

125 FERC ¶ 61,045
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.

Pacific Gas & Electric Company

Project Nos. 12781-001
12781-002
12779-001
12779-002

ORDER ON REHEARING

(Issued October 16, 2008)

1. This order involves requests for rehearing relating to Commission staff's March 13, 2008 orders issuing preliminary permits to Pacific Gas & Electric Company (PG&E) for projects located in the Pacific Ocean off the coasts of Mendocino and Humboldt Counties in California,¹ and the denial of late intervention in the same proceedings.² Issues include the sufficiency of notice of the filing of the preliminary permit applications and the Commission's alleged lack of authority to issue preliminary permits for proposed projects located on the outer Continental Shelf (OCS). For the reasons discussed below, we grant in part rehearing of the intervention denials and deny rehearing of the issuance of the permits.

I. Background

2. On February 27, 2007, PG&E filed applications with the Commission for preliminary permits to maintain priority of applications for licenses while it gathers data and studies the feasibility of developing two wave power projects in Humboldt and

¹ 122 FERC ¶ 62,228 (2008) (Mendocino Project No. 12781); 122 FERC ¶ 62,229 (2008) (Humboldt Project No. 12779).

² Unpublished Notices Denying Late Intervention in Project No. 12779 and Project No. 12781 (issued March 4 and 5, 2008, respectively).

Mendocino Counties, respectively called Humboldt WaveConnect Project No. 12779 (Humboldt Project) and Mendocino WaveConnect Project No. 12781 (Mendocino Project).

3. The proposed Humboldt Project is located in the Pacific Ocean, two to ten miles off the coast of Eureka and the Samoa Peninsula in Humboldt County. A portion of the project will be on the OCS. The proposed project site is eight miles wide and seventeen miles long, resulting in a project area of 136 square miles.

4. The proposed Mendocino Project is located in the Pacific Ocean, half a mile to six miles off the coast of Fort Bragg in Mendocino County, California. A portion of the project will be on the OCS. The proposed site is approximately four miles wide and seventeen miles long, resulting in a project area of sixty-eight square miles.

5. The other details of the two projects are almost identical. PG&E is considering placing between eight and 200 wave energy conversion (WEC) devices in waters with depths of 60 to 600 feet. PG&E estimates the projects will each generate approximately 40-megawatts. The exact length of the subsea transmission cables for both projects has not been determined but they are expected to be between half a mile to six miles in length. PG&E has identified a potential interconnection point to the grid at an existing PG&E transmission substation on the Samoa Peninsula for the Humboldt Project and at a point in Fort Bragg for the Mendocino Project. Offshore components for both projects will consist of the WEC devices, anchors to the ocean floor, mooring lines, power cables to the junction box, junction box, navigational aids, transmission cables along or beneath the ocean floor, and other appurtenant components. The onshore infrastructure will likely include a small command and control station, transformer, circuit breaker, and other interconnection equipment.

II. Procedural History

6. The Commission issued public notice of the Humboldt Project application on April 17, 2007, published notice in the *Federal Register* on April 23, 2007,³ and published notice in the *Eureka Times Standard* on April 23, April 30, May 7, and May 14, 2007.⁴ Protests, comments, and motions to intervene were due June 16, 2007. The U.S. Department of the Interior (Interior), the National Marine Fisheries Service (NMFS), and City and County of San Francisco (San Francisco) filed timely motions to intervene. Fishermen Interested in Safe Hydrokinetics (FISH Committee) filed a late

³ See 72 Fed. Reg. 20,114 (2007).

⁴ Proof of Publication in *Eureka Times-Standard* (filed on March 4, 2008).

motion to intervene, which was denied. Thereafter, Commission staff issued a preliminary permit to PG&E.⁵

7. FISH Committee timely filed a request for rehearing of the denial of its late intervention, but did not seek rehearing of the issuance of the permit. Interior filed a timely request for rehearing of the issuance of the permit, contending that the Commission lacks jurisdiction to issue preliminary permits for projects on the OCS.

8. As for the Mendocino Project, the Commission issued public notice of the application on April 6, 2007, published notice in the *Federal Register* on April 12, 2007,⁶ and published notice in the *Ukiah Daily Journal* on April 16, April 23, April 30, and May 7, 2007.⁷ Protests, comments, and motions to intervene were due on June 6, 2007. Interior, NMFS, and San Francisco also timely intervened in this proceeding. Mendocino County, City of Fort Bragg (Fort Bragg), and FISH Committee filed untimely motions to intervene, which were denied. Thereafter, Commission staff issued a preliminary permit to PG&E.⁸

9. Mendocino County, Fort Bragg, and FISH Committee filed timely requests for rehearing of the denial of their motions to intervene, but only Mendocino County also seeks rehearing of the issuance of the permit.⁹ In addition, Interior filed a request for rehearing similar to that in the Humboldt proceeding.

⁵ 122 FERC ¶ 62,229 (2008). The order also denied the competing permit application of Fairhaven OPT Ocean Power, LLC.

⁶ *See* 72 Fed. Reg. 18,473 (2007).

⁷ Proof of Publication (*Ukiah Daily Journal* filed on March 5, 2008).

⁸ 122 FERC ¶ 62,228 (2008).

⁹ On April 18, 2008, PG&E filed an answer to Mendocino County's request for rehearing of the permit, to which Mendocino County filed a response on May 5, 2008. Rules 713(d) and 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.713(d) and 385.213(a)(2) (2008), do not allow answers to request for rehearing or to other answers, unless otherwise ordered by the Commission. PG&E's answer and Mendocino County's response assist us in considering the issues in this proceeding, and we therefore find good cause to accept them. *See* 18 C.F.R. § 385.101(e) (2008).

III. Late Interventions

A. Mendocino Project

10. Mendocino County filed its motion for late intervention on October 16, 2007, almost four months after the June 6, 2007 deadline. Fort Bragg filed its motion on December 5, 2007, almost six months after the deadline. Our regulations require that entities seeking to intervene late “show good cause why the [deadline] should be waived.”¹⁰ Because neither the County nor the City showed good cause for their late filings, their motions were denied.

11. On rehearing, Mendocino County and Fort Bragg point out for the first time that, under section 4(f) of the FPA,¹¹ the Commission must provide written notice of permit applications to states or municipalities “likely to be interested in or affected by” a preliminary permit application.¹² They assert that the Commission failed to provide the required written notice to them, and that the Commission’s failure to do so must be remedied by granting them late intervention. Both contend that any other form of notice, such as publication in local newspapers or the *Federal Register*, is insufficient notice to them under the law.¹³

12. The record does not demonstrate that Mendocino County and Fort Bragg received written notice of the permit application. However, contrary to Mendocino County’s and Fort Bragg’s assertion, the Commission is not required to automatically grant late intervention even in the event of a failure to provide the written notice required by section 4(f). Rather, the Commission’s policy is to examine the facts of each case, and to

¹⁰ See 18 C.F.R. § 385.214(b)(3) (2008). See, e.g., *California Department of Water Resources and the City of Los Angeles*, 122 FERC ¶ 61,150 (2008).

¹¹ 16 U.S.C. § 797(f) (2006).

¹² Both entities are municipalities as defined in section 3(7) of the FPA, 16 U.S.C. § 796(7) (2006).

¹³ Mendocino County and Fort Bragg cite to *Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984); and *Allegheny Electric Cooperative, Inc.*, 29 FERC ¶ 61,208 (1984). However, those cases do not address the issue of whether a failure to provide written notice of a permit application requires the Commission to grant late intervention to a municipality. Instead, both cases address the issue of whether the failure to provide such notice requires the Commission to reopen a preliminary permit application proceeding.

find good cause for intervening late where a municipality acts within a reasonable amount of time after receiving actual notice.¹⁴

13. Mendocino County states that in August 2007 its County Counsel received a copy of San Francisco's Motion to Intervene in the Mendocino Project proceeding.¹⁵ At that point, the County's governing body, the Board of Supervisors, asked its staff for additional information on wave technology, which it received in a staff presentation on September 18, 2007. After the presentation, it decided to intervene in the proceeding and filed its motion to intervene 28 days later (on October 16, 2007), only about two months after receiving actual notice of the application.¹⁶ Under these circumstances, we find that the time Mendocino County took to intervene after it received actual notice of the preliminary permit application was reasonable.¹⁷ For these reasons, we conclude that Mendocino County has demonstrated good cause for seeking to intervene late in the permit proceeding and will accordingly grant it intervention.

