



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

JUL 10 2009

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: NMFS Comments on New York Tidal Energy Company's East River Tidal Energy Project (P-12665), Draft Pilot License Application

Dear Ms. Bose:

The National Marine Fisheries Service (NMFS) has reviewed the draft license application for New York Tidal Energy Company's (NTEC) proposed East River Tidal Energy Project, dated June 1, 2009 and filed by the Federal Energy Regulatory Commission (FERC) on June 10, 2009. The project is located in the East River at Hell Gate, New York City, New York. Contents of NTEC's draft submittal include: a notice of intent (NOI) and draft license application; summaries of correspondence and prior coordination undertaken by the applicant; a proposed stakeholder distribution list; a list of existing FERC docket filings pursuant to this matter; a letter of request for waivers and modifications of FERC's integrated licensing process (ILP) necessary for expedited processing of a hydrokinetic pilot project license and a proposed process plan, project schedule and justification statement; the applicant's requests for designation as non-federal representative for purposes of informal consultation pursuant to Section 7 of the Endangered Species Act (ESA) of 1973, as amended and Section 106 of the National Historic Preservation Act; a proposed monitoring plan, design drawings, and location map; as well as various supplemental exhibits.

FERC asserts jurisdiction over non-federal hydrokinetic projects when they are proposed in navigable waters of the U.S. and would be connected to the interstate electrical grid (16 U.S.C. §§796(8), (11), 817(1)). NTEC's draft application, submitted under FERC's ILP pursuant to §241 of the Energy Policy Act of 2005, was prepared following FERC's Pilot Licensing Procedures for Ocean Kinetics Projects. NMFS responsibilities in this matter are codified under its authorities pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. §661 et seq.), which requires that the federal action agency give great weight to the comments of federal and state resource agencies; the Endangered Species Act (16 U.S.C. §1531 et seq.) of 1973 as amended which requires Federal agencies to ensure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of any listed species; the Marine Mammal Protection Act (MMPA) (50 C.F.R. 216) of 1972, which provides protection to all marine mammals, regardless of listing status under the ESA; and the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (Public Law 94-265), which requires consultation between the federal action agency and NMFS for projects that affect essential fish habitat. NMFS is providing comments on the draft application in response to our agency's charge to protect, manage, and conserve the nation's living marine resources and the habitats that support them.

NMFS intends to provide FERC technical assistance and more comprehensive comments throughout this proceeding, as outlined in the ILP and pilot licensing process. At this juncture in



the pre-filing stage, we would like to raise some generic issues regarding our views on whether the proposal achieves the eligibility criteria FERC has set forth for pilot licenses. We also address the efficacy and potential applicability of the proposed studies and monitoring plan to additional licensing activities that may ensue in the wake of the proposed demonstration deployment. NMFS notes that these comments are specific to the pilot project described in the draft application materials; they should not be construed as being indicative of policy considerations or thoughts on future proposals for a full build or alternate pilots as may be entertained by NTEC or others.

NMFS takes this early opportunity in the pre-filing stage to make preliminary suggestions for revising portions of the draft application and to raise concerns regarding the submittal that should be addressed prior to its finalization and filing for a pilot license. NMFS' comments on the draft application focus on several substantive issues that must be addressed with respect to FERC's Criteria for Pilot Project Licensing Procedures. In particular, we 1) highlight our concerns regarding the "sensitive location" issue; 2) explain our reservations that the proposed studies and monitoring may not provide information sufficient to support the necessary environmental analysis; and 3) clarify the coordination responsibilities that NTEC would have with NMFS in their role as FERC's non-federal representative in a pilot license proceeding.

We have considerable concern on whether the NTEC proposal would meet FERC's criteria for pilot licensing. However, we also suggest acceptable solutions that will dispense with the most substantive issues in order for NTEC's demonstration project to proceed under a pilot license. Details on what would be required for amending the draft application to address these concerns are presented in the attached comments prepared by my staff. Please be advised that NMFS' willingness to adopt this approach is predicated on certain project-specific characteristics and should not be construed as our implied consent to entertain this process 1) for any future deployments of larger or multiple devices by NTEC or its successor at this site or elsewhere, or 2) as a matter of course for other projects seeking to enter FERC's pilot licensing process. We will of course continue to review the individual merits of each application before us on a case-by-case basis.

