

133 FERC ¶ 62,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tidewalker Associates
Eastport Tidal Power LLC

Project No. 12704-004
Project No. 13830-000

ORDER ISSUING PRELIMINARY PERMIT,
GRANTING PRIORITY TO FILE LICENSE APPLICATION,
AND DENYING COMPETING APPLICATION

(December 3, 2010)

1. On April 12, 2010, Tidewalker Associates (Tidewalker) filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Half Moon Cove Tidal Power Project, to be located in Cobscook and Passamaquoddy Bay, in Washington County, Maine. On August 9, 2010, Eastport Tidal Power LLC (Eastport) filed a competing permit application for the Half Moon Cove Tidal Power Plant Project at the same site. As discussed below, this order issues a preliminary permit to Tidewalker, with the earliest application acceptance date, and denies Eastport's permit application.

I. Project Proposals

2. Tidewalker's proposed project would consist of: (1) a new 1,200-foot-long rock-filled barrage with a crest elevation of approximately 27 feet above mean sea level (msl), a new 30-foot-wide, 15-foot-high gated section, and a new powerhouse with four turbine generating units with a total capacity of 9.0 megawatts (MW) impounding 850 acres of Half Moon Cove; and (2) a new 34.5 kilovolt (kV), 7.1-mile-long transmission line. The project would produce an estimated average annual generation of about 45,000 megawatt-hours (MWh).

3. Eastport's proposed project would consist of: (1) two new impervious core, sand, and gravel embankments, one 410-foot-long and another 115-foot-long, a new 860-foot-long concrete modular wall extending about 11 feet above msl consisting of new concrete support columns, a new gated section, and a new powerhouse with four reversible bulb generating units with a total capacity of 20 MW impounding 544 acres of Half Moon Cove; and (2) a new 34.5 kV, 7.1-mile-long transmission line. The project would produce an estimated average annual generation of about 52,500 MWh.

¹ 16 U.S.C. § 797(f) (2006).

II. Background

4. On May 17, 2010, the Commission issued a public notice accepting Tidewalker's permit application, soliciting comments, motions to intervene, competing applications, or notices of intent (NOI) to file competing applications. The deadline for filing these documents was July 16, 2010. On July 7, 2010, and August 9, 2010, Eastport filed a timely NOI and its competing permit application, respectively.² On September 17, 2010, the Commission issued a public notice accepting Eastport's permit application, soliciting comments and motions to intervene. The deadline for filing these documents was November 16, 2010.

5. For Tidewalker's project, the Maine State Planning Office (Maine SPO),³ Passamaquoddy Tribe at Pleasant Point (tribe), and Eastport filed timely motions to intervene.⁴ The U.S. Department of the Interior (Interior),⁵ Maine Department of Inland Fisheries and Wildlife (Maine DIFW), and the Maine Department of Environmental Protection (Maine DEP) filed timely comments. The National Marine Fisheries Service (NMFS) filed late comments. Further, Eastport filed a motion for leave to file comments out of time on September 24, 2010, and on September 26, 2010, Tidewalker filed a petition to protest Eastport's September 24th filing. On October 4, 2010, Eastport filed comments responding to Tidewalker's September 26th petition. On October 15, 2010, Tidewalker filed a response to Eastport's October 4th filing.

6. For Eastport's project, the Maine SPO and Tidewalker filed timely motions to intervene. Interior, NMFS, Maine DIFW, Maine DEP, Maine Department of Marine Resources (Maine DMR), Maine Historic Preservation Commission (Maine HPC), and Tidewalker filed timely comments.

² Section 4.36(a)(2) of the Commission's regulations requires any preliminary permit application filed pursuant to a NOI must be submitted for filing in competition with an initial preliminary permit application not later than 30 days after the prescribed intervention deadline (in this case by August 16, 2009).

³ The Maine SPO moved to intervene on behalf of the State of Maine, the Maine Department of Environmental Protection, the Maine Department of Inland Fisheries and Wildlife, the Maine Department of Marine Resources, and the Maine Department of Conservation.

⁴ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2010).

⁵ Interior also filed a correction to its comments.

7. Eastport's motion for leave to file comments out of time states that Tidewalker's permit application includes technical errors that overstate the proposed project's estimated average annual generation, lacks detail regarding project dimensions and composition, and demonstrates a lack of progress on the project design since issuance of a prior permit in 2007.⁶ Tidewalker's petition to protest Eastport's comments states that Eastport misinterpreted the turbine generating specifications and the number of proposed turbines in Tidewalker's permit application; thus underestimating power generation. Regarding the lack of project details, Tidewalker states that other options will be considered during the design phase, including the use of composite materials and a flexible dam. Regarding the lack of progress, Tidewalker states that it has complied with the terms and conditions of the prior permit,⁷ and has modified project plans in response to stakeholder concerns.

8. In the October 4th filing, Eastport argues that the projected capacity factor used to estimate energy generation of Tidewalker's project cannot be achieved and appears to be double what it should be based on other existing tidal power plants. In the October 15, 2010, filing, Tidewalker states that Eastport has incorrectly interpreted its projected capacity factor, and Tidewalker proposes to complete a modeling study which would allow the optimization of energy production and characterization of environmental impacts.