14. The same cannot be said for Fort Bragg. The City's pleadings provide scant information on when it received actual notice of PG&E's permit application. Its December 5, 2007 motion for late intervention states merely that the application "only

¹⁴ *See, e.g., River Electric Company*, 61 FERC ¶ 61,304, at 62,145 (1992) (stating that "the failure to give written notice as required sections 4(f) and 4(e) can be considered harmless if the municipality somehow receives actual notice but fails to lodge its objections with the Commission within a reasonable time") (citation omitted); *Mega Hydro, Inc.*, 38 FERC ¶ 61,058, at 61,164 n.7, reh'g denied, 38 FERC ¶ 61,313 (1987); *see also Covelo Indian Community v. FERC*, 895 F.2d 581, 586-87 (9th Cir. 1990) (holding that "[e]ven if FERC owed the Community actual notice of the relicensing proceedings, its failure to provide this notice *is not by itself* sufficient to warrant the Community's late intervention") (emphasis added).

¹⁵ San Francisco's motion provided information about the relevant Commission rules, date of the Commission's notice, date when PG&E filed its application, purpose of the project, and location of the project.

¹⁶ Although there is some evidence (*see* PG&E's April 18, 2008 Answer at 4, and Mendocino County's May 5, 2008 Response at 2) that, in late February or early March 2007, PG&E informed a member of the County's Board of Supervisors by voicemail about PG&E's application filing, we do not accept this as the date of actual notice because we do not have information about the precise content of the voice message or whether (or when) the board member heard it.

¹⁷ *See, e.g., Adirondack Hydro*, 35 FERC ¶ 61,178 (1986) (granting late intervention following a delay of approximately three months).

recently came to the City's attention."¹⁸ Its rehearing request sheds no additional light on the matter, other than the statement from the City Manager, which indicates the City was aware of the application earlier than the Fall of 2007, but it was "not made aware of FERC's 60-day period to seek intervenor status until the Fall of 2007. . . ."¹⁹

15. In fact, there is ample evidence that Fort Bragg had actual notice of PG&E's application shortly after it was filed with the Commission and well before the June 6, 2007 intervention deadline. In the March 8, 2007 edition of the *City Hall News*, the Fort Bragg City Manager, who is the person that handles the City's notice issues,²⁰ described PG&E's filing of its preliminary permit application with the Commission, the location and estimated capacity of the proposed project, the purpose and duration of the preliminary permit, project name, and the approximate date of a PG&E presentation about the project.²¹ In addition, the permit application was discussed at the Fort Bragg Town Hall meeting on April 23, 2007.²² Articles in the *Fort Bragg Advocate-News* and the *Ukiah Daily Journal* further substantiate that Fort Bragg had actual knowledge of the

¹⁸ Fort Bragg, Motion to Intervene, at 3.

¹⁹ Declaration of Linda Ruffing in Support of Request for Rehearing by the City of Fort Bragg, at 2.

²⁰ *Id.* at 1 (stating that "my duties require me to advise the City Council about any and all issues that could impact the community and so such a notice would have been presented by me to the City Council").

²¹ *Wave Energy*, CITY HALLNEWS FROM THE DESK OF FORT BRAGG CITY MANAGER LINDA RUFFING, March 8, 2007, at 1-2, available at <http://ci.fort-bragg.ca.us/pdf/03-08-07%20City%20News.pdf>.

²² The minutes from a Town Hall meeting in Fort Bragg, issued by the City Council of Fort Bragg, states that the city was informed that PG&E filed an application for a preliminary permit for the wave power plant off its coast in February 2007. Minutes from City Council Town Hall Meeting on April 23, 2007, at 2-3, available at <http://ci.fort-bragg.ca.us/pdf/CCM2007-04-23-07.pdf>. At the Town Hall meeting, Greg Lamberg, the PG&E project manager, provided a presentation in which he described the potential capacity of the project, the current status of the technology, the amount of time in which to conduct studies as a permit holder, the size of the study area, and the purpose of a preliminary permit. In addition, a public comment and discussion period was available at the meeting.

application well before the June 6, 2007 intervention deadline.²³ Even assuming that Fort Bragg did not have information regarding the intervention deadline, it does not appear that it took any steps to become involved in the proceeding until December 2007. In fact, Fort Bragg made a filing in the proceeding on October 1, 2007, over two months before it moved to intervene, to clarify its position on an attachment to PG&E's application. Under these circumstances, Fort Bragg's failure to timely intervene cannot be excused. Consequently, we affirm the denial of Fort Bragg's late motion to intervene based on the City's failure to demonstrate good cause for filing late.

16. We note, in any event, that granting Fort Bragg late intervention at this stage would be pointless. The purpose of seeking to intervene in a Commission proceeding is to obtain party status, which entitles the intervenor to file a request for rehearing of any final order issued in the proceeding and to seek judicial review of such orders.²⁴ Here, Fort Bragg (unlike Mendocino County) did not timely file a request for rehearing of the permit order, so there would be no benefit to Fort Bragg if we were to grant late intervention.²⁵

²³ See Frank Hartzell, *PG&E for Wave Power Study off Fort Bragg Coast*, FORT BRAGG ADVOCATE-NEWS, April 26, 2007 (archived with newspaper) (Ms. Ruffing stating at the Town Hall meeting on April 23, 2007, that "the city was informed in late February [of 2007] that PG&E had filed for a preliminary permit"); Frank Hartzell, *PG&E for Wave Power Study off Fort Bragg Coast*, UKIAH DAILY JOURNAL, April 30, 2007 (archived with newspaper) (duplicate quote).

²⁴ See *City of Orrville v. FERC*, 147 F.3d 979, 984 n.3 (D.C. Cir. 1998).

²⁵ Because the requirement that a party seek rehearing within 30 days of the issuance of a Commission order is statutory (*see* 16 U.S.C. § 8251(a) (2006)), we cannot waive it. *See, e.g., City of Tacoma, Washington*, 105 FERC ¶ 61,333, at 62,545 (2003) (*citing Sierra Association for Environment v. FERC*, 791 F.2d 1403 (9th Cir. 1986)). Thus, even if we were to grant Fort Bragg late intervention, we could not accept any subsequent request for rehearing it might file. The way for an entity that seeks to intervene late or that believes that it has improperly been denied intervention to protect its rights is to seek rehearing of the denial and to file a timely request for rehearing of any order on the merits, as Mendocino County did. Thus, if the Commission grants late intervention, it can proceed to consider the timely-filed request for rehearing.

B. FISH Committee

17. FISH Committee²⁶ filed its motion for late intervention in the Mendocino Project proceeding on February 11, 2008, more than eight months after the June 6, 2007 deadline; it filed for late intervention in the Humboldt Project proceeding on February 28, 2008, more than eight months after the June 16, 2007 deadline. The motions were denied because FISH Committee failed to show good cause for late intervention.

18. On rehearing, FISH Committee argues that the Commission's notices of the applications in both Project Nos. 12779 and 12781 were deficient. Specifically, it claims that the public notices of the applications published in the *Ukiah Daily Journal* (for the Mendocino Project), the *Eureka Times Standard* (for the Humboldt Project), and the *Federal Register* were inadequate because they failed to provide the residents of Fort Bragg with actual notice of the projects.

19. According to FISH Committee, most Fort Bragg residents read two coastal weekly newspapers, the *Fort Bragg Advocate-News* and the *Mendocino Beacon*, instead of the *Ukiah Daily Journal*, which is the daily newspaper published in Ukiah, the county seat.²⁷ Fort Bragg and Ukiah are approximately sixty miles apart. Additionally, FISH Committee maintains that no one in Fort Bragg regularly monitors notices in the *Federal Register*. It also asserts that good cause exists for its late motions to intervene because the member-organizations decided to form the FISH Committee only after several "local fishermen heard about the importance of organizing and forming a stakeholder group, and obtaining the right to full participation in the proceedings"²⁸ while attending a wave energy forum presented by Fort Bragg and Mendocino County on January 19, 2008.²⁹

²⁶ Organized in January or February of 2008, FISH Committee is an unincorporated association that represents the Mendocino County coastal fishing community in negotiations over the development of wave energy projects along the Mendocino coast.