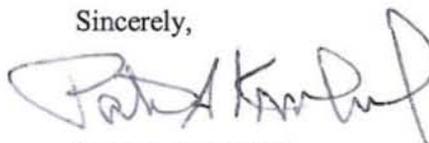
Equally important, by conceptually agreeing to go forward with this proposal under the pilot licensing procedures, we do not cede/relinquish our view that the project site likely includes "sensitive locations". We look forward to specific revision and implementation of the project studies and monitoring 1) to obtain data that better define habitat uses by NOAA trust resources at the NTEC site and 2) to assist advancement of the pilot project through its iterative sequence in a manner that protects both the aquatic environment and its living resources from reasonably foreseeable harm. Finally, since the project proponents are proposing to use the pilot license as an opportunity to test their hydrodynamic devices and to study the suitability of the East River at Hell Gate for a potential original license, we urge them to incorporate those future information needs to the extent practicable in their pilot demonstration and associated data collection efforts. Taking good advantage of the time and site access allotted while a pilot permit is in force not only would assist them meeting baseline data needs for an original license application, but it would also maximally leverage their data-gathering investment and afford them increased regulatory efficiencies.

FERC has chosen its ILP/pilot license approach as the primary means of evaluating project alternatives and to collect the necessary data for meeting our mutual agency mandates. It is essential to NMFS that FERC ensures this process will provide the information we need to facilitate interagency consultations and otherwise help address our collective responsibilities outlined in our operating authorities. The pilot license process signals a generic process template

that would become the backdrop in which FERC may consult with NMFS. However, it is unclear in the present proposed timeline how consultation requirements will be integrated. This is a key factor in that this is the means by which NMFS would submit conservation recommendations to manage project impacts, and FERC and the applicant would complete any consultations and/or permitting requirements pursuant to the ESA or the MMPA. It is necessary for the applicant to understand the requirements of these statutes in order that they provide ample time and information for these activities to be addressed. This integration is critical for successful coordination under the pilot license approach. The attachment that follows this letter includes information on the necessary consultations that must be completed prior to the issuance of any permit by FERC. We note that our own responsibilities have established criteria and timeframes that must be accommodated by the process plan.

Thank you for the opportunity to comment on the draft application. NMFS identifies and explicates its most substantive concerns regarding the draft application materials in the attachment to this letter. We offer these comments as ongoing technical guidance and coordination pursuant to FERC's hydrokinetic pilot licensing process under the ILP and the authorities referenced above. If you have any questions, please contact: Julie Crocker, Protected Resources Division (978-282-9394); or Diane Rusanowsky, Habitat Conservation Division (203-882-6504).

Sincerely,



Patricia A. Kurkul
Regional Administrator

e-filed, w/attachment
FERC, Docket Number P-12665-XXX

Attachment

cc: PRD (Colligan, Crocker)
HCD (Colosi, McDermott, Gorski, Rusanowsky)
OHC (Bigford)
USEC/DGC1 (Lynch)
USFWS (Cortland)
USEPA, Region 2 (Knutson)
ACOE (Jensen)
NYSDEC, Region 1 (Kispert)

ATTACHMENT to: Patricia Kurkul letter of July 10, 2009 to Kimberly Bose

**National Marine Fisheries Service Comments on the Draft Application for New York Tidal Energy Company's East River Tidal Energy Project, P-12665
July 10, 2009**

1. Site Conditions & General Project Description:

The East River is a tidal strait in New York City that connects Upper New York Bay with western Long Island Sound. These latter two water bodies provide important habitat values and functions for a wide variety of fin fish, mollusks, crustaceans, marine wildlife, and their associated prey items and have been recognized for their regionally important ecological services to fish and wildlife by both the federal government and State of New York. As can be readily discerned from NOAA's navigation charts for coastal waters proximal to New York City's five boroughs, the East River provides the primary hydrologic connection between western Long Island Sound and Upper New York Bay.¹ As such, this waterway provides a critical connection for fish and other water-dependent organisms migrating between the Hudson-Raritan and Long Island Sound estuaries. Owing to these movements, the Hell Gate/Astoria portion of coastal New York City supports vibrant recreational and day-boat fisheries, and recently was the host site of the Manhattan Cup, one of the ESPN Saltwater Series fishing tournaments.

