

122 FERC ¶ 61,158
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Grand River Dam Authority

Project No. 1494-328

ORDER ON REHEARING AND CLARIFYING PRIOR ORDER

(Issued February 21, 2008)

1. On October 18, 2007, we issued an order¹ modifying and approving an application filed by Grand River Dam Authority (Grand River), licensee for the Pensacola Hydroelectric Project No. 1494, for authorization to permit Shangri-La Marina Group, LLC (Marina Group) to use project lands for the construction of two marinas on the project's reservoir, Grand Lake O' the Cherokees (Grand Lake) - one at the tip of a peninsula known as Monkey Island and another at Davis Cove, which is located on the west shore of the peninsula about 0.5 miles up from its tip. The project is located in northeastern Oklahoma.
2. Paul and Laurie Ross, who opposed the application, have filed a timely request for rehearing of the October 18 Order as it pertains to the Davis Cove development. For the reasons discussed below, we grant rehearing in part and clarify our prior order.²

¹ 121 FERC ¶ 61,052 (2007) (October 18 Order).

² Duck Creek Homeowners Association (Homeowners Association) filed a late request for rehearing on November 27, 2007. Because the pleading was filed more than thirty days after the issuance of the Commission's order, it was rejected in a notice issued December 7, 2007 (unreported). On December 19, 2007, the Commission's Secretary issued an order granting rehearing for the limited purpose of further consideration and tolling the time by which action would have to be taken on timely-filed rehearing requests (i.e., the Rosses' rehearing request). On January 6, 2008, the Homeowners Association filed comments under the mistaken belief that the December 19 tolling order applied to its late-filed rehearing request. Inasmuch as the 30-day rehearing deadline is statutorily based and cannot be extended, the late rehearing request that the Homeowners Association filed cannot be accepted or amended with additional filings.

Davis Cove Marina Proposal

3. Grand River's October 24, 2006 application requested permission for the Marina Group to use project lands to dredge over 2.3 acres of land and construct a 107-slip marina to be located in Davis Cove.³ The marina would be part of a residential subdivision to be constructed nearby on lands outside the project boundary. The proposal calls for dredging approximately 62,000 cubic yards of material from two ponds located on a golf course at the upper end of the cove,⁴ and removing two existing dikes that separate the two ponds from the cove. Removal of the dikes would extend the length of the cove and widen it to a maximum of 350 feet to accommodate the installation of three floating docks with a total of 107 boat slips.

4. Several Davis Cove residents opposed the proposal, asking the Commission to deny the proposed marina on numerous grounds, including that it would reduce the value of their homes, increase boat traffic in the cove to unacceptable levels, and adversely affect the cove's navigational safety. They also contended that Grand River and the Marina Group did not follow Grand River's Rules and Regulations in processing and approving the proposal, that the proposed dredging and marina construction would encroach on the Rosses' adjacent property, and that the 85-to-90-foot gap between the two private boat docks (the Rosses' and Donald Dill's) on opposite shores near the end of the cove is too narrow to permit safe passage for boat traffic coming from the marina. Our October 18 Order addressed these concerns and approved the proposal with certain conditions.

5. On November 19, 2007, the Rosses filed a timely request for rehearing of our order.

³ The 46,500-acre Grand Lake has 1,300 miles of shoreline and extends 66 miles upstream of the Pensacola Project dam. The Commission regulates only a strip of land (of varying horizontal distance, depending on the steepness of the terrain) around the reservoir's perimeter. Most of the land surrounding Grand Lake is privately-owned, and many areas along the shoreline have been developed with private homes, docks, condominiums, municipal and state parks, and commercial resorts and marinas.

⁴ Davis Cove is 2,300 feet long and varies in width from about 533 feet at its mouth to about 239 feet at its narrowest point. The application initially called for dredging approximately 100,000 cubic yards of material, but that was later reduced to 62,000 cubic yards. See Grand River's response to Commission staff's May 18, 2007 Request for Additional Information, filed June 11, 2007.