9. For both projects, the Maine SPO states that they are entitled to party status to meet their responsibilities for inter-governmental coordination and comprehensive planning. Interior expressed concern regarding the effects that project operations may have on wildlife, aquatic, cultural, recreation resources, and threatened and endangered species. Interior recommended that the applicants consult with the state and federal fish and wildlife agencies regarding studies of effects on fish and wildlife resources. NMFS recommended early consultation to identify potential impacts to species under its jurisdiction. The Maine DIFW stated that the proposed project operations have the potential to disrupt wildlife habitat, and requested early consultation to discuss needed information. The Maine DEP expressed concerns about the economic viability of the projects and effects on aquatic organisms and water craft.

10. For Tidewalker's project, the tribe states that its properties may be affected by the proposed project and that they have concerns regarding environmental, cultural, and spiritual impacts on tribal members.

⁶ 119 FERC ¶ 62,022 (2007).

⁷ Tidewalker filed the required schedule of activities, a NOI/Pre-application Document, and six progress reports pursuant to the permit order issued on April 10, 2007.

11. For Eastport's project, the Maine DMR expressed concern about the proposed project's potential to delay the time it takes tidal water to enter Half Moon Cove, and recommends consultation to discuss environmental issues. The Maine HPC states that there are three known potentially eligible prehistoric archaeological sites in the project area, and recommends that Eastport conduct Phase I archaeological surveys prior to any ground disturbing activities. Tidewalker questions the feasibility of Eastport's proposed project operation and optimization of energy production.

12. The purpose of a preliminary 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 the project is found to be feasible, prepares an acceptable development application. The permit confers no authority on the permittee to undertake construction of the proposed project, or to occupy or use lands or other property of the United States or of any other entity or individual.⁸ Therefore, because the purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts, the issues raised in the comments and interventions are premature at the permit stage and can properly be addressed in the licensing process.

III. Discussion and Successive Permits

13. The Commission's rules of preference among competing applications state that if both of two applicants are either a municipality or a state, or neither of them is a municipality or a state (such as is the case here), and the plans of the applicants are equally well adapted to develop, conserve, and use in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the earliest application acceptance date.⁹ Because neither of the applicants has presented a plan based on detailed studies, there is no basis for concluding that one plan would be superior to the other. Therefore, because Tidewalker's permit application was accepted first, and its' plan is as well adapted as Eastport's plan to develop, conserve, and use the water resource of in Cobscook and Passamaquoddy Bay, the preliminary permit is issued to Tidewalker.

14. Tidewalker has previously held a preliminary permit for this site under Project No. 12704-000.¹⁰ On March 25, 2009, Tidewalker filed a NOI and Pre-Application

⁸ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment.

⁹ 18 C.F.R. § 4.37(b)(2) (2010).

¹⁰ 119 FERC ¶ 62,022 (2007).

Document (PAD) for the proposed project.¹¹ The Commission will grant successive permits if it concludes that the applicant has diligently pursued the requirements of its prior permits in good faith. Tidewalker has provided information to Commission staff during its previously held permit showing progress including proposed project operation. It is expected that during this permit term, Tidewalker will consult with federal and state agencies, tribes, non-governmental organizations (NGOs) and others to develop a license application.

15. The Commission usually does not prescribe in great detail what a permittee must accomplish under a permit. However, a successive permit can warrant a greater standard of Commission oversight. Therefore, we will monitor the progress of the permittee's activities. If the permittee fails to make significant progress toward developing a license application, the permit may be subject to cancellation.

16. During the course of the permit, the Commission expects that the permittee will carry out consultation and study development leading to the possible development of a license application. 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.

17. This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of permittee, this permit will 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 dates for consulting with federal and state agencies, Indian tribes, and NGOs, and completing necessary studies that demonstrate progress toward filing a license application within the term of this permit. 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.

18. 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

¹¹ In a letter issued November 10, 2009, Commission staff terminated Tidewalker's Integrated Licensing Process due to the lack of an adequate study plan proposal. In a letter issued November 25, 2009, Commission staff suggested the traditional licensing process and the alternative licensing process as two other options to use when developing a license application.

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 to hold 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.¹²

The Director orders:

(A) A preliminary permit is issued for the Half Moon Cove Tidal Power Project No. 12704 to Tidewalker Associates 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) The competing application for preliminary permit for Project No. 13830, filed by Eastport Tidal Power LLC, is denied.

(C) 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.

(D) Within 45 days of the issuance date of the permit, Tidewalker Associates shall file 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 the dates for consulting with federal, state, and local agencies, tribes, NGOs, and other interested entities, and completing necessary studies that demonstrate progress toward filing a license application.

(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.

Bob Easton, Chief
New England Branch
Division of Hydropower Licensing

¹² See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

Form P-1 (Revised December 2009)**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 the 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. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

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 a progress report electronically via the Internet; and shall serve a copy on the intervenors in this proceeding. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. 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 C.F.R. sections 4.38 and 5.1-5.31 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 to access and use the land.

Document Content(s)

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