Several species listed by NMFS under the ESA occur in New York waters. A population of the federally endangered shortnose sturgeon (*Acipenser brevirostrum*) occurs in the Hudson River. Shortnose sturgeon have been captured near the confluence of the East River and New York Harbor and at least two shortnose sturgeon tagged in the Hudson River have been recaptured in the Connecticut River. It is unknown whether these fish traveled through the East River and through Long Island Sound (the most direct route) or exited New York Harbor into the Atlantic Ocean and swam around southern Long Island and back into Long Island Sound. At this time, the East River is not known to be a high use area for sturgeon and there have been no documented captures of shortnose sturgeon in this waterbody. However, the best available information indicates that at least occasional transient shortnose sturgeon may be present in the East River in the vicinity of the proposed project.

Listed sea turtles also occur seasonally in New York waters and are known to be present in western Long Island Sound and in the New York Harbor complex. The sea turtles in these waters are typically small juveniles with the most abundant being the federally threatened loggerhead (*Caretta caretta*) followed by the federally endangered Kemp's ridley (*Lepidochelys kempi*). New York waters have also been found to be warm enough to support federally endangered green sea turtles (*Chelonia mydas*) from June through October. While federally endangered leatherback sea turtles (*Dermochelys coriacea*) may be found in the waters off Long Island during the warmer months as well, this species is less likely to occur in the action area for this project as it is typically found in more offshore waters. Like shortnose sturgeon, there have been no documented captures of sea turtles in the East River and it is not likely to be a high use area for

¹ The greater New York City metropolitan area is depicted on NOAA Charts: 12327 [New York Harbor], 12335 [Hudson and East Rivers – Governors Island to 67th Street], 12338 [East River – Newtown Creek], 12339 [East River – Tallman Island to Queensboro Bridge, and 12342 [Harlem River].

these species. However, as sea turtles are known to occur in the waterbodies surrounding the East River, it is likely that occasional transient sea turtles occur in the East River.

Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) are also present in the Hudson River and surrounding coastal waters, including Long Island Sound. Research conducted by Savoy and Pacileo (2003)² suggests that the East River is used by juvenile Atlantic sturgeon to migrate from the Hudson River to western Long Island Sound. Atlantic sturgeon are considered a Candidate Species as NMFS has initiated a status review for this species to determine if listing as threatened or endangered under the ESA is warranted. A status review report was completed by the status review team in February 2007. NMFS is currently reviewing the report and other available information to determine if listing under the ESA is warranted. A listing determination, and, if listing is warranted, any accompanying proposed rule(s), is expected to be published by NMFS in 2009. Atlantic sturgeon are known to occur in the Hudson River and Long Island Sound and also are likely to occur in the East River, although not likely in high numbers.

Several species of marine mammals are also known to occur seasonally in the East River and seals are known to haul out in various areas of opportunity in the general project vicinity. Marine mammal species in the project area include gray seals, harbor seals and harbor porpoises.

In addition, aquatic habitats of Upper New York Bay, Long Island Sound and the entire East River have been designated as essential fish habitat (EFH) for one or more life stages of more than a dozen federally-managed fishery resources under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). EFH contains habitat that has been designated essential to the long-term survival and health of our nation's fisheries, including both the water column and the underlying bottom substrate of a particular area. EFH includes those locales that support the different life stages of each federally-managed species. A single species may use many different habitats throughout its life to support breeding, spawning, nursery, feeding, and protection functions. EFH encompasses those habitats necessary to ensure healthy fisheries now and in the future. Pursuant to the MSA (Public Law 94-265), federal action agencies must consult with NMFS for projects that affect EFH.

