be entirely redone. Tom Haislip, a developer, indicated that even a tentative comprehensive plan, or a plan limited to stream reaches instead of basinwide, identifying likely and unlikely development sites, would be a boon to developers because they would not have to spend money to study unfruitful developments. Roy Heberger, a

biologist with the U.S. Fish and Wildlife Service, testified it would be impossible to designate some proposals as having no adverse impact without first developing a comprehensive plan, and that in his judgment no project's impact could be measured independently from the impacts of other proposed projects.

In a written submission to the Commission, Charles Bennett, Fisheries Biologist for the National Marine Fisheries Service, concluded:

Data concerning the proposed projects, particularly their individual and cumulative impacts to anadromous fish resources . . . [are necessary]. . . . These information requirements cannot be met if exemptions and preliminary permits are issued on a staggered, case-by-case basis.

The preceding information strongly indicates the need for a consolidated review of all small hydro projects now planned for the Salmon River Basin. [End of FN 13]

Dr. Carl Shuster, who chaired the hearings for the Commission, noted the importance of developing a basin-wide comprehensive plan before issuing preliminary permits. At the conclusion of the hearing Dr. Shuster said: "We agree that you need site-specific information, and you need to assess cumulative impacts, and you need to have a basin plan." No evidence was received suggesting comprehensive planning should be deferred or cumulative impacts need not be studied."

801 F.2d at 1507, 1511.

The Court in *NWF et al v. FERC* also noted:

As we have said, all of the evidence in the record suggests that some or all of the steps urged by petitioners are necessary if the Commission is to have the information necessary for the discharge of its statutory duty at the licensing stage. The reasons advanced by the Commission for not developing a comprehensive plan, not requiring permittees to conduct studies designed to provide data to measure cumulative impacts, not formulating uniform study guidelines, and not collecting baseline environmental data, have no discernible support in the record. The Commission simply did not mention the extensive and uncontradicted evidence offered by petitioners in support of their requests. "Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed [\*\*18] to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). [FN 16:} *See also Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 472 (9th Cir. 1984) (as amended) ("The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.") (quoting *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965)); *Farmers Union Central Exchange, Inc. v. FERC*, 236 U.S. App. D.C. 203, 734 F.2d 1486, 1499 (D.C. Cir. 1984) (as

amended) (court "must conduct a 'searching and careful' inquiry into the record in order to assure itself that the agency has examined the relevant data and articulated a reasoned explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting in part *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962)).

801 F.2d at 1512.

While the court did not hold that a comprehensive plan, uniform studies and consideration of cumulative impacts must take place prior to the issuance of a preliminary permit, the court did hold:

the Commission's decision to reject these options is not sustainable on the present record. [FN 17] The Commission relies on *Appomattox River Water Authority v. FERC*, 736 F.2d 1000, 1004 (4th Cir. 1984); *City of Dothan v. FERC*, 221 U.S. App. D.C. 385, 684 F.2d 159 (D.C. Cir. 1982); and *Delaware River Basin Commission v. FERC*, 680 F.2d 16 (3d Cir. 1982), for the proposition that the Commission is vested with authority to determine whether to conduct the detailed and sophisticated analyses required by the Federal Power Act at the licensing stage or at some earlier time. We do not dispute this proposition. We hold only that such a decision must be based upon stated reasons supported by the record.

801 F.2d at 1512.

The position of Friends of Merrymeeting Bay is that Maine Tidal Energy proposes to utilize between 50 and 100% of the water column in the most sensitive and vital area of the entire Kennebec system with new and untested generating technology. The project consisting of a field of "underwater windmills" may be appropriate in a broader reach of river but simply does not pass the straight-face test here, if fisheries are to be given any weight, let alone "equal consideration" as required by law.

In issuing the preliminary permit for the proposed project, there is no apparent consideration by the Commission of cumulative impacts from the addition of this project to existing dams on the river [already rife with turbine mortality and problematic fish passage issues], there is no apparent discussion of how the project fits in with the existing meager comprehensive plan for hydro power and fisheries on the river and there is no uniform standard or expectations set forth for baseline studies to be conducted. Issuance of a preliminary permit for this proposed project indeed begs the question: Can there ever be a proposed project so incompatible with resource values [particularly considering equal consideration is required] that FERC would deny a preliminary permit from the outset and what might that look like?

## 2. *The preliminary permit is confusing and ambiguous.*

There is also a good deal of confusion regarding the permit and scope of proposed work. FOMB, Maine DOC and USFWS are among the interveners who believed that field work including construction could be conducted within the time period and scope of the preliminary permit as described on the applicant's schedule of activities. NOAA Fisheries

reserved their right to intervene thinking the permit would only authorize desk-top studies. While the permit as issued specifies no construction, it does not define this term. There is also ambiguity in the language around pilot hydro-kinetic devices and test units. Are they the same and do they include floating units or those suspended from a vessel which are typical methods for testing underwater technologies and that still have adverse impacts?

3. *Other laws conflict with the proposed project.*

Other laws this project conflicts with include:

**The Federal Water Pollution Control Act, a.k.a. The Clean Water Act.  
33 U.S.A §§ 125-1387**

**Maine Water Quality Certification, Department of Environmental Protection [DEP]  
Rules**

**Maine Surface Water Classification, Title 38**

**1996 Amendments [PL 104-267] to the Magnuson-Stevens Fishery Conservation and  
Management Act [MSA] [16 U.S.C. §1801 et seq. [1998], defining Essential Fish  
Habitat**

**Marine Mammal Protection Act**

**Endangered Species Act**

We respectfully request the Commission to review our original comments as well as the substantive resource issues raised by the various agencies and other interveners in their submissions, to rehear this case and retract the preliminary permit.

Thank you for your consideration.

Sincerely,



Ed Friedman, Chair

C.C. Service List by email