

150 FERC ¶ 61,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Green Energy Storage Corp

Project No. 14613-001

ORDER RESCINDING PRELIMINARY PERMIT, DENYING
PRELIMINARY PERMIT APPLICATION, AND DISMISSING
REQUEST FOR REHEARING AS MOOT

(Issued January 22, 2015)

1. On October 29, 2014, Commission staff issued a preliminary permit to Green Energy Storage Corp (Green Energy) for the proposed Weed Heights Pumped Storage Project No. 14613, to be located off-stream near the town of Yerington in Lyon County, Nevada.¹ On November 26, 2014, Singatse Peak Services, LLC (SPS), intervenor in the permit proceeding, filed a request for rehearing of the October 29 Order. For the reasons discussed below, this order rescinds the October 29 Order, denies Green Energy's preliminary permit application, and dismisses SPS' request for rehearing as moot.

I. Background

2. On April 3, 2014, as revised on May 14 and June 18, 2014, Green Energy filed an application for a preliminary permit pursuant to section 4(f) of the Federal Power Act (FPA),² to study the feasibility of the proposed Weed Heights Project. The proposed 150-megawatt (MW) closed loop pumped storage project would utilize the 775 feet of head between a proposed upper reservoir and the former Anaconda open pit copper mine and consist of a new 35-foot-high upper dam; a tunnel connecting the two reservoirs; two 75-MW pump/turbines; a 2,700-foot-long, 16-foot-diameter draft tube extending from the turbines to the lower reservoir; a new 7-mile-long transmission line; and appurtenant facilities. The transmission lines would be located on federal lands, including lands managed by the Bureau of Land Management (BLM).

¹ *Green Energy Storage Corp.*, 149 FERC ¶ 62,063 (2014) (October 29 Order).

² 16 U.S.C. §§ 791a-825r (2012).

3. The Commission issued public notice of Green Energy's permit application on June 9, 2014. On August 8, 2014, SPS filed a timely motion to intervene and the Department of Interior's Bureau of Indian Affairs (BIA) submitted comments. SPS owns the Anaconda copper mine and appurtenant ground water rights that Green Energy would use for the proposed project. SPS expressed concern that the project, if constructed, would preclude the resumption of mining operations. It also stated that it would not grant Green Energy access to the site to perform the requisite studies and would not transfer any of the rights to groundwater necessary for project operation.

4. BIA commented that the proposed project is located on an active Superfund cleanup site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)³ and that a cleanup plan, which would need to be approved by the U.S. Environmental Protection Agency (EPA), may not accommodate Green Energy's project. BIA also expressed concern that contaminated water from the Anaconda mine could have negative impacts on the water quality of the proposed upper reservoir, local birds and wildlife, and the flow and quality of the hydraulically-connected Walker River.

5. The October 29 Order issuing the permit concluded that the issues raised by SPS were speculative and premature at the preliminary permit stage. The order similarly concluded that the issues raised by BIA were premature because they relate to impacts resulting from or associated with the construction of the proposed project. SPS' request for rehearing followed.

II. Discussion

6. Green Energy proposes to use the former Anaconda copper mine's open pit lake as a lower reservoir and water source for the Weed Heights Project. The abandoned mine is part of the Anaconda Mine Superfund site under the CERCLA, which covers more than 3,400 acres in Lyon County, Nevada.⁴ The site is contaminated primarily by elevated levels of heavy metals (including arsenic, lead, mercury, copper, uranium, and

³ 42 U.S.C. §§ 9601-9675 (2012).

⁴ U.S. Environmental Protection Agency, *Anaconda Mine*, EPA.GOV, (last updated Sep. 22, 2014), <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/vwsoalphabetic/Anaconda+Mine?OpenDocument>. The Anaconda Mine is not on EPA's National Priority List, so federal funds are not available for site cleanup. However, EPA can conduct investigations of the Superfund site and order responsible parties to undertake or fund removal actions. *See id.*

chromium) and radiological compounds that were released into the soil and water as a result of the processes used to extract copper from ore at the site.⁵