NTEC's pilot project is proposed as a series of four distinct project phases. The first phase entails baseline data collection and consultations, followed by the deployment and short term surface-testing of a 2-m diameter hydrokinetic unit off a moored barge. The unit would be run in stints of 1-2 weeks at a time over a period of six months. Should this deployment be deemed successful, the project proponents would deploy a 6-m diameter device mounted to the bottom on an armature that has not yet been completely designed. This unit would be deployed and operated more or less continuously over a six to twelve month period, with accompanying studies and monitoring. In phase 3, the bottom-mounted device would be connected to a subaqueous transmission cable capable of delivering the generated energy to shore. The final phase entails decommissioning and removal of the structures and site restoration, unless the project proponents have been awarded or anticipate receiving an original project license that includes this equipment. As described, the proposed approach is iterative, in that the applicants plan to advance to subsequent stages only if their findings are favorable. Various baseline and monitoring studies have been proposed to occur throughout the pilot within a period of 5 years or less. The project

² Savoy, T. and D. Pacileo. 2003. Movements and important habitats of subadult Atlantic sturgeon in Connecticut waters. *Transactions of the American Fisheries Society* 132: 1-8.

proponents state explicitly in their draft application their intention to provide evidence of financial assurance that the structures would be removed upon completion or decommissioning of the pilot, consistent with FERC's procedures for hydrokinetic pilot project applications.

2. Project Issues for Meeting FERC's Pilot License Criteria:

The application for this proposal must meet certain criteria to proceed under a FERC pilot license. Specifically, the project proponents must demonstrate that: 1) the generating capacity of devices that would be deployed cannot exceed a maximum threshold, 2) the activities undertaken in the pilot would be completed in the short term, 3) the pilot project will avoid sensitive locations, 4) the pilot activities include strict safeguards that would protect the public and environmental resources, 5) the project structures and appurtenant gear can be removed and the site restored upon completion of the pilot unless an original license is obtained, and 6) the draft application is in a form sufficient to support environmental analysis and includes proposed monitoring plans.

Our review of the NTEC draft application materials indicates that the pilot project proposal would meet FERC's pilot license thresholds for most of these criteria. However, we discuss below key issues that lead us to question whether these materials collectively establish that NTEC has met the standard for their proposal to be regulated under a pilot license. The items at issue surround two substantive areas. These are NTEC's assertion that the chosen project setting avoids "sensitive locations" and whether the draft application and its associated study and monitoring plans would be sufficient to support environmental analysis. Our rationale is as follows:

NMFS Questions NTEC's Certification That the Project is Proposed Outside of "Sensitive Areas": The draft application documents are technically correct that the proposed project footprint does not lay in a *mapped* sensitive coastal habitat. However, it does not consider or note that it lies between portions of Long Island Sound and the New York Bays that have been recognized by the Federal government and State of New York as regionally-important fish and wildlife habitats. These specific areas, including the immediate project environs, have been singled out as especially valuable ecological areas, that is, sensitive regions of the coast that provide exemplary habitat values and functions for fish and wildlife.³

As such, the East River provides an ecologically important migratory corridor for fish, invertebrates and wildlife that move among marine, estuarine and fresh water habitats to carry out their life cycles. In particular, the salinity gradient and flow regimes between these waters are conducive to attracting diadromous fishes that migrate between spawning or nursery areas and adult feeding grounds or similar important areas. Likewise, various features of the benthos and shoreline structures, both man-made and natural, also influence microhabitat conditions that make them suitable for torpid fish to survive in winter or for fish to seek refuge during periods of high flow.

Further, NTEC's draft application materials confirm that the hydrodynamic character of the East River system is not uniform. While portions of the waterway seem favorable for meeting the engineering requirements of hydrokinetic devices, others clearly are not. As demonstrated elsewhere in the New York City waterfront, and supported by the levels of recreational fishing

³ The specified areas have been cited as regionally-important fish and wildlife habitats under New York's Coastal Management Program, The US Fish and Wildlife Service's Coastal Ecosystems Program [*Significant Habitats and Habitat Complexes of the New York Bight Watershed (1997) and Northeast Coastal Areas Study (1991)*], and the US EPA's Long Island Sound Study and New York Harbor Estuary Program.

activities taking place in the greater East River area, at least some of the aquatic habitat in the general project reach appears highly suitable for supporting various fishes and invertebrates. These organisms can occur as permanent residents, or as transients that migrate between western Long Island Sound and Upper New York Bay.