²⁷ FISH Committee's request for rehearing and motion to intervene focus mainly on the Mendocino Project.

²⁸ FISH Committee, Request for Rehearing, at 8. It is unclear from FISH Committee's pleadings whether the fishermen who attended the forum are members of FISH Committee. For the purposes of this order, we assume they are members.

²⁹ See generally Wave Energy Discussed in Fort Bragg, <http://city.fortbragg.com/pages/viewpage.lasso?pagename=11|Wave%20Energy> (providing information about the forum) (last visited May 19, 2008).

20. FISH Committee's arguments are unpersuasive. Members of the public received proper notice of PG&E's applications. Unlike Mendocino County and Fort Bragg, neither FISH Committee nor its members are state or municipal entities entitled to written notice from the Commission under FPA section 4(f). With respect to non-state and non-municipal entities, section 4(f) requires the Commission to "publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated."³⁰ The Commission's regulations provide further for publication of such notice in the *Federal Register*.³¹ Commission staff complied with these requirements by publishing notice of the projects in two daily newspapers in both Mendocino and Humboldt counties and in the *Federal Register*.³² Consequently, all members of the general public were put on notice of the applications.³³ Therefore, FISH Committee has failed to demonstrate that the notice procedure in these proceedings was in any way inadequate.

21. Nor do we accept FISH Committee's argument that its formation after the intervention deadlines constitutes good cause for its late interventions. All its member organizations existed prior to the deadlines,³⁴ and thus had constructive notice of the proceedings.³⁵ Yet they failed to timely intervene. Allowing a newly-formed entity to

³⁰ 16 U.S.C. § 797(f) (2006).

³¹ See 18 C.F.R. § 2.1(a)(1)(iii) (2008).

³² See *supra* P 6 and 8.

³³ See 44 U.S.C. § 1507 (2006); see also *Fed. Crop. Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (holding that publication in *Federal Register* provides notice to all affected parties).

³⁴ According to California's Office of the Secretary of State, all but two of the member-organizations are active corporate entities in the State of California: North Coast Fishing Association (incorporated June 2006), Salmon Trollers Marketing Association (1953), Sonoma County Abalone Network (1997), Salmon Restoration Association (1979), Caito Fisheries (1975), and Fishermen's Marketing Association (1952). The Recreational Fishing Alliance and the California Sea Urchin Harvesters Commission, although not incorporated in California, have been in existence for a number of years.

³⁵ Although FISH Committee's pleadings suggest that its members first learned about the applications on January 19, 2008, while attending the wave energy forum, there is evidence to the contrary. On September 27, 2007, Jim Martin, the FISH Committee coordinator and the signatory of FISH Committee's Motion to Intervene, attended a

(continued...)

intervene late based on the date of its formation, notwithstanding that its members had notice of a proceeding, could encourage the formation of groups simply to seek late intervention.

22. As discussed above, individual FISH Committee member-organizations had constructive notice of PG&E's applications, but decided not to intervene for more than eight months. Moreover, like Fort Bragg, FISH Committee did not seek rehearing of the issuance of the permits, so intervention at this stage of the proceedings would confer no benefit on FISH Committee. FISH Committee has failed to show good cause for late intervention,³⁶ and we therefore deny its request for rehearing.

C. The Distinction between Permit and Licensing Proceedings

23. The filings regarding late intervention in these proceedings evince a misunderstanding regarding the nature of preliminary permit proceedings and licensing proceedings. We will attempt to clarify these matters here.

24. As noted above, the only purpose of a preliminary permit is "to secure priority of application for a license for a water power project under Part I of the Federal Power Act while the permittee obtains the data and performs the acts required to determine the feasibility of the project and to support an application for a license."³⁷ In other words, while an entity holds a preliminary permit for a project site, no other entity may file a

meeting of approximately 100 people and hosted by the North Coast Fishing Association (also a member of FISH Committee) where representatives of PG&E provided detailed information on the projects. *See* Postings of Jim Martin, <http://www.fishpolitics.com/forum/showthread.php?t=1705> (September 27, 2007, 10:03 pm and 10:07 pm). In addition, member groups of FISH Committee spoke about the proposed projects at a September 18, 2007 meeting of the Mendocino County Board of Supervisors. *See* Summary and Action Minutes at 120-121, *available at* www.co.mendocino.ca.us/bos/pdf/current/Minutes%2009-18-07.pdf. Despite having actual notice of the applications no later than September 2007, the Recreational Fishing Alliance and the North Coast Fishing Association chose not to intervene at that time, waiting for almost five months until FISH Committee filed its late motion to intervene. *See also* Frank Hartzell, *County Urged to Catch a Ride on Wave Energy*, FORT BRAGG ADVOCATE-NEWS, Sept. 27, 2007 (archived with newspaper); Frank Hartzell, *PG&E for Wave Power Study off Fort Bragg Coast*, FORT BRAGG ADVOCATE-NEWS, April 26, 2007 (archived with newspaper) (describing the proposed projects and applications).

³⁶ *See* 18 C.F.R. § 385.214(b)(3) (2008).

³⁷ 18 C.F.R. § 4.80 (2008).

permit or license application, and should the permit holder file a license application before the permit expires, the Commission will prefer an application from the permit holder to that of a competitor, all else being equal.³⁸

25. By its terms, a preliminary permit gives the permit holder no land-disturbing or other property rights, nor does it authorize the placement of any test devices.³⁹ This being the case, we generally do not consider environmental issues in issuing permits.⁴⁰

26. Because the issuance of a permit can have no environmental impacts, there are few reasons for the Commission to deny a permit application.⁴¹ The Commission will deny a permit where it selects one competing permit application over another.⁴² As a matter of policy, the Commission has decided not to issue permits where there is a legal bar to issuing a license for the proposed project.⁴³ We have also denied permits where we had completed an environmental analysis in a previous proceeding and decided that environmental considerations had made the site in question inappropriate for hydropower development,⁴⁴ and where a permit applicant was unfit to be a licensee.⁴⁵

³⁸ A competitor could nonetheless be awarded a license instead of the entity that had held the permit if the Commission ultimately determined that a competing applicant's plans were better adapted to develop, conserve, and utilize in the public interest the water resources of the region at issue. *See* 18 C.F.R. § 4.37(c) (2008).

³⁹ *See, e.g., Pacific Gas and Electric Company*, 122 FERC ¶ 62,228, at 64,473 (2008) (Mendocino Project) and *Pacific Gas and Electric Company*, 122 FERC ¶ 62,229, at 64,476 (2008) (Humboldt Project).

⁴⁰ *See, e.g., McKay Hydro, LLC*, 105 FERC ¶ 61,045 (2003).

⁴¹ *See Don L. Hansen*, 120 FERC ¶ 61,069, at P 8 (2007) (explaining that “[t]he question of whether it would be in the public interest to authorize a project . . . is premature at the preliminary permit stage”).

⁴² *See, e.g., City of Wadsworth, Ohio, et al.*, 123 FERC ¶ 61,272 (2008).

⁴³ *See, e.g., Symbiotics, LLC*, 110 FERC ¶ 61,235 (2005).

⁴⁴ *See Symbiotics, LLC*, 99 FERC ¶ 61,100, *reh'g denied*, 100 FERC ¶ 61,004 (2002), *aff'd*, *Symbiotics, LLC v. FERC*, 110 Fed. Appx. 76; 2004 U.S. App. LEXIS 19,596 (10th Cir. 2004).

⁴⁵ *See, e.g., Mt. Hope Waterpower Project LP*, 123 FERC ¶ 61,096 (2008).

27. None of these considerations applies here. Mendocino County, Fort Bragg, and FISH Committee did not suggest in their motions to intervene that they wanted to compete for the permits here.⁴⁶ They do not allege that there is a legal bar to issuing the permits, that we have previously found the project site unfit for development, or that PG&E is not fit to be a licensee. That being the case, these entities raise no issues that can properly be considered in a permit proceeding.⁴⁷

28. In its motion to intervene, Mendocino County states that it generally supports renewable energy projects, but wants to ensure that any development takes account of economic and environmental conditions. Fort Bragg expresses similar concerns. For its part, FISH Committee expresses concern that the project, if not properly sited, could interfere with fishing and harvesting activities.