7. EPA took over regulatory lead of the Anaconda Mine site from the Nevada Division of Environmental Protection (Nevada) in 2005.⁶ EPA has completed a number of short-term response actions to deal with immediate hazards and is nearing the conclusion of the Remedial Investigation phase, which is used to identify the nature and extent of risks at the site.⁷ EPA is currently transitioning into the Feasibility Study phase, during which it will evaluate potential remedial options, eventually leading to a Record of Decision that explains which cleanup alternatives will be used at the site.⁸ Once the Record of Decision has been completed, the Remedial Design/Remedial Action phase will begin, which includes preparing for, designing, and conducting the site cleanup.⁹ EPA has not provided a timeline for completion of remediation activities at the Anaconda Mine site, but EPA cautions that sites with groundwater contamination as complex as the Anaconda Mine site can take decades to clean up.¹⁰

8. Based on the fact that the proposed project area is a Superfund site, the Commission has decided to rescind Green Energy's preliminary permit. Although the

⁵ *Id.*

⁶ EPA considered placing the Anaconda Mine site on the National Priority List in 2001, but agreed to defer the listing when the State of Nevada objected. EPA subsequently negotiated a memorandum of understanding with the U.S. Bureau of Land Management and Nevada that allowed Nevada to retain lead responsibility for the cleanup while EPA provided oversight. In late 2004, Nevada requested that EPA take regulatory lead of the cleanup because of the complexity of the contaminants at the site. *Id.*

⁷ See U.S. Env't'l Protection Agency, *Groundwater Investigation Update* (2013), available at [http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/9f2430c8db0967ae88257c92006c8bae/\\$FILE/Anaconda%208_13.pdf](http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/9f2430c8db0967ae88257c92006c8bae/$FILE/Anaconda%208_13.pdf).

⁸ *Id.*; U.S. Env't'l Protection Agency, *The Superfund Process*, EPA.GOV, (last updated Aug. 9, 2011), <http://www.epa.gov/superfund/community/process.htm>.

⁹ U.S. Env't'l Protection Agency, *The Superfund Process*, EPA.Gov, (last updated Aug. 9, 2011), <http://www.epa.gov/superfund/community/process.htm>.

¹⁰ U.S. Env't'l Protection Agency, *Groundwater Investigation Update* (2013), available at [http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/9f2430c8db0967ae88257c92006c8bae/\\$FILE/Anaconda%208_13.pdf](http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/9f2430c8db0967ae88257c92006c8bae/$FILE/Anaconda%208_13.pdf).

October 29 Order states that the potential conflict created by a CERCLA investigation is a premature concern at the preliminary permit stage, we do not think it is prudent to issue a permit for a site undergoing an indefinite cleanup process. The CERCLA investigation and remediation process will take many years to complete, and our prior experience with Superfund sites is that they essentially preclude project development.¹¹ Given the size and complexity of the contaminated site, and the fact the Superfund process is still at a relatively early stage, it seems highly unlikely that Green Energy would be able to perform any site-specific studies or take any significant steps toward developing a license application during the term of the preliminary permit. Accordingly, no purpose would be served by issuing a permit here.

9. Our decision to rescind Green Energy's preliminary permit renders SPS' request for rehearing moot. Nevertheless, for clarity, we will briefly address SPS' arguments. In short, SPS argues that: (1) the October 29 Order was *ultra vires* because the preliminary permit proceeding was contested; (2) the Commission lacks jurisdiction to issue a preliminary permit; (3) the adverse impacts on SPS' water rights are not speculative; (4) issuance of the preliminary permit interferes with a contractual agreement entered into by SPS and impedes SPS' progress toward resuming mining activities; (5) consideration of property rights and economic interests is proper at the preliminary permit stage; and (6) there is no rational basis for issuance of a permit where the land owner has made a *prima facie* showing that completion of the project would preclude the development of valuable natural resources outweighing any benefits from the project.

10. In past orders, we have rejected each of these arguments. SPS argues that Commission staff's issuance of the October 29 Order was *ultra vires* because SPS opposed issuance of the preliminary permit, making it a contested proceeding that required Commission, not staff, action.¹² We disagree. A preliminary permit proceeding is contested if the intervention opposes the grant of the permit itself, as opposed to the construction of the project, which is outside the scope of the preliminary permit.¹³

¹¹ See *Northumberland Hydro Partners, L.P. and Adirondack Hydro Development Corporation*, 115 FERC ¶ 61,319 (2006) (noting that existence of Superfund site had precluded commencement of project construction); *Montana Power Company*, 91 FERC ¶ 61,280 (2000) (stating that Commission could not see how licensee could prepare surrender application regarding project on Superfund site, or Commission act on application, during pendency of remediation process).

