

122 FERC ¶ 62,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas & Electric Company

Project No. 12779-000

Fairhaven OPT Ocean Power, LLC

Project No. 12780-000

ORDER ISSUING PRELIMINARY PERMIT
AND DENYING COMPETING APPLICATION

(Issued March 13, 2008)

Pacific Gas & Electric Company (PG&E) and Fairhaven OPT Ocean Power, LLC (Fairhaven) filed competing applications, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the hydrokinetic PG&E Humboldt WaveConnect Project (Humboldt WaveConnect Project) and Fairhaven Wave Power Station Project (Fairhaven Project), respectively. The projects would be located in the Pacific Ocean west of the City of Eureka in Humboldt County, California. The Humboldt WaveConnect Project would be located two to ten miles from shore and the Fairhaven Project would be located approximately 2.8 miles from shore.

The project proposed by PG&E in its February 27, 2007 application would consist of: (1) 8 to 200 wave energy conversion buoys (WECs) having a total installed capacity of 40 megawatts, (2) a 40 kilovolt submarine transmission cable, (3) integrated generators, (4) anchoring devices, (5) an onshore transmission line, and (6) appurtenant facilities. The project would have an annual generation of 100 gigawatt-hours annually, which would be sold to a local utility.

The project proposed by Fairhaven in its February 28, 2007 application would consist of: (1) 40 to 80 wave energy conversion buoys (WECs) having a total installed capacity of 20 megawatts, (2) a submarine transmission cable, (3) integrated generators, (4) anchoring devices, and (5) an onshore transmission line, and (6) appurtenant facilities. The project would have an annual generation of 61.32 gigawatt-hours annually, which would be sold to a local utility.

Since neither of the applicants presented a plan based on detailed studies, there is no basis for concluding that any applicant's plan would be better adapted to develop, conserve, and utilize water resources in the public interest.² Because PG&E's application is the first-

¹ 16 U.S.C. § 797(f) (2000).

² See 18 C.F.R. § 4.37(b)(1) (2007).

filed, and after taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the first-filed application.³ Therefore, this preliminary permit is being issued to PG&E for Project No. 12779.

Background

Public notice of the Humboldt WaveConnect Project preliminary permit application was published in the *Federal Register* on April 23, 2007 (72 Fed. Reg. 20,114). Public notice of the Fairhaven Project preliminary permit application was published in the *Federal Register* on April 12, 2007 (72 Fed. Reg. 18,472). The National Marine Fisheries Service (NMFS) and the Department of the Interior (Interior) filed timely motions to intervene and comments in both proceedings.⁴ The Fisherman Interested in Safe Hydrokinetics (FISH Committee) filed a late motion to intervene on February 28, 2008. The City and County of San Francisco (San Francisco) filed a motion to intervene and protest in both proceedings. Fishermen Interested in Safe Hydrokinetics (FISH Committee) filed a late motion to intervene in the Humboldt WaveConnect Project proceeding.⁵ Late comments were filed by the California State Lands Commission (CASLC), the Humboldt County Board of Supervisors (HCBS) and the Redwood Coast Energy Authority (RCEA) on the Humboldt WaveConnect Project. Additionally, HCBS filed identical late comments on the Fairhaven Project.

NMFS comments that the Humboldt WaveConnect Project and the Fairhaven Project applications lack adequate information to assess potential project impacts on the resources under NMFS' jurisdiction. The Interior comments that the proposed projects may affect at least three species listed under the Endangered Species Act (ESA), including the California brown pelican, the marbled murrelet, and the short-tailed albatross.

CASLC filed comments on the Humboldt WaveConnect Project stating that any placement of WECs devices on state sovereign tide and submerged lands will require the prior authorization of the CASLC. HCBS and RCEA filed comments in support of renewable energy and the potential of capturing wave energy from abundant coastal resources. Additionally, HCBS commented that the waters off the coast of Humboldt County contain a multitude of fish and wildlife species as well as commercial and recreational fisheries.

Site-Banking

³ *See id.* § 4.37(b)(2).

⁴ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Regulations. *See id.* § 385.214(a)(3).

⁵ On March 4, 2008, the Commission issued a notice denying FISH Committee's motion for late intervention.

San Francisco comments that it generally supports the development of energy from waves, tides, and ocean currents but advocates that the Commission cease issuing preliminary permits while it is deciding on a standard of review of applications for preliminary permits for new hydrokinetic projects. San Francisco expresses concerns about site-banking by ill-prepared applicants with ill-conceived applications and its effect on the Commission's resources to review hydrokinetic projects. With regard to PG&E's project in particular, San Francisco does not point to any deficiencies or problems with the application.

In response, PG&E filed an answer in its proceeding commenting that the Commission should continue to issue preliminary permits because it would lead to earlier commercial development of necessary hydropower generation. It argues that San Francisco's proposal would potentially stifle a burgeoning industry.