29. As explained above, we do not consider these types of issues in reviewing a preliminary permit application. However, these matters would be appropriate for consideration in a licensing proceeding. Our regulations require an extensive precicensing process, during which potential applicants must collaborate with all interested parties and with Commission staff. This includes the development and dissemination by the potential applicant of a pre-application document providing information covering the impacts of the proposed project on all resource areas; the issuance by the Commission of an environmental scoping document discussing the issues that the Commission will analyze in the licensing process; the public development of an environmental study plan and the analysis of the results of the studies; and the preparation and public dissemination by the potential applicant of a draft license application or preliminary licensing proposal. All of these steps provide opportunities for public comment, and many involve the issuance by the Commission of public notice and the holding of public meetings. No entity need be an intervenor to participate in the precicensing process, and in fact we do not accept interventions until an application is filed. Thus, regardless of the outcome here, Mendocino County, Fort Bragg and FISH

⁴⁶ As discussed below, in their requests for rehearing, Mendocino County and Fort Bragg do suggest for the first time (but do not assert with any certainty) that they might want to compete, but such an assertion, which might have been timely if made in their motions to intervene, is now untimely.

⁴⁷ In light of the foregoing, it appears that none of these entities is aggrieved by the issuance of the permits.

Committee will have the opportunity to participate in all stages of the prelicensing process.⁴⁸

30. Once an application is filed, the Commission will issue public notice and invite intervention. As with the prelicensing process, there will be a number of opportunities during the licensing process for public comment, including the preparation and issuance for public comment by the Commission of an environmental document. In the licensing process, the Commission is required to consider all aspects of the public interest, which would include the type of fisheries and recreation issues the movants have alluded to here.

31. In sum, the substantive interests and concerns expressed by Mendocino County, Fort Bragg, and FISH Committee have been in no way resolved by our action here. They will, in due course, have many opportunities to be heard on those matters.

32. We also note that denying Fort Bragg's and FISH Committee's motions to intervene did not detract from our consideration of their pleadings. The only legal significance between an intervenor and other commenters is that the intervenor, as a party, may seek rehearing and subsequent judicial review of final Commission actions by which it is aggrieved.⁴⁹ In our hydroelectric program, we treat comments by parties and non-parties with equal gravity.

33. In sum, our grant of late intervention to Mendocino County, and our denial of the motions by Fort Bragg and FISH Committee will not impact the ability of these entities to intervene, to raise issues, to obtain information, and to otherwise participate fully, in any licensing proceedings regarding the Humboldt and Mendocino Projects.

IV. Rehearing of Issuance of Preliminary Permit for the Mendocino Project

34. Having granted Mendocino County's late intervention in the permit application proceeding, we will consider its request for rehearing.

35. On rehearing, the County requests that the Commission rescind the Mendocino Project permit and reopen the proceeding to allow competing preliminary permit

⁴⁸ This presumes that PG&E will proceed under the Commission's default integrated licensing process, *see* 18 C.F.R. Part 5 (2008). Even if PG&E seeks and is granted the ability to use one of the Commission's other processes, many opportunities for public notice, comment, and involvement will remain.

⁴⁹ *See City of Orrville*, 147 F.3d at 984 n.3.

applications, but does not state its intention to file a competing permit application for the Mendocino Project.

36. As explained in *Northern Colorado Water Conservancy District v. Federal Energy Regulatory Commission (Northern Colorado)*,⁵⁰ failure to meet the written notice requirements of section 4(f) of the FPA does not automatically require the Commission to reopen the preliminary permit proceeding.⁵¹ Rather, the Commission will examine the facts of each case, and determine whether an entity acted in a timely manner to preserve its rights once it received actual notice of the application.⁵² In other words, “the failure to give written notice as required by sections 4(f) and 4(e) can be considered harmless if the municipality somehow receives actual notice but fails to lodge its objections with the Commission within a reasonable amount of time.”⁵³

37. As discussed above, Mendocino County received actual notice of the permit application in August 2007 and filed its late motion to intervene in October 2007. In its motion, the County did not allege a violation of section 4(f) of the FPA, ask the Commission to re-notice PG&E’s permit application, or express any interest in filing a competing application or developing a hydroelectric project on the site.⁵⁴

⁵⁰ *See Northern Colorado, supra*, 730 F.2d 1509 (D.C. Cir. 1984).

⁵¹ *See id.* at 1521 (“Having established FERC’s statutory obligation to [the municipality], we still need to determine the consequences of FERC’s breach of that obligation”).

⁵² *See id.* at 1521, 1523. The concurring opinion also highlighted this point. *See id.* at 1527 (MacKinnon, J., concurring) (“The majority is willing to concede that at *some* point actual knowledge renders the provision of written notice superfluous. The question then becomes *when* did the [municipality] have sufficient knowledge of the . . . application that it should have begun taking steps to protect its interest?”) (emphasis in original). Timeliness of action is based on relevant Commission’s procedures (for example, the normal period allowed for filing competing permit applications). *See id.* at 1524.

⁵³ *River Electric Co.*, 61 FERC ¶ 61,304, at 62,145 (1992); *New York Irrigation District*, 46 FERC ¶ 61,379, at 62,181 (1989); *Mega Hydro, Inc.*, 38 FERC ¶ 61,058, at 61,164 n.7 (1987); *Torrey Assocs.*, 35 FERC ¶ 61,298, at 61,684 (1986).

⁵⁴ The same is true of Fort Bragg.

38. The first time Mendocino County raised any of these issues was on April 3, 2008, in its request for rehearing, almost eight months after learning of the permit application.⁵⁵ And then, it raised the violation of FPA section 4(f), but only mentioned in general terms the idea of, though not a specific interest in, filing a competing application. Such a delay is unreasonable, especially given that the County did not at that time explicitly state its intention to compete for the site.⁵⁶ Indeed, had Mendocino County suggested in its motion to intervene that it wanted to file a competing application, the Commission could have considered the merits of that assertion before it ruled on PG&E's application. We conclude that, by waiting until rehearing of the preliminary permit order, Mendocino County has waived its right to compete for the permit. Accordingly, the Commission denies rehearing on this issue and affirms issuance of the permit to PG&E for the Mendocino Project.

V. The Commission's Jurisdiction on the Outer Continental Shelf

39. As noted earlier, PG&E's proposed projects would be located partially in state waters and in the waters and partially on the submerged lands of the OCS (the OCS generally begins three nautical miles offshore).⁵⁷ Each proposed project, if constructed, would be considered a hydroelectric project since it would generate electricity through ocean waves. Interior contests the Commission's jurisdiction under Part I of the FPA "to award any authorization that is intended to include portions of the OCS."⁵⁸ Interior does not contest the Commission's jurisdiction with respect to projects located entirely on state waters and submerged lands.⁵⁹

⁵⁵ See Mendocino County, Request for Rehearing, at 13.

⁵⁶ See *Northern Colorado*, 730 F.2d at 1523-24. The Commission's standard time frame in which to file a competing application or a notice of intent to file a competing application is sixty days from issuance of notice of the application. In other similar cases we have found delays of up to four months to be reasonable. See *City of Augusta, Ga.*, 40 FERC ¶ 61,345 (1987) (two-month delay); *Black Canyon, Gem and Ridgeview Irrigation Districts of Idaho and Oregon*, 38 FERC ¶ 61,293 (1987) (four-month delay); *Adirondack Hydro*, 35 FERC ¶ 61,178 (1986) (three-month delay at most); *Torrey Assocs.*, 35 FERC ¶ 61,298 (1986) (five-day delay); and *Allegheny Electric Coop.*, 29 FERC ¶ 61,208 (1984) (one-month delay).

⁵⁷ Hereinafter, all references to miles are to nautical miles.

⁵⁸ Interior's request for rehearing at 4.

⁵⁹ See *id.* at 2, 4, 9.

