

128 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Green Wave Energy Solutions, LLC

Project No. 13053-001

ORDER DENYING REHEARING

(Issued July 16, 2009)

1. On May 1, 2009, Commission staff issued a preliminary permit to Green Wave Energy Solutions, LLC (Green Wave), to study the proposed hydrokinetic Green Wave Mendocino Project No. 13053, to be located in the Pacific Ocean off the coast of Mendocino County, California.¹ On May 28, 2009, Fishermen Interested In Safe Hydrokinetics, Elizabeth Mitchell, Mendocino County, the City of Fort Bragg, the Recreational Fishing Alliance, the Pacific Coast Federation of Fishermen's Associations, the Institute for Fisheries Resources, Sierra Club Coastal Programs, and the Ocean Protection Coalition (collectively, the petitioners) jointly filed a timely request for rehearing of the permit order. For the reasons discussed below, we deny rehearing.

Background

2. On October 19, 2007, Green Wave filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),² to reserve priority of application while it conducts studies to determine the feasibility of the proposed Green Wave Mendocino Project.

3. The proposed project consists of: (1) 10 to 100 Pelamis or OPT style hydrokinetic devices having a total installed capacity of 100 megawatts; (2) a proposed 2- to 3-mile-long, 36-kilovolt transmission line; and (3) appurtenant facilities. The proposed project would use no dam or impoundment, and would have an estimated average annual generation of 250 gigawatt-hours, which would be sold to a local utility.

¹ *Green Wave Energy Solutions, LLC*, 127 FERC ¶ 62,093 (2009).

² 16 U.S.C. § 797(f) (2006).

4. On December 9, 2008, the Commission issued public notice of the preliminary permit application. The petitioners filed motions to intervene and comments in the proceeding. The petitioners requested that the Commission stay or deny the preliminary permit until it develops a comprehensive plan for hydrokinetic energy for the portion of the Pacific Ocean off the coasts of California, Oregon, and Washington.

5. On May 1, 2009, the Commission issued a preliminary permit to Green Wave for three years, subject to terms and conditions. In response to the petitioners' request, the permit order explained that the Commission does not perform a comprehensive analysis of project impacts during a permit application proceeding because that analysis takes place during the licensing process; when, and if, a project reaches that stage.³

6. On May 28, 2009, the petitioners filed a request for rehearing.

Discussion

7. In their rehearing request, the petitioners repeat the argument they made in their comments on the permit order,⁴ i.e., that the Commission must, before issuing a preliminary permit for Project No. 13053, develop a comprehensive plan for the waters off the coast of California, Oregon, and Washington and that its failure to do so violates

³ 127 FERC at 64,292.

⁴ In their rehearing request, the petitioners incorrectly state that a preliminary permit gives the permit holder exclusive rights to study the area for development. A preliminary permit does not give anyone the exclusive right to a site because a permit confers no authority to access or use another's land. Rather, a permit merely gives the holder priority to file a development application while the holder conducts the studies necessary to prepare a development application. In fact, issuance of a permit does not preclude others from studying the site.

The petitioners also reference proposed federal legislation that they state addresses a comprehensive approach to ocean development and would require the Commission to work with other federal agencies to jointly conduct a study of the potential for marine spatial planning to facilitate the development of offshore renewable energy facilities in a manner that protects and maintains coastal and marine ecosystem health. We will of course comply with any enacted legislation; and, in fact, our staff is participating in the interagency Ocean Policy Task Force established by the President.

section 10(a)(1) of the FPA,⁵ as interpreted by court decisions.⁶ Petitioners explain that, by “comprehensive plan,” they mean that the Commission should 1) prepare a comprehensive plan; 2) collect baseline environmental data and furnish it to the permittees; 3) include uniform study criteria and guidelines in preliminary permit articles; and 4) require permittees to conduct studies to provide data by which cumulative impacts of proposed projects can be assessed.

8. Section 10(a)(1) of the FPA requires the Commission to ensure that projects are “best adapted to a comprehensive plan for improving or developing a waterway.” However, as we explained in the permit order, it is clear on the face of section 10(a)(1) that it applies specifically to licenses, and not to preliminary permits. Section 10(a) is prefaced with the direction that “all *licenses* issued under this Part” shall include the conditions required by section 10(a). The requirements for preliminary permit applications can be found in FPA sections 4(f) and 5.⁷

9. Neither *National Wildlife Federation* nor *Washington Department of Fisheries*, on which petitioners continue to rely, stands for the proposition that the Commission must prepare a comprehensive plan prior to issuing a preliminary permit. Rather, the cases held that the Commission must adequately explain its reasons for not doing so. Subsequent to these cases, the Commission explained its rationale for not developing a comprehensive plan prior to issuing a preliminary permit.⁸ The Commission explained that, because of the high attrition rate from permit to development proposal (i.e., the vast majority of permits do not result in development applications), any comprehensive plan

⁵ 16 U.S.C. § 802 (2006).

⁶ *National Wildlife Federation, et al. v. Federal Energy Regulatory Commission*, 801 F.2d 1505, 1514 (9th Cir. 1986) (*National Wildlife Federation*); *Washington Department of Fisheries, et al. v. Federal Energy Regulatory Commission*, 801 F.2d 1516 (9th Cir. 1986) (*Washington Department of Fisheries*).

⁷ 16 U.S.C. §§ 797(f) and 798 (2006).

⁸ See, e.g., *Cowlitz Basin I Limited Partnership, et al.*, 62 FERC ¶ 61,165 (1993) (order denying rehearing of 10 permits issued for the upper Cowlitz River); and *Skykomish River Hydro*, 39 FERC ¶ 61,361 (1987) (order issuing a permit to study project proposed to be located in Snohomish River Basin), *appealed denied*, *Skykomish River Hydro, et al.*, 42 FERC ¶ 61,283 (1988) (order on appeal of 71 permits issued for 4 river basins), *reh'g denied*, 43 FERC ¶ 61,123. The Commission has continued its policy in this area, as reflected in more recent cases. See *Maine Tidal Energy Company*, 125 FERC ¶ 61,044 (2008); *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 (2003); and *Symbiotics, L.L.C.*, 99 FERC ¶ 61,101 (2002).

pertaining to permits would be of no value. We further stated that, instead of preparing an abstract comprehensive plan against which all proposed projects are measured, we examine individual projects against all the information developed in the record of each licensing proceeding. To ensure that we have adequate information for this purpose, we require license applicants to provide detailed information regarding the proposed project, and, before applying, to have performed all reasonable studies requested by resource agencies. The development of this site-specific information, which includes an analysis of the cumulative impacts of the proposed project and any other relevant activities, satisfies our comprehensive planning responsibility. Consistent with that approach, the impact issues mentioned in the filings requesting preparation of a comprehensive plan will be addressed in a licensing proceeding if this project reaches that stage.

10. For the above reasons, the Commission denies rehearing.

The Commission orders:

The request for rehearing filed by the petitioners on May 28, 2009, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.