

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

FINAVERA RENEWABLES
OCEAN ENERGY, LTD.

Project No. 12751-000

**REQUEST FOR REHEARING OF
STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

Pursuant to Section 313(1) of the Federal Power Act (FPA),¹ and Rule 713 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure,² the State of Washington, Department of Ecology (Ecology) hereby requests rehearing of the December 21, 2007 *Order Issuing Conditioned Original License* (Order)³ issued by the Commission for the Makah Bay Offshore Wave Pilot Project (Makah Bay Project).

I. STATEMENT OF ISSUES

1. Whether the Commission violated Section 401 of the Clean Water Act (CWA)⁴ by approving Finavera Renewables Ocean Energy, Ltd.'s (Finavera) application before Finavera obtained a certification from Ecology providing that it has reasonable assurance that the Makah Bay Project will meet water quality standards and other applicable requirements of state law.

2. Whether the Commission violated Section 307 of the Coastal Zone Management Act⁵ by approving Finavera's application before Finavera obtained concurrence from Ecology that the Makah Bay Project "complies with the enforceable policies of

¹ 16 U.S.C. § 8251(a) (Supp. 2007).

² 18 C.F.R. § 385.713 (2006).

³ *Finavera Renewables Ocean Energy, Ltd.*, 121 FERC ¶ 61,288 (2007).

⁴ 33 U.S.C. § 1341 (2000).

⁵ 16 U.S.C. § 1456(c)(3)(A) (2000).

[Washington's] approved [Coastal Zone Management Program] and that such activity will be conducted in a manner consistent with the program.”

II. MAKAH BAY PROJECT

On November 8, 2006, AquaEnergy, Ltd., now known as Finavera, filed pursuant to Part I of the FPA, an application for an original minor license to construct, operate, and maintain the 1.0 megawatt Makah Bay Project. Order at 1. On December 16, 2006, the Commission issued a public notice stating that the application was ready for environmental analysis, and requested motions to intervene and comments on the application. Order at 2. Ecology filed a timely motion to intervene. Order at 3. Ecology also submitted comments and recommendations to the Commission on the application. *Id.* Commission staff prepared an Environmental Assessment (EA) on May 31, 2007. *Id.* Ecology filed comments on the EA. *Id.*

On February 15, 2007, Finavera submitted a Joint Aquatic Resources Permit Application (JARPA) to Ecology requesting a water quality certification under Section 401 of the CWA. Order at 6. Ecology has one year from the receipt of the JARPA to make a determination on Finavera's request for a water quality certification. 33 U.S.C. § 1341(a). Finavera also requested certification from the Makah Indian Tribe on February 15. Order at 6. The Makah Indian Tribe issued its Section 401 water quality certification to Finavera on June 7, 2007. Order at 6-7.

On June 25, 2007, Finavera submitted a statement of consistency with Washington's Coastal Zone Management Program (CZMP) to Ecology seeking the agency's concurrence. Order at 7. On December 14, pursuant to 15 C.F.R. § 930.60(b), Finavera and Ecology

agreed in writing to stay the six-month deadline for issuance of a consistency concurrence determination.⁶ The stay is effective until Ecology issues its decision on Finavera's request for the Section 401 water quality certification. *See* Ex. 1.

Although Ecology had not issued a Section 401 water quality certification or CZMA consistency concurrence, nor waived its authority to issue either approval, on December 21, 2007, the Commission issued its Order granting a license to Finavera for the Makah Bay Project. *Finavera Renewables Ocean Energy, Ltd.*, 121 FERC ¶ 61,288 (2007). Ecology now seeks rehearing of the Commission's Order.

III. ARGUMENT

Section 401 of the CWA precludes the Commission from issuing a license for the Makah Bay Project under the FPA until Finavera has received a water quality certification from Ecology. The CZMA includes a similar restriction on the Commission's issuance of a license under the FPA, prohibiting the Commission from doing so until Finavera obtained a consistency concurrence. The Commission's failure to adhere to the limitations in the CWA and CZMA render its decision invalid. The Commission should grant rehearing of its Order and rescind its grant of a license to Finavera under the FPA.

⁶ Finavera electronically filed the letter with the Commission on December 18 and the Commission noted receipt of the letter on that same day. The Commission received the hard copy on December 21. The letter was posted in the Commission's electronic library for this project on December 21. A copy of the letter is attached hereto as Exhibit 1.