A. The Commission's Jurisdiction under the FPA

40. On rehearing, Interior argues that the FPA does not grant the Commission authority to issue preliminary permits for projects located on the OCS.⁶⁰ Interior recognizes that, under section 23(b)(1) of the FPA, hydroelectric projects located on “navigable waters of the United States” are required to be licensed by the Commission. However, Interior maintains that to the extent that the definition of “navigable waters” in the FPA includes ocean waters, it cannot be interpreted to include any waters beyond the traditional three-mile boundary⁶¹ of the United States territorial sea.⁶² In support, Interior relies on the definition of “navigable waters” in the Clean Water Act,⁶³ the Oil Pollution Act of 1990,⁶⁴ Rivers and Harbors Act of 1899,⁶⁵ and the Artificial Reef

⁶⁰ Interior cites FPA section 23(b), 16 U.S.C. § 817 (2006), as the basis of the Commission's authority to issue preliminary permits. Although specific authority for the issuance of permits appears in section 4(f) of the FPA, the Commission's permitting authority derives from its licensing jurisdiction, which is found in FPA sections 4(e) and 23(b)(1). While both sections define the scope of that jurisdiction, they serve different purposes. As discussed in more detail, *infra*, under the FPA, licensing can be either permissive under section 4(e) or mandatory under section 23(b)(1).

Additionally, although the Commission's authority to issue preliminary permits derives from its licensing authority, Interior's rehearing request is at least arguably not ripe for review. The PG&E preliminary permits, themselves, do not affect the OCS. As discussed earlier, the issuance of the preliminary permits to PG&E does not authorize the placement of any test devices on the Pacific Ocean, including on the waters above the OCS. The preliminary permits, in essence, are merely placeholders in the Commission's queue of license applications. When, or if, PG&E files license applications to develop the Mendocino or Humboldt Projects, its permits will allow them “guaranteed first-to-file status” within the Commission. *See Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006). It would only be after the issuance of licenses that PG&E could have authority to engage in ground-disturbing activities.

⁶¹ The coastal zones of Texas, western Florida, Louisiana, and Puerto Rico extend nine miles offshore.

⁶² *See* Interior's request for rehearing at 5.

⁶³ 33 U.S.C. §§ 1251-1387 (2006).

⁶⁴ *Id.* §§ 2701-2761.

⁶⁵ *Id.* §§ 401-418.

Program of the National Fishing Enhancement Act of 1984⁶⁶ as excluding any waters beyond the three-mile boundary of the United States territorial sea.⁶⁷ In essence, Interior presumes that this limitation also applies to the FPA, and asserts that, absent subsequent legislation to expand the Commission's authority beyond the traditional three-mile boundary, the Commission's hydropower licensing jurisdiction could not extend into the OCS.⁶⁸

41. Our reading of the FPA and its related legislative history supports the Commission's jurisdiction over hydropower projects on the OCS, its submerged lands, and the waters above it. In interpreting the FPA, we must necessarily begin with the actual language used in that statute. The fact that Congress may have used the term

⁶⁶ *Id.* § 2105(3).

⁶⁷ *See* Interior, Request for Rehearing, at 5-7. The definition of "navigable waters" that Interior cites in connection with section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, appears in regulations implementing the statute, rather than in the act itself. *See* 33 C.F.R. § 329.12 (2008). Contrary to Interior's suggestion, the omission of this type of limitation in the FPA's definition of "navigable waters" should not be taken as evidence that Congress inadvertently failed to include it. Rather, this omission suggests that Congress clearly knew how to impose such a limitation, but chose not to do so in enacting the FPA.

⁶⁸ Interior also cites Presidential Proclamation No. 5928 of December 27, 1988, 54 Fed. Reg. 777 (Jan. 9, 1989), which proclaims that the sovereignty and jurisdiction of the United States over its territorial seas is extended to twelve miles from the coastal baselines (noted in the proclamation as the limit permitted by international law). *See* Interior's request for rehearing at 7. Interior relies on the savings clause of this proclamation, which states: "Nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . ." In Interior's view, this clause provides further evidence that, absent subsequent legislation to expand the Commission's authority, the Commission's licensing jurisdiction could not extend into the OCS. To the contrary, in our view this clause simply states that the proclamation does not extend or alter existing law, or any jurisdiction derived from existing law. Thus, whether the Commission has jurisdiction on the OCS must be determined with reference to the provisions of the FPA. If, as we have concluded here, the FPA authorizes and requires the Commission to license hydroelectric projects on the OCS, the Commission already had such jurisdiction under the FPA before the proclamation, and it would continue to have it after the proclamation.

“navigable waters” differently in other statutes cannot be used to define the scope of the Commission’s jurisdiction under the FPA.⁶⁹

42. Section 4(e) of the FPA authorizes the Commission, in pertinent part:

To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement, transmission, and utilization of power across, along, from, or in *any of the streams or other bodies of water* over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among several States, or upon any part of the public lands and reservations of the United States.⁷⁰

43. Complementing section 4(e), section 23(b)(1) describes those activities for which licensing is required.⁷¹ Specifically, and as pertinent here, section 23(b)(1) prohibits the

⁶⁹ The Supreme Court has rejected the notion that “the concept of ‘navigable waters of the United States’ has a fixed meaning that remains unchanged,” regardless of context. *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979) (finding that although an improved pond that was made into a marina was a “navigable water” for purposes of delimiting the regulatory authority of Congress under the Commerce Clause, the navigational servitude of the United States did not allow the government to create a public right of access without payment of just compensation for the taking). *See U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940) (noting that there are different standards of navigability for purposes of admiralty and maritime jurisdiction, state title determination, and regulation of commerce). Even when the source of regulatory authority is the Commerce Clause, differences in statutory purposes, language, and legislative history can combine to yield different results. *See Swanton Village, Vermont*, 70 FERC ¶ 61,325, at 61,996 (1995) (holding that, under section 4(e) of the FPA, the Commission is authorized to license pumped-storage hydroelectric projects using ground water, and noting that the Clean Water Act does not apply to groundwater contamination).

⁷⁰ 16 U.S.C. § 797(e) (2006) (emphasis added). Notably, Congress referred to not only interstate but also foreign commerce in defining the scope of the Commission’s jurisdiction over these waters in FPA section 4(e). Similarly, Congress twice referenced both interstate and foreign commerce in the definition of “navigable waters” in FPA section 3(8). Commerce with foreign nations, in many instances, necessarily involves transportation beyond the nation’s coastal waters.

⁷¹ *See id.* § 817.

unlicensed construction, operation, or maintenance of any hydroelectric project works “across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservation of the United States.”⁷²

44. Section 3(8) of the FPA defines “navigable waters” as

those parts of streams or *other bodies of water* over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. . . .⁷³

45. Section 3(2) defines “reservations” as “national forests, tribal lands embraced within Indian reservations, military reservations, and other *lands and interests in lands owned by the United States*, and withdrawn, reserved or withheld from private appropriation, and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes. . . .”⁷⁴

46. The best interpretation of the relevant FPA sections is that Congress authorized the Commission under FPA section 4(e) to grant preliminary permits and licenses for hydroelectric projects on bodies of water over which Congress has jurisdiction under the Commerce Clause, and on public lands and reservations of the United States. Similarly, under FPA section 23(b)(1), Congress required hydroelectric project developers to obtain a license for projects on “navigable waters” and U.S. lands and reservations.⁷⁵

⁷² *Id.* Section 23(b)(1) also requires potential developers of projects on non-navigable Commerce Clause streams to file a declaration of intention to allow the Commission to determine whether the project would affect commerce, and thus would require a license. Because of the specific language used, as well as the legislative history of these two sections, the Commission may license a project in response to a voluntary application under section 4(e) even if licensing is not required under section 23(b)(1). *See Cooley v. FERC*, 843 F.2d 1464, 1469 (D.C. Cir. 1988).

⁷³ *Id.* § 796(8) (emphasis added).

⁷⁴ *Id.* § 796(2) (emphasis added). The other type of federal land is “public lands” as defined in section 3(1) of the FPA. *See id.* § 796(1).

⁷⁵ In *AquaEnergy Group, Ltd.*, 102 FERC ¶ 61,242 (2003), we reviewed these provisions and held that FPA section 23(b)(1) requires licensing of an ocean wave energy
(continued...)

