

UNITED STATES OF AMERICA 131 FERC ¶ 62,118
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Project No. 13641-000

ORDER ISSUING PRELIMINARY PERMIT AND GRANTING PRIORITY TO FILE
LICENSE APPLICATION

(May 14, 2010)

1. On December 11, 2009, Pacific Gas and Electric Company (PG&E) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act,¹ proposing to study the feasibility of the Central Coast WaveConnect Project. The requested project boundary comprises of approximately 45 square miles of coastal waters, located off the Coast of Santa Barbara County, California, on submerged lands of the State of California, and would use no dam or impoundment. For the reasons discussed below we are issuing a preliminary permit for the study of the feasibility of constructing the Central Coast WaveConnect Project.

Background

2. The proposed Central Coast WaveConnect Project consists of: (1) multiple arrays of wave energy conversion devices, in depths ranging from 36 to 300 feet of water; (2) a proposed 3.5- to 5-mile-long, up to 12-kilovolt transmission line; and (3) appurtenant facilities. The project is estimated to have an average annual generation of 260 gigawatt-hours, which would contribute to PG&E's existing grid.

3. The Commission issued public notice accepting the application for filing and soliciting comments, motions to intervene, and competing applications on December 17, 2009. A timely motion to intervene and comments were filed by the National Oceanic, Atmospheric Administration, National Marine Fisheries Service (Fisheries Service).² Comments were also filed by the Morro Bay Commercial Fishermen's Organization (Commercial Fishermen), Community Environmental Council, and Environmental Defense Center.

¹ 16 U.S.C. § 797(f) (2006).

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2009).

4. A letter was received from the U.S. Department of the Interior, Office of Environmental Policy and Compliance, stating that they had no comments to offer.

Discussion

5. Section 4(f) of the 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 section 9 of the FPA,³ 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.⁴ 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.⁵

6. The Fisheries Service commented that a number of species listed as threatened or endangered under the Endangered Species Act (ESA), or their critical habitat, may occur in the project area, including anadromous fishes, sea turtles, and marine mammals, the latter of which are also protected under the Marine Mammal Protection Act (MMPA). The Fisheries Service stated that if the Commission should issue a preliminary permit for the project, the permit should require an assessment of the potential exposure of sturgeon, salmon, and marine mammals to EMF and low amplitude underwater sound, as well as elevated sound pressure levels produced during installation. The Fisheries Service further stated that because the proposed project may impact marine mammals, the permittee may need to apply for a permit under the MMPA, if a preliminary permit is granted.

³ 16 U.S.C. § 802 (2006).

⁴ 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.”).

⁵ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. 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 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

7. The Fisheries Service further commented that the project area was within an area designated as Essential Fish Habitat, under the Magnuson-Stevens Act (MSA), in the Fisheries Management Plans for Pacific Groundfish, Coastal Pelagics, and Highly Migratory Species. The Fisheries Service stated that the siting and operation of the project may adversely affect the quantity and quality of habitat supporting managed species. The Fisheries Service also stated that if the Commission were to issue a preliminary permit for the project, the permit should require an assessment of the impact of the project on recreational and commercial fishing and include a review of all the federal and state regulations with regard to fishing access for the fleets.

8. In conclusion, the Fisheries Service states that the proposed project is subject to requirements under the ESA, MMPA, and the MSA, among others, and that if a preliminary permit were granted, the Fisheries Service would appreciate being engaged at the earliest possible time to provide guidance on the study plans to address potential effects to Fisheries Service trust resources. In addition, the Fisheries Service states that a preliminary permit for this project should include a requirement for the development of environmental baseline information for the project area, gathered prior to the installation of project facilities.

9. The Commercial Fisherman commented that the safety of the commercial fishing fleet as well as the economic impacts to the coastal communities of Morro Bay and Port San Luis due be addressed in the development of this project and requested that they be kept informed throughout the process.

10. The Community Environmental Council and the Environmental Defense Center recommend that PG&E engage in a Marine Spatial Planning effort to help identify places within the permit area that would be compatible or incompatible with proposed project. To facilitate this effort, they recommend that PG&E characterize the existing environment utilizing, to the extent feasible, existing information and where the information is insufficient, conduct baseline studies.

11. The concerns expressed by the Fisheries Service, Commercial Fisherman, the Community Environmental Council, and the Environmental Defense Center relate to the preparation of a development application and the construction and operation of the proposed project. As noted, a preliminary permit does not authorize a permittee to undertake any construction. Furthermore, the purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The issues raised in the comments can properly be addressed in the licensing process.

12. To ensure that we have adequate information for determination of project effects and benefits, we require license applicants to provide detailed information regarding the proposed project, and, before applying, to have performed all reasonable studies

requested by resource agencies, including site-specific and cumulative impact analyses.⁶ Consistent with that approach, the information needs identified in the comments of the Fisheries Service, Commercial Fisherman, the Community Environmental Council, and the Environmental Defense Center will be addressed in a licensing proceeding if this project reaches that stage.

13. 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 Preliminary Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.⁷ 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.⁸ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

14. This permit includes conditions to closely monitor the progress of the permittee's activities. In addition to the six-month progress reports required of the permittee, 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 schedule shall include: (1) 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 in lieu of the Integrated Licensing Process; or (2) the filing of an NOI and Draft License Application for a Pilot Project within two years of the permit issuance with a request for the necessary waivers to the Integrated Licensing Process to pursue hydrokinetic pilot project licensing procedures. 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 for financial reasons or otherwise, the permit may be cancelled.

15. 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

⁶ See *Symbiotics, L.L.C.*, 99 FERC ¶ 61,101 (2002).

⁷ 18 C.F.R. §§ 5.5 and 5.6 (2009)

⁸ See 18 C.F.R. § 5.3 (2009).

evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other entities intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. 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.⁹

The Director orders:

(A) A preliminary permit is issued for this project to Pacific Gas and 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) 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.

(C) 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 issuance 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 in lieu of the Integrated Licensing Process, or the filing of an NOI and Draft License Application for a Pilot Project no later than two years from the date of issuance of this permit with a request for the necessary waivers to the Integrated Licensing Process 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.

⁹ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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(D) 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.

Timothy J. Welch, Branch Chief
Hydro West Branch 2
Division of Hydropower Licensing

Form P-1 (Revised December 2009)**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 the 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. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

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 a progress report electronically via the Internet; and shall serve a copy on the intervenors in this proceeding. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. 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 C.F.R. sections 4.38 and 5.1-5.31 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 to access and use the land.

Document Content(s)

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