The importance of the immediate project area provides other ecological functions in addition to habitat as a migratory corridor. Portions of the Hell Gate reach of the East River exhibit characteristics that are highly suitable for providing other important habitat values and functions for fish and wildlife. For instance, we expect certain microhabitats within the subject reach provide cover, over-wintering areas, or resting opportunities for various motile species including fishes and crustaceans. Regardless of whether there is a seasonal, lunar/tidal, diurnal, or other component to these uses, continued access to such important refugia are important for the survival of living aquatic resources that seek them.

Further, while it is not “mapped” habitat in the sense used by NTEC, as mentioned above, we note that aquatic habitats in the entire area covered under NTECs preliminary permit have been designated as EFH under the MSA for one or more life stages of various federally managed fishery resources. Designation as EFH indicates that the habitat conditions in a particular area meets the critical life history requirements of the particular species or life stage in question. Many of these collective activities and habitat uses, so vital for ensuring fish survival or recruitment, are susceptible to disturbance and are among the attributes that NMFS considers important to assess whether a particular site is a “sensitive location” from the perspective of living aquatic resources. Accordingly, NTEC used too narrow a frame of reference for making their “sensitive location” evaluation, leading them to make a premature inference.

NMFS Questions That the Draft Application and Its Associated Study and Monitoring Plans are Sufficient to Support Environmental Analysis: The extent to which the proposed pilot structures or a potential future hydroelectric project would intrude upon or adversely affect living marine or estuarine resources behaviors or habitat uses as described in the foregoing section is largely unknown. This lack of information and understanding frustrates hydrokinetic entrepreneurs, resource agencies and regulators alike. While some of the uncertainty is due to the novelty associated with emerging technology, a lack of high quality, baseline information also confounds informed decision-making. Rather than recommend the proposed NTEC project be rejected as a potential pilot project, NMFS sees merit in an approach where important aspects of the project can be redesigned to lend themselves to one of two alternate strategies under which it would be acceptable to this agency that this demonstration project could proceed under a pilot license. NMFS expects either option to lead to development of sufficient information to assess any adverse effects and to complete mandatory consultations.

Option 1: The first option entails the project proponents delaying installation of the first phase structures until they have conducted baseline studies of sufficient duration and rigor to adequately characterize the areas and extent to which sensitive habitat uses as described above occur at their site. It is conceivably possible that these studies could be concluded in time to complete the planned pilot demonstration within the 5 year time limit.

Option 2: Given the very limited nature and scope of NTEC’s proposed deployments, it appears appropriate to entertain a second option that would entail 1) designing heightened monitoring and implementing an expanded study and

management plan to identify potentially sensitive sectors of the project site during Phase 1 of the pilot and 2) using these data to avoid impacting those areas in subsequent phases. Under this scenario, Phase 2 would not be allowed to proceed before sufficient information is collected to ensure the site selected would not adversely affect a sensitive location in the NTEC parcel. Similarly, the final cable alignment and installation methodology would be guided by the data to avoid sensitive locations and aquatic resources in Phase 3.

Given the many unknowns regarding actual site conditions, as well as what is known about the site, especially regarding the fierce tidal currents, and how the pilot devices will function in the field, the project proponents should develop contingency plans for alternate data collection methods acceptable to the state and Federal agencies and other pre-negotiated adaptive management strategies directed at ensuring the data being collected is of high quality and would support project analysis. In addition, as the data being collected in the pilot begin to shed light on actual site conditions, it may be necessary to adapt the study plan accordingly to account for unanticipated habitat uses or features of interest.