¹² 18 C.F.R. §§ 375.301(c) and 375.308 (2014).

¹³ See, e.g., *Robert A. Davis III and Michael P. O'Brien*, 53 FERC ¶ 61,040 (1990).

11. SPS did not sufficiently raise the issue of jurisdiction in its intervention to contest jurisdiction in this action.¹⁴ In any case, contrary to SPS' assertion, the Commission has clear permissive jurisdiction over groundwater under section 4(e) of the Federal Power Act (FPA).¹⁵ The Commission also has mandatory jurisdiction under FPA section 23(b)(1) because project transmission lines would occupy federal lands; there is no *de minimis* exception or requirement that major project facilities be located on federal lands, as SPS asserts.¹⁶

12. SPS' concerns about the project's potential impacts on its water rights, contractual agreements, and economic interests are premature. These concerns are speculative at the preliminary permit stage because a permit does not authorize construction or convey any water rights. Rather, it only allows the permittee to study the feasibility of constructing the proposed project. We have previously explained that concerns about the development of a project on existing or future land use at a potential development site is an issue to be examined at the licensing, not the permit, stage.¹⁷ To conclude otherwise would in effect make our permit process subject to veto by parties with economic interests in the vicinity of the project site.¹⁸ The issue of obtaining access to the site for the performance of studies is one for the permittee to address during the permit term.¹⁹

¹⁴ In its August 8, 2014 intervention and protest, SPS raised the issue of jurisdiction only in asserting that the groundwater that Green Energy proposed to use for initial fill water is not considered a Commerce Clause stream for purposes of the Commission's mandatory licensing jurisdiction. SPS August 8, 2014 Intervention at 9.

¹⁵ *Swanton Village, Vermont*, 70 FERC ¶ 61,325 (1995) ("We therefore conclude that, for purposes of section 4(e) of the FPA, ground water is a Commerce Clause water. The use of ground water for initial filling and subsequent additions to the lower reservoir of the proposed project would mean the project works (water conduits) would be located 'from' a Commerce Clause water within the meaning of section 4(e) of the FPA.").

¹⁶ Furthermore, assuming *arguendo* that the Director exceeded his authority by issuing a preliminary permit in a contested proceeding, the Commission may cure defects arising from the Director's improper issuance of the permit. *See Eagle Mountain Energy Company*, 62 FERC ¶ 61,066 (1993).

¹⁷ *See, e.g., Don L. Hansen*, 120 FERC ¶ 61,069, at PP 7-8 (2007).

¹⁸ *Id.* P 8; *see also Mid-Atlantic Engineers, Ltd.*, 53 FERC ¶ 61,155 (1990).

¹⁹ *Carex Hydro*, 36 FERC ¶ 61,031, at 61,069 (1986).

The Commission orders:

(A) The preliminary permit issued to Green Energy on October 29, 2014, for the Weed Heights Pumped Storage Project No. 14613 is rescinded.

(B) The preliminary permit application filed by Green Energy on April 4, 2014, is denied.

(C) The request for rehearing filed by Singatse Peak Services on November 26, 2014, is dismissed as moot.

(D) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R § 385.713 (2014).

By the Commission. Commissioner Bay is concurring with a separate statement attached.

Commissioner Honorable is voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

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Green Energy Storage Corp.

Project No. 14613-001

(Issued January 22, 2015)

BAY, Commissioner, *concurring*:

The Commission has long recognized that, “[w]here there are no longer any live issues presented,” the case is moot and a “request for rehearing should be dismissed.”²⁰ Here, the Commission has rescinded a preliminary permit for a project proposed to be developed within a Superfund site subject to an indefinite cleanup process. This action moots the rehearing request filed by Singatse Peak Services, LLC, which objected to the proposed project. While my colleagues recognize this fact, they nonetheless go on to address the merits of Singatse’s claims. In the absence of a live controversy, and particularly here where the objecting party has obtained the relief it sought, the Commission need not reach those claims, and, as a prudential matter, I would not do so.

Norman C. Bay
Commissioner

²⁰ *Sw. Power Pool, Inc.*, 119 FERC ¶ 61,307, 62,694 (2007).