A. The Commission Violated The CWA By Issuing A License Before Finavera Received A Section 401 Certification.

1. Through Section 401 Congress gave states primary authority to protect water quality.

In crafting the CWA, Congress made plain that states retained the primary role in protecting water quality:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources

33 U.S.C. § 1251(b). In carrying out this policy, Congress carved out specific roles for the states. One such role is the exercise of Section 401 authority to determine if federally permitted or licensed activities requiring a discharge to navigable water will comply with applicable water quality standards. 33 U.S.C. § 1341. Section 401 provides in part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters and the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of [the Clean Water Act].

33 U.S.C. § 1341(a)(1). The certification decision is made by the certifying agency, which is defined as the agency designated by the governor of a state to certify a project's compliance with applicable water quality standards.⁷ 40 C.F.R. § 121.1(e).

⁷ If no state or interstate agency has authority to certify a project, the responsibility falls to the Administrator of the Environmental Protection Agency. 33 U.S.C. § 1341(a)(1). Ecology is the state agency designated to implement the provisions of the CWA in Washington State. Wash. Rev. Code 90.48.260.

The filing of an application for a federal permit or license triggers Section 401's certification requirement. The applicant must submit a request for certification to the state. 33 U.S.C. § 1341(a)(1). Upon receiving the request, the state has one year "to act on [the] request for certification." *Id.* Failure of the state to act on the request within one year constitutes a waiver of the certification requirement. *Id.* The federal agency is prohibited from granting a license or permit until a certification from the state has been obtained. *Id.* Denial of the certification request by a state precludes issuance of the federal permit or license as a matter of law. *Id.*

The terms of a Section 401 water quality certification shall become a condition of any federal license or permit issued. 33 U.S.C. § 1341(d); *see also Roosevelt Campobello Intern. Park Comm'n v. EPA*, 684 F.2d 1041, 1056-57 (1st Cir. 1982). The federal permitting or licensing agency lacks authority to review or revise state water quality certification conditions. *Roosevelt Campobello*, 684 F.2d at 1056; *American Rivers, Inc. v. FERC*, 129 F.3d 99, 110-11 (2nd Cir. 1997). Congress thus reserved to the states the responsibility for certifying compliance with state water quality standards.

2. Section 401 precludes granting of federal permit or license prior to receipt or waiver of state certification.

Section 401 provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence." 33 U.S.C. § 1341(a)(1). The Commission ignored this prohibition when it issued its Order granting a FPA license to Finavera for the Makah Bay Project. As the Commission's action is contrary to the requirements of the CWA, the license is not valid and the Order must be rescinded.

The D.C. Circuit Court of Appeals recently discussed the prohibition contained in Section 401 as it related to the Commission's issuance of a FPA license. *City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006). In *City of Tacoma*, the Skokomish Indian Tribe challenged a license issued by the Commission under the FPA asserting, among other things, that Ecology had failed to provide public notice of the applicant's request for certification. Discussing the requirements of Section 401, the Court held that it is "evident from the plain language of section 401" that the Commission "has an obligation to determine that the specific certification required by section 401 has been obtained," because "without that certification, FERC lacks authority to issue a license." *City of Tacoma*, 460 F.3d at 67-68 (internal quotation marks and brackets omitted). The Court stated further that, "in the absence of . . . assurance" that an applicant has obtained a "certification [from] the state . . . [that] satisfies section 401," the Commission "has no authority to grant a license," because "section 401 sets forth constraints upon FERC's authority to act." *Id.* at 68.

The court's interpretation of Section 401 applies equally to this case. There is no dispute that through its Order the Commission issued Finavera a license under the FPA. *See* Order at 27-28. However, when describing the requirements of Section 401 in the Order, the Commission ignores the unambiguous statutory prohibition on its ability to issue a license. Instead, the Commission discusses the requirements of Section 401(d) stating that "where the state water quality certifying agency has issued a water quality certification for a proposed hydroelectric project, the certification shall become a

condition of any federal license that authorizes construction or operation of the project.”⁸ Order at 6, ¶ 16. The Commission’s issuance of a license to Finavera prior to receipt of a Section 401 water quality certification is contrary to the terms of the statute, case law, and the Commission’s own precedents. *See, e.g., Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 (2004) (license not granted until Ecology issued water quality certification to applicant).