47. If constructed, the PG&E projects, including those parts that would be on the OCS, would be located in waters that are both navigable in fact under FPA section 23(b)(1) and are subject to the Commerce Clause jurisdiction of Congress under FPA section 4(e).⁷⁶ Similarly, as discussed in more detail below, the projects would include structures that would be affixed to U.S. lands and reservations within the meaning of FPA sections 4(e) and 23(b)(1). Accordingly, these projects fall within the Commission's licensing jurisdiction under the FPA. Hence, before PG&E could

project proposed to be located on navigable waters and U.S. lands 3.17 miles off the coast of the State of Washington. (The Commission subsequently issued a conditioned original license for the project, which had been relocated to 1.9 nautical miles offshore. *See Finavera Renewables Ocean Energy, Ltd.*, 121 FERC ¶ 61,288 (2007), *on reh'g and clarification and amending license*, 122 FERC ¶ 61,248 (2008)). Interior states that it is aware of the 2003 jurisdictional decision, but argues without elaboration that "the Commission is not permitted to expand its own authority under the FPA to include the OCS." Interior's request for rehearing at 9. In support, Interior cites *Little Falls Fibre Co. v. Henry Ford & Son*, 249 N.Y. 495, 501 (1928), *aff'd*, 280 U.S. 369 (1930), presumably as an example of the Federal Power Commission's exceedance of its statutory authority. In that case, construing provisions of the Federal Water Power Act of 1920 (FWPA) that now appear in the FPA, the Supreme Court upheld an award of damages and an injunction against a licensed operator of a hydroelectric project in a navigable river for the uncompensated destruction of a riparian owner's prior right to use the water for power purposes. The Court relied on the specific provisions of section 10(c) of the act, 16 U.S.C. § 803(c), which makes Commission licensees liable for damages to the property of others from operation of their projects, and section 27 of the act, 16 U.S.C. § 821, which preserves existing state laws regarding water rights. The Court expressly declined to address whether section 21 of the act, 16 U.S.C. § 814, which confers on licensees the federal power of eminent domain, could be used to condemn the water rights in question. We find nothing in this case that has any bearing on the issue of whether the Commission has jurisdiction under the FPA to license hydroelectric projects on the navigable waters and submerged lands of the OCS.

⁷⁶ As used in the FPA, "navigable waters" are a subset of "streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the Several states" (commonly referred to, in Commission practice, as "Commerce Clause waters"). 16 U.S.C. § 796(8) (2006). The Supreme Court long ago held that the power of Congress to regulate commerce necessarily includes power over navigation and navigable waters. *See Gibbons v. Ogden*, 22 U.S. 1, 189 (U.S. 1824). *See also United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) (adopting an expansive definition of navigable waters and commerce for purposes of the FPA).

construct the projects, it would be required by section 23(b) to obtain licenses from the Commission, and the Commission would be authorized by section 4(e) to grant the licenses.

48. Interior's argument that "navigable waters" do not include the OCS is inconsistent with our interpretation of the FPA. Citing to three statutes (and the implementing regulations of a fourth) that define "navigable waters" to exclude the coastal zone boundary of three miles,⁷⁷ Interior overlooks the fact that the statutory use of these terms has been notably inconsistent. Indeed, the U.S. Commission on Ocean Policy, created by the Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644, concluded in its comprehensive analysis of United States ocean policy that there is inconsistent use of this term.⁷⁸ Accordingly, we find no basis to question that the FPA, which expressly grants the Commission jurisdiction over not only "navigable waters" without limitation under section 23(b)(1), but also "streams or other bodies of water over which Congress has jurisdiction under its [Commerce Clause] authority" under section 4(e), gives the Commission jurisdiction over hydropower projects such as those being studied under the permits issued here.⁷⁹

⁷⁷ See Interior, Request for Rehearing, at 5-7.

⁷⁸ The Ocean Commission states:

Many laws [] use imprecise or inconsistent terms to refer to ocean areas, such as "navigable waters," "coastal waters," "ocean waters," "territory and waters," "waters of the United States," and "waters subject to the jurisdiction of the United States." These terms can mean different things in different statutes and sometimes are not defined at all.

U.S. Comm'n on Ocean Policy, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT, July 22, 2004, at 73 (Box P.1), *available at* www.oceancommission.gov. Even earlier, in 1978, the U.S. Department of Justice investigated whether a general definition of the term "navigable waters" exists in various federal statutes, concluding that the term "does not lend itself to a definition of general applicability, and that, as a matter of law, *it is neither feasible nor desirable to formulate, either administratively or by statute, a definition of the term for government-wide use.*" U.S. Dep't of Justice, Memorandum to James T. McIntyre, Jr., Director of the Office of Management and Budget, Aug. 21, 1978, at 3 (emphasis added).

⁷⁹ Even if we were to assume, for the sake of argument, that the term "navigable waters" as used in section 23(b)(1) of the FPA could somehow be limited as Interior suggests to exclude the OCS, that would not end the matter. As noted earlier, the

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49. The FPA also authorizes, and indeed, requires the Commission to license hydroelectric projects on the OCS and on the waters above the OCS through its provisions in sections 4(e) and 23(b)(1) concerning “reservations of the United States.” The question is whether the OCS, or more specifically, the submerged lands of the OCS on which the proposed projects would be located (the projects would be located on lands and waters extending up to ten miles from the coastal baseline), are “lands and interests in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws” within the meaning of section 3(2) of the FPA. If the OCS lands meet this test, then the OCS is a “reservation” under the FPA, and the Commission’s licensing jurisdiction extends to projects proposed to be located thereon.⁸⁰

50. We conclude that the answer is yes. The OCS is land or an interest in land owned by the United States, thereby qualifying it to be a “reservation” under the FPA.⁸¹ The

Commission may issue voluntary licenses under FPA section 4(e) for projects that do not require licensing under section 23(b)(1). Here, because the projects would be located on waters that are subject to the jurisdiction of Congress under the Commerce Clause, the Commission is authorized to license them under FPA section 4(e), notwithstanding any apparent limitation that might preclude it from requiring a license under section 23(b)(1). Although Interior does not address this aspect of the Commission’s licensing jurisdiction, we find no basis for concluding that the waters of the OCS are not subject to the jurisdiction of Congress under its Commerce Clause authority.

In addition, Interior’s statutory survey illustrates the difficulty of trying to extract a consistent usage of oceanic terms. Its request for rehearing references two statutes that concern the territorial seas and two statutes that concern the OCS. Legally, these two terms are distinct and are not used interchangeably. Under international law, the territorial seas end at twelve miles from shore, while the OCS begins between three to nine miles from shore and extends to either the outer edge of the continental margin or to 200 miles from the baseline if the continental margin does not extend that far. *See generally* U.S. Comm’n on Ocean Policy, *supra* note 78, at 72-73.

⁸⁰ The Commission would have to find that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and the license would be subject to and contain such condition as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. *See* 16 U.S.C. § 797(e) (2006).

⁸¹ To be an “interest in land” within the meaning of the FPA section 3(2), the United States must have some property ownership interest in the land. *See FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 112-13 (1960). *See also FPC v. Oregon*, 349 U.S. (continued...)

Supreme Court of the United States has consistently held that the United States owns the submerged lands off its shores, beginning from the low-water mark. Beginning in *United States v. California*, 332 U.S. 19 (1947), a case involving the issue of whether the state or the federal government owns the bed of the sea, the Court held that “the Federal Government rather than the state has paramount rights in and the power over that [three-mile marginal belt along a state’s coast], an incident to which is full dominion over the resources of the soil under that water area, including oil.”⁸² In *United States v. Texas*, 339 U.S. 707 (1950), the Court further explained the federal government’s interest in submerged lands off its coast. As the Court explained, a government can have *dominium* (ownership or proprietary rights) or *imperium* (governmental powers of regulation and control) with respect to the lands, minerals and other products underlying the marginal sea.⁸³ Though *dominium* and *imperium* are normally separable and separate, the Court maintained that with regard to the bed of the ocean itself, or the property located thereupon, “[p]roperty rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign.”⁸⁴ In the companion case to *Texas*, the Court in *United States v. Louisiana*, 339 U.S. 699 (1950), extended the federal government’s proprietary ownership (i.e. *dominium*) to beyond the three-mile marginal sea boundary, holding: “If, as we held in California’s case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is.”⁸⁵

51. Later, Congress passed the Submerged Lands Act of 1953, Pub. L. No. 83-31, 67 Stat. 29, through which it granted states dominion over the offshore seabed three miles from their coastlines, except for those states bordering the Gulf of Mexico and the Great Lakes.⁸⁶ Moreover, when Congress passed the Submerged Lands Act, it expressly

435, 442-43 (1955) (authority to issue licenses in relation to navigable waters of the United States springs from the Commerce Clause of the U.S. Constitution (Article I, Section 8); authority to do so in relation to public lands and reservations springs from the Property Clause (Article IV, Section 3)).