NMFS Questions Aspects of the Proposed Monitoring/Study Plans: According to FERC's white paper, the purposes of licensing hydrokinetic pilot projects are to test new, innovative and untried hydrokinetic technology devices; to determine the appropriate sites for hydrokinetic projects; and to gather information on environmental and other effects of the devices. The project proponents apparently intend to use a pilot license as an opportunity to explore all of these project dimensions. Accordingly, it is vital that the activities undertaken while the pilot license is in force are clearly and rationally related to this overall data quest and would be sufficiently comprehensive to support analysis. While NTEC has provided a good strawman for discussion, aspects of their monitoring and study plan remain fairly conceptual or contain elements that make us wary about its overall efficacy for providing data suitable to support environmental analysis. We offer the following comments and observations regarding our certain aspects of the proposed study and monitoring design:

Provision Should Be Made to Ensure that Data Collected During the Pilot Will be Useful to Inform the Pilot Study and Potential Licensing Action:

Sampling Gear: Highly dynamic current regimes, subaqueous obstructions, debris fields, heavy commercial traffic, and related conditions in the East River promise to complicate efforts to collect site data. It is highly desirable that the project proponents conduct preliminary data collections as soon as possible to determine if their selected gear will work effectively in the actual project setting. It is conceivable that trawls and net samplers would hang up easily on submerged obstructions, as happened in other East River sampling programs. Care must be taken to select mesh sizes and gear styles that are appropriate for collecting desired species and life stages that may be present.

Video Monitoring and Diver Observation: The monitoring components proposed to rely on clear video or diver observation will be ineffective for at least parts of the year due to reduced water clarity, and will be difficult at best because of strong currents. Substitute means of monitoring should be incorporated in the final study plan to collect this information over the annual period. If this does not occur, at least one alternate strategy should be available to roll out in the event that site conditions do not permit adequate quality images. We particularly note

that video and diver observations would not be useful modes of data collection at night, regardless of water clarity. Since fish use of habitats can be influenced by diurnal, lunar/tidal or similar factors, due consideration should be given covering these variables in the field monitoring work.

Supplement Hydroacoustic Monitoring: We strongly suggest inclusion of DIDSON⁴ or its equivalent as a complementary modality to fixed hydroacoustics as this would give insights into interpreting the hydroacoustic signals and also assist with key fish behavior assessments that will be necessary to evaluate pilot impacts.

Consider Alternative to Sidescan Sonar: Given the heavy shipping interests that ply local waters, and high probability of encountering subaqueous snags, it would be difficult to operate a vessel towing a “fish” (the sonar transmitter) on a cable behind the vessel. We advise using either a hull-mounted sonar device or QTCView⁵ or its equivalent, a device capable of collecting similar data, even generating three dimensional bottom profiles tuned to global positioning system marks. This latter alternative has some potential advantages at the site in that it can be used in very shallow water, and together with ground-truthing, can be used to characterize bottom cover types. It also can be deployed on relatively small vessels, so it could potentially provide more thorough coverage than might be obtained using SONAR.

Collect and Analyze Appropriate Sediment Samples: Evaluating benthic habitat conditions requires that an adequate number of sediment samples are taken and subjected to grain size analysis and bulk chemistry. We suggest that the protocol includes companion samples that could be picked for benthic invertebrates and other prey items.

Include Qualified Environmental Monitors: In the event that sampling is ongoing when sturgeon or other marine wildlife could be present, we recommend that NMFS-approved observers are on board to record the type and nature of interactions, species encountered, and other relevant data. The monitoring plan should include clear procedures to avoid “taking” federally protected resources.

Reduce Reliance on Qualitative Methodologies: It is not desirable to place as much emphasis on visual estimates and similar means of evaluation that are based on subjective judgments that are not easily replicated among different research staff. Similarly, proof should be offered that hydroacoustic signals can be used to deduce fish species, especially fish species which have similar body shapes, as implied in the monitoring plan.

Revise or Redesign Proposed Use of Radio-Tagged Fish: The proposed deployment of radio-tagged fish will not likely be effective. If the project proponents consider this to be a vital element in their constellation of monitoring activities, we suggest that they field test this method on a modest scale to demonstrate it under East River conditions before committing large amounts of resources to this element.