The Commission believes that the application of the strict scrutiny standard of review for preliminary permits, as discussed in the Interim Statement of Policy,⁶ will protect against site-banking and ensure that holders of preliminary permits either diligently pursue potential projects or have their permits revoked.

Discussion

Section 4(f) of the Federal Power Act (FPA) authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by FPA section 9,⁷ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁸ Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.⁹

⁶ *Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,112 (2007).

⁷ 16 U.S.C. § 802 (2000).

⁸ *See, e.g., Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

⁹ Thus, a permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); *see also Town of Summersville, W. Va. v. FERC*, 780

Placement of test devices is not authorized by the issuance of a permit pursuant to the FPA; however, such activities would be subject to other federal and state laws.

The majority of the comments filed in response to the notice express concerns associated with construction of the project, not with activities carried out under a permit.

On February 15, 2007, the Commission issued a notice of inquiry seeking comments on how it should treat applications for preliminary permits to study hydropower projects involving proposals to utilize wave, current, and instream new technology methods.¹⁰ In the notice of inquiry, the Commission posed three possible alternatives and stated that, pending the outcome of the notice of inquiry proceeding, it is adopting in the interim a “strict scrutiny” approach. Under that approach, the Commission will process new technology preliminary permit applications with a view toward limiting the boundaries of the permits, to prevent site-banking and to promote competition. Further, to ensure that permit holders are actively pursuing project exploration, the Commission will carefully scrutinize the reports that permit holders are required to file on a semi-annual basis,¹¹ and would, where sufficient progress was not shown, consider canceling the permit. Stricter scrutiny could entail requirements such as reports on public outreach and agency consultation, development of study plans, and deadlines for filing a Notice of Intent to file a license application and a Pre-Application Document.

During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission’s Regulations.¹² The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹³ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an

F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits). For this reason, issuance of this preliminary permit is not a major federal action significantly affecting the quality of the human environment.

¹⁰ See Interim Statement of Policy, *supra* note 5.

¹¹ As a standard condition in all preliminary permits, the Commission requires the permit holder to file progress reports every six months.

¹² 18 C.F.R. §§ 5.5 and 5.6 (2007).

¹³ See *id.* § 5.3.

opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of permittees, this permit will also require the permittee to file, within 45 days of the issuance date, a schedule of activities to be carried out under the permit and target dates for completion of these activities. At a minimum, this should include the filing of the NOI and PAD within one year of permit issuance, along with any request to use the traditional or alternative licensing process, or an NOI and Draft Application within two years of permit issuance for a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD must also include the time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and a preliminary list of issues identified and necessary studies related to these issues. If the periodic progress reports required by Article 4 of this permit do not show significant progress, or if the permittee fails to comply with any other conditions, the permit may be cancelled.

A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. If other parties intend to hold any proprietary rights necessary for the construction, operation, and maintenance of the proposed project during the term of an issued license, they must be included as joint applicants in any license application that will be filed with the Commission. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.¹⁴

The Director orders:

(A) A preliminary permit is issued for this project to Pacific Gas & Electric Company, for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) The competing application for preliminary permit for Project No. 12780, filed by Fairhaven OPT Ocean Power, LLC on February 28, 2007, is denied.

¹⁴ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

(C) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(D) The permittee, in addition to the six-month progress reports required under Article 4, shall file the following:

Within 45 days of the issuance date of the permit, a schedule of activities proposed by the permittee during the three-year permit term, leading to the filing of a development application. At a minimum, this shall include filing, within one year of the date of this permit, a notice of intent to file a license application (NOI) and pre-application document (PAD), accompanied by, if desired, a request to use the Traditional Licensing Process or Alternative Licensing Process, or the filing of an NOI and Draft Application no later than two years from permit issuance for a request for necessary waivers to pursue hydrokinetic pilot project licensing procedures. The PAD shall include a time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities; and for developing and filing a preliminary list of issues identified and studies related to these issues needed to develop a license application.

(E) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2007).

William Guey-Lee
Chief, Engineering and Jurisdiction Branch
Division of Hydropower Administration
and Compliance

FEDERAL ENERGY REGULATORY COMMISSION

**TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the Permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if said project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the Permittee undertakes, the Permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. All test sites shall be restored as closely as possible to their original condition and to the satisfaction of the Commission's authorized representative or, where federal lands are affected, to the satisfaction of the agency administering such lands.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the Permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the Permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. At the close of each six-month period from the effective date of this permit, the Permittee shall file four copies of a progress report with the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; and shall serve a copy on the interveners in this proceeding. The report shall describe, for that report period, the nature and timing of what the Permittee has done under the pre-filing requirements of 18 CFR sections 4.38 and 5 and other applicable regulations; and, where studies require access to and use of land not owned by the Permittee, the status of the Permittee's efforts to obtain permission.