⁸² 332 U.S. at 38-39.

⁸³ *See Texas*, 339 U.S. at 713.

⁸⁴ *Id.* at 719.

⁸⁵ *See Louisiana*, 339 U.S. at 705.

⁸⁶ *See* 43 U.S.C. §§ 1301(a)-(b); 1311(a)-(b); 1312 (2006). The United States relinquished to those states “all right, title and interest . . . in all said lands, improvements, and natural resources,” *id.* § 1311(b), but retained ownership of submerged lands beyond this three-mile boundary, *see id.* § 1302.

preserved the federal government's right to power production on submerged lands off coastal waters.⁸⁷ In the companion statute, the OCS Lands Act,⁸⁸ Congress declared that it is the "policy of the United States that [] the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of the disposition as provided in [OCS Lands Act]".⁸⁹

52. These cases and statutes confirm that the OCS is land or an interest in land owned by the United States. To argue otherwise would not only be inconsistent with law, but would disturb settled expectations created by Interior's regulation over those lands, including the 7,949 oil and gas leases already issued for over 42 million acres on the OCS through the authority granted to Interior by the OCS Lands Act.⁹⁰ Consequently, we find that the submerged lands of the OCS at issue in this case, extending ten miles from the coastal baseline, are "reservations" within the meaning of section 3(2) of the FPA, and any hydroelectric projects proposed to be located on them are subject to the Commission's mandatory licensing jurisdiction.

53. The purpose and legislative history of the FPA and its predecessor, the Federal Water Power Act of 1920 (FWPA), provide ample support for the Commission's

⁸⁷ See 43 U.S.C. § 1311(d) (2006) ("Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power").

⁸⁸ 43 U.S.C. §§ 1331-1356 (2006).

⁸⁹ *Id.* § 1332. The Supreme Court, after passage of the Submerged Lands Act and the OCS Lands Act, confirmed the United States' proprietary ownership of the submerged lands in the ocean in two cases. In *Alabama v. Texas*, 347 U.S. 272 (1954), the Court affirmed that Congress could statutorily grant submerged lands to states, because these lands were property of the United States and Congress could dispose of such lands without limitation, as provided by Property Clause of the U.S. Constitution. See 347 U.S. at 273-74. Then in *United States v. Maine*, 420 U.S. 515 (1975), the Court stated that the transfer to the states of the rights to the seabed underlying the marginal seas "was in no wise inconsistent with paramount national power but was merely an exercise of that authority." 420 U.S. at 524.

⁹⁰ See About the MMS National Program, Active Lease Statistics as of July 17, 2008, available at http://www.mms.gov/5-year/PDFs/ocs_status_map_8e.pdf (last visited on Aug. 23, 2008).

interpretation of the FPA. As the Supreme Court has confirmed, Congress intended to create comprehensive energy legislation to avoid arbitrary boundaries that would restrict the Commission's jurisdiction over hydroelectric projects on the Nation's waters.⁹¹ The FWPA was created based on the national interest in utilizing the nation's bodies of water to produce hydroelectric power under a comprehensive rather than segmented system.⁹²

⁹¹ *Tuscarora Indian Nation*, 362 U.S. at 118 (holding that the FPA is considered the "complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers."). Regarding the FWPA, the Court has observed: "It was the outgrowth of a widely supported effort . . . to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so" *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180-81 (1946). More recently, the Court has stated: "The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and very prominently, hydroelectric power -- uses which, while unregulated, might well be contradictory rather than harmonious." *FPC v. Union Electric Co.*, 381 U.S. 90, 95 (1965).

⁹² See generally Gifford Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945) (the author was the first Chief of the United States Forest Service from 1905 through 1910 when private developers began to generate power of waterways in national forest reserves prior to the passage of the FWPA). During the Woodrow Wilson Administration, Congress was awash with bills to develop the budding hydroelectric industry under federal control, but those bills would have continued the divided jurisdiction of multiple federal agencies over hydropower development, principally based either on federal lands or navigable waters. See generally JEROME G. KERWIN, *FEDERAL WATER-POWER LEGISLATION* 171-216 (1926). In the winter of 1917, President Wilson suggested the creation of the Committee on Water Power to investigate the principle of federal control over water power development in navigable waters, public lands and national reserves and convened the Secretaries of War, Interior and Agriculture, as members of the Committee, to prepare a single bill to develop the hydroelectric industry. See *id.* at 217-18. The Wilson Administration's bill, introduced in the House on January 15, 1918, as H.R. 8716, 65th Cong., 2^d Sess., responded to Congressional requests to define critical jurisdictional terms by proposing in Section 3 definitions of public lands, reservations, and navigable waters. The latter was defined as follows: "'Navigable waters' means all streams or parts of streams, and *other bodies of water* or parts thereof, over which Congress has jurisdiction under its authority (continued...)"

54. Congress purposefully chose broad terms instead of narrow terms of jurisdiction in order to develop the new hydroelectric industry. For instance, when amendments were proposed to exclude international boundary waters, such as the St. Lawrence or Niagara Rivers, from the definition of “navigable waters,” Congress did not adopt those amendments, thus preserving broad and comprehensive hydroelectric legislation.⁹³ By passing the FWPA, Congress abandoned the previous hydroelectric scheme of divided and limited jurisdiction, whereby the Secretary of Agriculture would regulate hydropower projects in national forests, the Secretary of the Interior would regulate projects on lands outside of the national forests, and the Secretary of War would regulate projects located in navigable waters.⁹⁴ With the passage of the FWPA, and the eventual passage of the FPA in 1935, one federal entity had jurisdiction over all non-federal hydroelectric development in the United States.

55. In 1919, Congress sought to promote the development of new, efficient power sources through harnessing the power of water.⁹⁵ Today, the nation is again exploring the

to regulate commerce with foreign nations and among the several States” H.R. 8716, 65th Cong. 2d Sess. (1918) (emphasis added). After extensive hearings in the spring of 1918, the Administration’s bill was largely approved by the House and the Senate, forming the basis, with its broad jurisdictional concepts, of the FWPA. *See generally* H.R. REP. NO. 65-715 (1918). In the final debate leading to passage of the FWPA in 1920, Congress expressly rejected narrow definitions of jurisdictional terms, such as a definition of “navigable waters” which would have been restricted to “streams or parts of streams.” *See* S. REP. NO. 66-180 (1919) (replacing the House’s narrow definition of “navigable waters” with a broader definition); H. R. REP. NO. 65-1147 (1919) (narrow definition of “navigable waters” in section 3). On June 11, 1920, H.R. 3184, 66th Cong., 2d Sess., was signed into law as the FWPA, thus creating a uniform national policy for the use and development of water power on streams and other bodies of water and public lands and reservations. *See* Kerwin, *supra*, at 261.

⁹³ *See* 58 CONG. REC. 2027-34 (1919); 59 CONG. REC. 1483-95 (1920).

⁹⁴ *See* Kerwin, *supra* n.92, at 85-86, 143.

⁹⁵ *See, e.g.,* S. REP. NO. 66-180, at 2-3 (1919) (statement of Senator Jones) (“It is unnecessary to point out the need for or the beneficent results to come from water power development. It means a saving of coal, a lower price for that used; a saving of oil, and a lower price for that consumed; more efficient transportation, and a lower cost of service; the development of new industries; the building up of new communities . . .”).

development of renewable resources, including oceans energy.⁹⁶ The FPA, as crafted by Congress, is sufficiently broad to encompass development, not just of inland hydropower projects, but also of the vast kinetic potential of our oceans.