3. The Commission’s assertion that it can issue conditional licenses is not supported by law.

The Commission’s explanation in its Order why it issued a license prior to Finavera’s receipt of a water quality certification is not satisfying. First, the Commission’s citation to instances where it has followed the same process under the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717z, does not make its action legal. *See* Order at 24 n.65. The fact that the Commission, on more than one occasion, elected to issue licenses under the NGA in advance of compliance with Section 401 of the CWA does not indicate that such an approach is consistent with the legal requirements of Section 401. Nor does it lend support in this case where the Commission is issuing a license under the FPA. Neither the FPA nor the NGA authorize the Commission to ignore the express requirements of the CWA. Section 401 of the CWA is

⁸ In its recent *Policy Statement on Conditioned Licenses for Hydrokinetic Projects*, 121 FERC ¶ 61,221, the Commission appears to assert that it can pick and choose which elements of a Section 401 water quality certification it will include in a previously issued license. “When the authorizations [required by federal law] are obtained, licensees will be required to file them with the Commission, and the Commission then will review them and incorporate their terms in the license, *as appropriate*.” 121 FERC ¶ 61,221 ¶ 9 (emphasis added). While Ecology does not concede that the Commission has authority to issue such a conditional license under the FPA, it must be noted that the Commission’s incorporation of anything less than the full terms of a water quality certification into the license would be contrary to case law. *Roosevelt Campobello*, 684 F.2d at 1056; *American Rivers*, 129 F.3d at 110-11.

unambiguous—the applicant **must** obtain the appropriate authorizations **prior** to the Commission acting on an application for a license under the FPA. *See State of North Carolina v. FERC*, 112 F.3d 1175, 1183-84 (D.C. Cir. 1997) (concluding that congressional intent in Section 401(a)(1) was clear and unambiguous).

Second, the mere fact that it may take the applicant some time to obtain a water quality certification does not provide the Commission with the authority to ignore the clear terms of Section 401(a)(1). If the Commission is concerned that compliance with applicable statutory requirements results in delay that impairs the applicant from undertaking non-construction activities, there are other remedies short of violating the requirements of the CWA. For example, the Commission could issue a draft license thus notifying the applicant of the conditions the Commission plans to impose. Additionally, nothing precludes the Commission from issuing a license the day after the applicant receives its water quality certification.

Finally, to the extent that the Commission claims its authority under the FPA to impose conditions on a license justifies its action in this case, that assertion is equally unavailing. The CWA imposes an independent statutory obligation on an applicant, not one created by the Commission. To assert that the Commission can, by condition, require compliance with the CWA when such compliance is already mandated by the statute itself turns the CWA on its head. Section 401 is clear on its face—“[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived” 33 U.S.C. § 1341(a)(1). Moreover, as detailed above, the Commission’s issuance of the license prior to receipt of the water quality certification is

contrary to the D.C. Circuit Court's decision in *City of Tacoma*. See also *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109 (4th Cir. 1989) (hydroelectric license applicant's failure to submit valid application for 401 Certification made FERC license to construct the project invalid). The Commission violated Section 401 of the CWA in issuing a license for the Makah Bay Project in advance of Finavera's receipt of a water quality certification from Ecology.

B. The Commission Violated The CZMA By Issuing A License Before Finavera Received A Consistency Concurrence From Ecology.

Congress enacted the CZMA "in order to promote comprehensive and coordinated planning for coastal zone development and preservation between states and the federal government." *Conservation Law Found. v. Watt*, 560 F. Supp. 561, 574 (D. Mass. 1983), *aff'd sub nom. Commonwealth of Mass. v. Watt*, 716 F.2d 946 (1st Cir. 1983). The CZMA applies when "any applicant" seeks "a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of [a] state." 16 U.S.C. § 1456(c)(3)(A). Such an applicant must (1) "provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program," and (2) "furnish to the state or its designated agency a copy of the certification" "[a]t the same time." *Id.* The state then must either "notify the Federal agency concerned that the state concurs with or objects to the applicant's certification" or be "conclusively presumed" to acquiesce by not acting on the certification within six

months. *Id.* In either case, “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification” *Id.*

The Ninth Circuit Court of Appeals addressed the issue of the Commission’s ability to issue a license under the FPA for a proposed hydroelectric project prior to the applicant’s compliance with the requirements of the CZMA in *Mountain Rhythm Res. v. FERC*, 302 F.3d 958 (9th Cir. 2002). The Court concluded that, under the CZMA, the Commission is “*required* by federal statute” to resolve issues of “state certification *before* issuing a license” and “cannot issue [a] license *unless* the state’s applicable agency concurs that the proposed project is consistent with the state’s Coastal Zone Management Program.” *Id.* at 960, 965 (second and third emphases added).