⁴ Use of trade names does not imply endorsement

⁵ Use of trade names does not imply endorsement

3. General Content Considerations/Sufficiency of Draft Application:

Our review of this portion of the draft application concludes that the generic content appears to meet most of the requirements set forth in Hydrokinetic Pilot Project Criteria and Draft Application Checklist (18 CFR § 5.18). Given the importance of the Hell Gate area for shipping, we recommend that you consider extending the service list to include all local commercial and industrial users from the greater New York City area. Our most substantive concern regarding the sufficiency of the draft application is that we do not understand how NTEC would use some of the data they are proposing to collect to support a potential future application for an original license. We suggest that NTEC considers this issue closely to ensure that the proposed pilot would provide the necessary and sufficient information to meet our mutual data needs to enable continued forward progress of their application. Absent that, failure of the project studies and monitoring to provide the necessary information would be to the distinct detriment of their original license application as they would not be in a position to provide the information necessary to support that request for authorization.

4. NMFS & Its Trust Resource Issues:

Our preliminary read of the draft application materials indicates that the project proponents may require some coaching regarding the EFH component of our coordination with FERC as well as NTEC's role in the Section 7 and MMPA consultations with NMFS. We suggest that this coordination begins as early as possible.

EFH Comments: We examined the preliminary discussion of EFH issues provided in the draft application and wish to confirm that an EFH assessment will be a necessary component of our review of this project. The section prepared in the draft application does not include some of the EFH designations in the immediate project vicinity. In particular, we note that the designations for several skates were erroneously omitted. These and any other designations that may be missing must be added to the narrative and the project impacts subsequently evaluated in the EFH assessment that is required pursuant to 50 CFR 600.920.

The required contents of an EFH assessment includes: 1) a description of the action; 2) an analysis of the potential adverse effects of the action on EFH and the managed species; 3) the federal action agency's conclusions regarding the effects of the action on EFH; 4) proposed mitigation, if applicable. Other information that should be contained in the EFH Assessment, if appropriate, includes: 1) the results of on-site inspections to evaluate the habitat and site-specific effects; 2) the views of recognized experts on the habitat or the species that may be affected; 3) a review of pertinent literature and related information; 4) an analysis of alternatives to the action that could avoid or minimize the adverse effects on EFH; and 5) any other information that might be relevant given the circumstances existing for the project.

The MSA and the Fish and Wildlife Coordination Act require Federal agencies to consult with one another on projects such as this. Insofar as a project involves essential fish habitat (EFH), as this project does, this process is guided by the requirements of our EFH regulation at 50 CFR 600.920, which mandates the preparation of EFH assessments and generally outlines each agency's obligations in this consultation procedure. More information about the MSA and EFH consultation requirements is available on the Habitat Conservation Division web site at: <http://www.nero.noaa.gov/hcd/>. Questions regarding these requirements should be directed to Diane Rusanowsky at: (203) 882-6504.

ESA and MMPA Comments: The best available information indicates that listed species may at least occasionally occur in the project area. NMFS recommends that consultation pursuant to Section 7 of the ESA be initiated. NMFS has no objection to the designation of the applicant as FERC's non-Federal representative for purposes of informal consultation. The applicant discusses ESA consultation on p. 3 of the NOI. The process that is outlined in that paragraph is inaccurate. NMFS has outlined the appropriate procedures here. Additionally, the applicant should note that permits issued pursuant to Section 10 of the ESA are only relevant when an applicant is proposing scientific research on listed species or is conducting an otherwise lawful activity that has no federal jurisdiction (i.e., there is no Section 7 obligation) that may result in incidental take of listed species. Neither of these situations apply to the subject pilot project.