56. In short, based on our review of the statutory language, relevant case law, and pertinent legislative history of the FPA, we find that the FPA provides the Commission with two bases of authority under section 4(e) to issue preliminary permits and licenses for hydroelectric projects located on the OCS, or the submerged lands extending ten miles from the coastal baseline in the case of this rehearing. The first is the authority to license hydroelectric projects located on “streams or other bodies of water over which Congress has jurisdiction” under the Commerce Clause and the second is the authority to issue hydroelectric licenses for projects located on “reservations” of the United States. Second, we find that FPA section 23(b)(1) makes it unlawful for any person to develop these projects without a Commission license, because of their proposed location on both “navigable waters” and U.S. “reservations.”

B. Plain Meaning of EAct 2005

57. Interior points to section 388 of the Energy Policy Act of 2005 (EAct 2005), 43 U.S.C.S. § 1337 (2008), as authorizing the Secretary of the Interior to grant leases, easements, or rights-of-way for activities on the OCS that produce or support production, transportation, or transmission of energy from sources other than oil and gas. Interior contends that this section demonstrates Congress’ intent to appoint Interior as the lead federal regulatory authority over wave and ocean current energy projects that would be sited on the OCS. Interior further argues that, if Congress intended the Commission to have jurisdiction over wave and ocean current energy projects on the OCS, Congress would have explicitly stated as much in EAct 2005.⁹⁷

58. As discussed earlier, the FPA authorizes and requires the Commission to license and regulate the development of hydroelectric projects on Commerce Clause streams and other bodies of water (including navigable waters), as well as on U.S. reservations, both of which include the OCS and the waters above it. The FPA is a comprehensive energy

⁹⁶ See, e.g., Ivan C. Waterbury, *Harnessing Ocean Tides*, N.Y. TIMES, Sept. 11, 1921; COMM’N ON MARINE SCI., ENG’G AND RES., MARINE RESOURCES AND LEGAL-POLITICAL ARRANGEMENTS FOR THEIR DEVELOPMENT, H.R. DOC. NO. 91-41, at VII-233-234 (1st Sess. 1969).

⁹⁷ See Interior request for rehearing at 7-8.

law, involving, among other authorizations, the development of hydroelectric power and regulation of electric utility companies engaged in interstate commerce.⁹⁸

59. Nothing in section 388 of EPAct 2005 limits or narrows the scope of the Commission’s authority over hydroelectric power under the FPA or withdraws the Commission’s jurisdiction over hydroelectric projects on the OCS. To the contrary, Congress expressly preserves the Commission’s comprehensive hydroelectric licensing authority under the FPA by including two saving clauses in section 388. Section 388(p)(1) provides that:

The Secretary [of the Interior] . . . may grant a lease, easement, or right-of-way on the outer Continental Shelf *for activities not otherwise authorized in this Act, the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law*, if those activities . . . produce or support production, transportation, or transmission of energy from sources other than oil and gas . . .⁹⁹

60. In addition, section 388(p)(9), provides that “[n]othing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.”¹⁰⁰

61. Interior’s argument that the FPA is not “other applicable law” under section 388 is without merit. The FPA is comprehensive federal legislation for the development and regulation of hydroelectric power in the United States. As discussed above, the pertinent phrases and terms—“streams or other bodies of water over which Congress has [Commerce Clause] jurisdiction,” “navigable waters,” and “reservations”—are broadly defined in the FPA to incorporate the OCS and the waters above it. The Commission thus has jurisdiction over hydroelectric projects located on the OCS. EPAct 2005 and the first saving clause in section 388(p) left the Commission’s jurisdiction on the OCS unaltered.

⁹⁸ Part I of the FPA, 16 U.S.C. § 791a *et seq.*, concerns the development of water power and resources. Part II of the FPA, 16 U.S.C. § 824 *et seq.*, concerns the regulation of electric utility companies engaged in interstate commerce, and includes provisions regarding the transmission and sale of electric power.

⁹⁹ 43 U.S.C.S. § 1337(p)(1) (2008) (emphasis added).

¹⁰⁰ *Id.* § 1337(p)(9) (emphasis added).

62. Interior argues that if Congress intended the FPA to be included within the general exception for “other applicable law” in EPOA 2005, it would have clearly stated that FPA was included.¹⁰¹ However, to argue that “other applicable law” must be explicitly defined would render the phrase meaningless, when in fact its purpose is to capture federal laws other than the two mentioned by name.¹⁰²

63. With regard to the second saving clause in EPOA 2005, which Interior does not address in its rehearing request, its applicability is also not ambiguous. The second saving clause explicitly states that section 388 does not displace, supersede, limit, or modify the jurisdiction, responsibility, or authority of any federal agency under any federal law. Congress could not have been clearer. The Commission’s jurisdiction, responsibility, and authority under the FPA, which provides broad authority over Commerce Clause “streams and other bodies of water,” “navigable waters,” and “reservations,” including the OCS and the waters above it, is thus unaffected by EPOA 2005.

64. EPOA 2005 was meant to be “gap-fill” legislation, in that Congress wanted to enable Interior to grant leases for activities on the OCS that produce or support production, transportation, or transmission of energy from sources other than oil and gas, an authority it previously lacked.¹⁰³ Nothing in EPOA 2005 suggests that Congress wanted to create an entirely new energy regulatory scheme or to narrow the Commission’s jurisdiction over such projects located on “reservations,” Commerce

¹⁰¹ See Interior, Request for Rehearing, at 8.

¹⁰² See *Abbott Labs v. Gardner*, 387 U.S. 136, 144-45 (1967) (interpreting a statute’s saving clause and rejecting the argument that the court should review only the laws enumerated in the statute).

Additionally, the FPA is similar to Deepwater Port Act and the Ocean Thermal Energy Conversion Act in that all of these statutes were created to develop energy sources, whether in the form of oil and gas with respect to the Deepwater Port Act, 33 U.S.C. § 1501, ocean thermal energy with respect to the Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9101, or hydroelectric power with respect to the FPA.

¹⁰³ When section 388(p) of EPOA 2005 was discussed in the floor debates or the committee reports, the focus was wind energy projects on the OCS, such as the Cape Wind offshore wind farm in Massachusetts. The only mention of ocean energy was with respect to tax credits and generally encouraging the development of such a new energy supply. See, e.g., Floor Debate on H.R. 6, 109th Cong., 2d Sess. (June 22, 2005), S. 7055-56 (remarks of Sen. Murkowski). The committee reports do not contain any discussion of ocean wave energy projects in relation to section 388(p).

Clause “streams or other bodies of water,” or “navigable waters” under the FPA to exclude the Commission from its preexisting jurisdiction on the OCS and the waters above it. The two saving clauses clearly preserved the Commission’s jurisdiction over hydroelectric projects on the OCS under FPA sections 4(e) and 23(b)(1).

65. As for the legislative history of the EPAct 2005, Interior does not point to anything that suggests that Congress wished to create a disjunctive energy policy for the regulation of hydroelectric projects on the OCS. Moreover, Congress recently declined to strip the Commission of its authority to approve or license wave or current energy projects on the OCS under the FPA. In 2007, a Senate bill, entitled the Renewable Fuels, Consumer Protection, and Energy Efficiency Act of 2007, contained a provision, section 283, which would have divested the Commission of licensing or approval authority for wave and current projects on the OCS.¹⁰⁴ Although the bill passed the Senate, the provision was removed from the final version of the legislation that was ultimately enacted as the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492. The removal of section 283 from the legislation indicates that Congress was aware of the Commission’s assertion of authority to regulate hydroelectric projects on the OCS and chose not to act adversely.

The Commission orders:

(A) The requests for rehearing filed on April 1, 2008, in Project Nos. 12779 and 12781 by Fishermen for Safe Hydrokinetics, on April 14, 2008, in Project Nos. 12779 and 12781, by the U.S. Department of the Interior, and on April 4, 2008, in Project No. 12781, by the City of Fort Bragg are denied.

(B) The request for rehearing filed on April 3, 2008, in Project No. 12781, by Mendocino County, is granted to the extent set forth herein and is otherwise denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰⁴ See H.R. 6, 110th Cong. § 283(a)(3) (1st Sess. 2007).