It is undisputed that Ecology has not issued a consistency concurrence to Finavera for the Makah Bay Project. As the Commission is aware, Ecology and Finavera agreed to stay the consistency decision until the date by which Ecology must act on Finavera’s request for a Section 401 water quality certification. Ex. 1. While the Commission may have anticipated the issuance of the consistency concurrence, there is no doubt that a decision on Finavera’s request was not rendered prior to the Commission’s license order. The Commission’s action is contrary to the requirements of the CZMA and, therefore, invalid.

Ecology’s arguments above regarding the Commission’s issuance of a license under the FPA in advance of Finavera’s receipt of a Section 401 water quality certification apply equally to the CZMA. The plain language of the CZMA precludes

issuance of a federal permit or license in advance of the applicant's receipt of a consistency concurrence from the state or the state has waived its authority to issue a concurrence. The statutory prohibition in the CZMA is identical to the one Congress included in the CWA. *Compare* 16 U.S.C. §1456(c)(3)(A) (“[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification or until, by the state’s failure to act, the concurrence is conclusively presumed”) *with* 33 U.S.C. §1341(a)(1) (“[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived”).

The fact that the Commission has issued conditional licenses under the NGA, which Ecology asserts is contrary to the CWA and CZMA, does not support the Commission’s decision to act similarly under the FPA. Neither the FPA nor the NGA provides the Commission with the authority to circumvent the requirements of independently applicable federal laws. The Commission cannot contort any authority it may have to impose conditions on a FPA license as a right to ignore the clear limitation in the CZMA or the CWA on its ability to issue such a license. Moreover, the Commission’s claim that it takes time to obtain a CZMA consistency concurrence does not justify its failure to comply with the requirements of the CZMA. Since Finavera has not received a consistency concurrence from Ecology and the agency has not waived its CZMA authority, the Commission was precluded from issuing the license for the Makah Bay Project.

IV. CONCLUSION

For the reasons stated above, Ecology requests that the Commission grant rehearing of its Order and rescind the license granted to Finavera under the FPA for the Makah Bay Project.

RESPECTFULLY SUBMITTED this 17th day of January, 2008.

ROBERT M. MCKENNA
Attorney General

s/ Joan M. Marchioro
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PROOF OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

DATED this 17th day of January 2007, at Olympia, Washington.

s/ Joan M. Marchioro
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FEDERAL ENERGY
REGULATORY COMMISSION

December 14, 2007

CERTIFIED MAIL
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Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: FERC Project Number P-12751-000, Makah Bay Offshore Wave Energy Pilot Project

Dear Ms. Bose:

Pursuant to 15 CFR § 930.60 the Washington Department of Ecology (Ecology) and Finavera Renewables, Inc. are writing to advise you of the status of Ecology's review of the Makah Bay Offshore Wave Energy Pilot Project Certification of Consistency with the Washington State Coastal Zone Management (CZM) Program.

Finavera Renewables, Inc. filed its application with the Federal Energy Regulatory Commission and provided a CZM statement form that Ecology received on June 25, 2007. The statutory six-month review period commenced to run and will expire on December 22, 2007. At this time Ecology has notified Finavera Renewables, Inc. that the Water Quality Certification (WQC) for the project will not be completed by that date. Therefore Finavera Renewables, Inc. and Ecology have mutually agreed to extend the time for Ecology's review of CZM.

Ecology and Finavera Renewables, Inc. have agreed to extend the review period until Ecology issues the WQC decision. The additional time is necessary to allow Ecology to complete the WQC review process. After completion of the review process Ecology will issue both the WQC decision and the CZM determination.

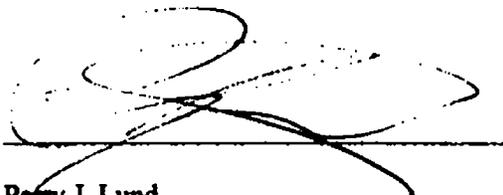
If you have any questions regarding this matter please contact Lori Ochoa of the Department of Ecology at 360-407-6926 or Mary Jane Parks with Finavera Renewables, Inc. at (626) 253-1981.

FERC Project Number P-12751-000

December 14, 2007

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Sincerely,



**Peffy J. Lund
Unit Supervisor
Shorelands and Environmental Assistance
Program
Department of Ecology
Southwest Regional Office**



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**cc: Nick Jayjack, FERC Project Manager
Olivia Romano, Corps of Engineers
Penny Keys, Ecology
Joan Marchioro, AAG**

Submission Contents

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