Request for Rehearing

A. Dredging

6. In comments on the application, the Rosses argued that the Commission should not approve the dredging proposal because the Marina Group had not obtained a dredging permit from Grand River, as required by Grand River's Lake Rules and Regulations. They further argued that, as owners of land adjacent to the dredging site, the Marina Group was required by Grand River's regulations to obtain the Rosses' permission to conduct the proposed dredging. The Rosses contended that it has been a long-standing policy for Grand River to disallow dredging in front of property not owned by the permit applicant unless the applicant obtains written permission from the landowner.

7. Our October 18 Order stated that Grand River had issued a permit for the proposal and that a copy of the dredging permit was included in Grand River's application.⁵ We also stated that a review of Grand River's Lake Rules and Regulations revealed no provision requiring written approval from adjacent landowners for proposed dredging, and that Grand River had confirmed that no rule, regulation, or statute requires such approval.⁶

8. On rehearing, the Rosses state that they have reviewed Grand River's application, and it does not include a copy of the dredging permit. In addition, they have attached to their rehearing request a copy of the "Application for Permit to Dredge" obtained from Grand River's website. The Rosses note that the application (at p. 2) clearly requires the permission of any "person who owns property in front of where this work is to be done."

9. Our conclusion that the Marina Group had sought and obtained a dredging permit from Grand River was based, at least in part, on the Marina Group's statement to that effect.⁷ However, our statement that the application contained a copy of the dredging

⁵ 121 FERC ¶ 61,052 at P 15 and n.16.

⁶ *Id.* at P 19.

⁷ *See* Marina Group's December 21, 2006 filing at 22. It states:

[A]s part of the commercial project permitting process, [the Marina Group] sought and GRDA's Board approved a dredging permit for [the Marina Group's] proposal. GRDA requires a dredging permit, as part of the overall commercial project permit, for all dredging projects requiring removal of more than 2,000 cubic [yards] of fill material.

(continued...)

permit was in error. To rectify this error, we will require Grand River, prior to authorizing the Marina Group to commence dredging operations, to file with the Commission copies of the completed “Application for Permit to Dredge” and the dredging permit previously issued by Grand River.

10. Although Grand River’s Lake Rules and Regulations and permitting applications and procedures are not approved (and thus not enforceable) by the Commission, they are the means by which Grand River gathers information and makes decisions on proposals that are subsequently submitted to the Commission for approval. We assume that Grand River complies with its own procedures, and when in individual cases it comes to our attention that Grand River or its applicants have not followed Grand River’s regulations or application procedures, we must determine whether some action on our part is required.

11. This is relevant to the Rosses’ argument that the Marina Group was required to obtain permission from abutting landowners in that, although the Lake Rules and Regulations do not require it, Grand River’s dredging permit application submitted by the Rosses clearly does.⁸ Grand River claims, however, that surveys of the area clearly show that the Marina Group does not need the Rosses’ permission, because there will be no dredging in front of their property. We will hold Grand River to this statement. Thus, all the planned dredging must take place in the two ponds, around which Grand River and the Marina Group own all the property. Any dredging of what is now the end of Davis

We note that Grand River provided no assistance in resolving this issue. In fact, Grand River responded to the Rosses’ contention by answering a different question, stating only that “the Army Corps has stated that no 404 dredging permit is required.” *See* Grand River’s December 22, 2006 filing at 13.

⁸ The conclusion in our October 18 Order was based on our review of the Lake Rules and Regulations, as well as on Grand River’s assurances that it had no such requirement. *See* Grand River’s December 22, 2006 filing (at 14):

The Rosses argue that “GRDA has historically required the approval of adjacent or abutting property owners prior to approval of a dredging application.” In fact, the Dredging Management Plan does *not* require notice to abutting shoreline property owners prior to approval of a dredging application. Likewise, no statute, regulation or GRDA rule requires such approval.

As it turns out, Grand River told the truth, but it certainly cannot be said that it told the whole truth.

Cove (other than to remove the existing dikes)⁹ would be in front of the Rosses' property, and the dredging permit application would have required their permission. Therefore, this order clarifies that we are authorizing dredging of the two ponds and the removal of the two dikes, and that no additional dredging in what is now Davis Cove is authorized.¹⁰

B. Navigational Safety

12. The Rosses raise on rehearing a new issue regarding a portion of the 85-to-90-foot-wide boating corridor that they and the Dills have between their docks. The Rosses argue that, even if the boats in the back of the cove can pass in and out of this corridor safely, the configuration of their dock and the Dills' dock is such that they are not able to safely pull away from their dock and enter the corridor perpendicular to other boats passing through the corridor.