To initiate the Section 7 consultation, FERC, and/or their designated non-Federal representative should submit a determination of effects along with justification for the determination and a request for concurrence to NMFS (this can take the form of a Biological Evaluation or a Biological Assessment). If FERC determines that the project is "not likely to adversely affect" any listed species (i.e., when direct or indirect effects of the proposed project or its interdependent and/or interrelated actions on listed species are expected to be discountable, insignificant or completely beneficial) and NMFS concurs with this determination, NMFS will reply to FERC in a letter that will convey the concurrence, thus completing Section 7 consultation. If FERC determines that the project is "likely to adversely affect" any listed species (i.e., if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effects are not: discountable, insignificant, or beneficial) or NMFS does not concur with FERC's "not likely to adversely affect" determination, formal Section 7 consultation, resulting in the issuance of a Biological Opinion with an appropriate Incidental Take Statement, may be required. Any effects that amount to the take of a listed species (defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct") are not discountable, insignificant or entirely beneficial. Therefore, if any take is anticipated, formal consultation is required. Also, as the listing status of Atlantic sturgeon may change during 2009, NMFS recommends that the applicant and/or FERC obtain an updated species list from NMFS prior to initiating section 7 consultation.

Please note that if a formal section 7 consultation is necessary, NMFS has 135 days from the date of initiation of consultation (i.e., the date that NMFS has all information necessary to conduct consultation) to deliver a Biological Opinion and Incidental Take Statement to FERC. Any take of a listed species that occurs without special exemption (e.g., an Incidental Take Statement) is illegal pursuant to the prohibitions on take contained in Section 9 of the ESA. My staff looks forward to working with the applicant and FERC throughout the licensing process. Should you have any questions regarding listed species or the Section 7 process in general, please contact Julie Crocker of my staff at (978)282-8480 or by e-mail (Julie.Crocker@noaa.gov).

As noted above, several species of marine mammals, including gray seals and harbor seals, are known to occur in the East River. The proximity of the proposed project to known seal haul outs indicates that coordination with NMFS on potential impacts of the project on these species may be necessary. The MMPA prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. NMFS may issue permits under MMPA Section 104 (16 U.S.C. 1374) to persons that authorize the taking or importing of specific species of marine mammals. If the proposed project is likely to result in the take of marine mammals the applicant and/or FERC should coordinate with NMFS Office of Protected Resources regarding the potential need for an

MMPA Incidental Harassment Authorization. For more information regarding the permitting process, please see the permits program website (<http://www.nmfs.noaa.gov/pr/permits/>).

NMFS is concerned that some of these consultation issues could pose a challenge for us to meet our mutual consultation requirements because it can take time to gather the necessary information and prepare complete consultation packages for the EFH consultation. Additionally, sufficient time must be built into the process to allow the completion of Section 7 consultation prior to the issuance of a permit and to allow the applicant to obtain any necessary permits issued under the MMPA. We request that FERC and the project proponents coordinate with us to clarify what information will be needed, and how the proposed process plan will accommodate completing any consultations that are necessary in a manner that meets the requirements of our regulations. Should you have any questions pertaining to these matters, please contact the staff noted above.

Conclusion:

Our review of the draft application materials finds them generally well researched and comprehensive, but sections need to be revised as suggested in the foregoing pages of this attachment. While the iterative nature of the process plan for the various pilot phases leaves some important aspects of the studies and monitoring plans to be resolved in the future, including after a pilot license is issued, it appears that some flexibility is warranted given some of the significant unknowns in this situation. It appears that the generic process plan reasonably anticipates this, and allows for some level of adaptive management. It will be vital that FERC ensure that any adaptive management process for this project is not unilateral on the part of the project proponents, and that all studies and monitoring includes QA/QC measures that ensure the accuracy of the data (e.g., the gear was fishing properly, etc).

If the only aim of the study/monitoring is to cover the pilot project, then very little monitoring is required for assessing the operational characteristics and impacts of the 2-m and 6-m diameter devices. However, given NTEC's desire for potentially obtaining an original license, it is essential that the involved public sector stakeholders conference with NTEC to develop more complete and definitive studies. It appears that the issues conference may be necessary to begin that discussion and also to go over the "sensitive location" issue. If the parties work collaboratively in the interim, the technical conference could be used to discuss the revised monitoring plan and perhaps even finalize it prior to FERC making a pilot license decision. It is highly desirable that this take place to address the "sensitive location" issue and confirm eligibility for the limited pilot activity.