13. Currently, the area between the two docks is sufficient for the Rosses and the Dills to pull their boats out safely. Because of the location of their docks at the back end of the cove, the Rosses and Dills have almost exclusive use of the area between their docks, which is the full width of the corridor. With the increase in boat traffic entering and exiting the marina, when the Rosses and Dills attempt to pull away from their docks into the corridor, they will have to exercise added caution and take into account any passing boats. There is ample room in which to follow safe boating practices.¹¹ We therefore deny rehearing on this issue.¹²

⁹ Davis Cove currently ends at the dike located closest to the Rosses' property. Davis Cove will be extended to include an additional 1,480 feet of acreage, once both dikes are removed and the ponds are dredged, as proposed. *See* Figures 3 and 4 on pages 7 and 8, respectively, of the final Environmental Assessment, attached to our October 18 Order.

¹⁰ We note that the maps in Exhibit B of Grand River's June 11, 2007 filing appear to show dredging in the cove directly in front of the Rosses' and the Dills' property. Grand River's statements indicate that perhaps the maps were incorrect, or that its plans have changed. In any case, we have not authorized, and do not in this order authorize, Grand River to permit dredging in front of the Rosses' property or in the cove, other than to remove the dikes.

¹¹ The Rosses argue that they and the Dills need 45 feet and 37 feet, respectively, from the end of their docks to safely dock or undock their boats, and that this would leave less than 10 feet between the two docks for the boating corridor. However, the space needed for maneuvering their boats into or away from their docks is not separate from, or

(continued...)

C. Viability of the Davis Cove Development

14. The Davis Cove marina is part of a larger residential and resort development to be constructed on private land outside of, and adjacent to, the project boundary. The Rosses contend that the Commission is approving the marina without any guarantee that the larger development will be built.¹³

15. The fact that the residential marina and the dredging project in Davis Cove are dependent on revenues from the future condominium sales, which may or may not be realized, is not a consideration in our decision to grant or deny a licensee's application to authorize a non-project use of project lands and waters. In our review of a request for non-project use, we examine whether, and to what extent, the proposed use would be consistent with the project's licensed purposes, including protecting and enhancing the scenic, recreational, and other environmental values of the project.¹⁴ As far as the economic viability of a marina is concerned, it is ultimately the developer's responsibility to make a business judgment as to whether it wishes to construct a marina, given the incentives and revenues that may or may not be available.

The Commission orders:

(A) The request for rehearing filed in this proceeding by Paul Ross and Laurie Ross on November 19, 2007, is granted to the extent provided in this order and denied in all other respects.

in addition to, the boating corridor. Rather, the Rosses and Dills will have available to them for exiting their docks the full width of the corridor; they will just have to look both ways and avoid oncoming traffic.

¹² In addition, we find reconfiguring the proposed marina, as the Rosses request, is not necessary, because this would simply reduce the number of boats using Davis Cove; it would not change the existing width of the corridor between the Rosses' and the Dills' docks or the amount of space available to them for pulling out.

¹³ The Rosses assert that the Marina Group has failed to receive the state tax incentives needed to finance the project and may receive inadequate revenues from future condominium sales.

¹⁴ See, e.g., 121 FERC ¶ 61,052 at P 46; *Duke Energy Corporation*, 111 FERC ¶ 61,197 at P 13 (2005) (noting that the Commission authorizes licensees to permit private recreation facilities that do not unduly interfere with any project purposes).

(B) Prior to authorizing the Shangri-La Marina Group, LLC to commence dredging operations, Grand River shall file with the Commission copies of the completed “Application for Permit to Dredge” and the dredging permit it previously issued and receive written authorization from the Director, Hydropower Administration and Compliance.

(C) The Commission clarifies that its order issued October 18, 2007, in Project No. 1494-300 authorizes dredging of the two ponds and the removal of the two dikes, and that no additional dredging in front of the Rosses’ property or in what is now Davis Cove is authorized.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.