

121 FERC 61,072
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 and Electric Company

Project No. 233-105

ORDER ON REHEARING AND CLARIFICATION

(Issued October 22, 2007)

1. By order of July 2, 2007, Commission staff issued a new license to Pacific Gas and Electric Company (PG&E) for the Pit 3, 4, 5 Hydroelectric Project No. 233, located on the Pit River in Shasta County, California.¹ The U.S. Department of the Interior (Interior) has filed a request for rehearing of that order, and PG&E has filed a request for clarification of the new license. For the reasons discussed below, we are denying rehearing and clarifying the matters requested by PG&E.

Interior's Rehearing Request

Background

2. Under section 7(a)(2) of the Endangered Species Act of 1973 (ESA),² federal agencies must consult with the Secretary of the Interior to ensure that any actions "authorized, funded, or carried out" by the agencies are not likely to jeopardize the continued existence of federally listed threatened and endangered species. If the Secretary finds that an action is not likely to jeopardize the continued existence of a listed species, section 7(b)(4)³ requires that the action agency be provided with a written statement specifying the impact on the species of any taking incidental to the agency action, reasonable and prudent measures to minimize such impact, and terms and

¹ *Pacific Gas and Electric Company*, 120 FERC ¶ 62,001 (2007).

² 16 U.S.C. § 1536(a)(2).

³ 16 U.S.C. § 1536(b)(4).

conditions that must be complied with to implement those measures. Under section 7(o)(2),⁴ compliance with the terms and conditions is necessary to prevent an incidental taking from being a prohibited taking of the listed species.

3. During the relicensing process, Commission staff consulted with Interior's U.S. Fish and Wildlife Service (FWS) pursuant to the ESA on several federally-listed endangered or threatened species, including the threatened bald eagle. In an October 17, 2003, biological opinion, FWS concluded that the proposed licensing action, as modified by measures recommended by staff and conditions submitted by the U.S. Forest Service, would not be likely to jeopardize the continued existence of the bald eagle. The biological opinion contained an incidental take statement with one reasonable and prudent measure: minimize the effects of project impacts on the bald eagle throughout the project area. The incidental take statement included terms and conditions to implement this measure.

4. In the relicense order, staff noted that FWS had proposed to remove the bald eagle from the list of threatened species. Staff stated that the application, staff's recommendations, and the Forest Service conditions all contained many measures that would help protect the bald eagle and that would remain in the license even if the bald eagle were delisted. However, staff concluded, compliance with FWS's terms and conditions would no longer be necessary if the bald eagle were delisted. To ensure that no prohibited taking of the bald eagle would occur, staff included the incidental take conditions as Appendix C to the license order, but Ordering Paragraph (F) required the licensee to comply with them only as long as the bald eagle remained a listed species.

5. In its request for rehearing, Interior states that, on July 9, 2007, FWS issued a final rule (Final Delisting Rule) removing the bald eagle from the list of endangered and threatened wildlife.⁵ The rule became effective on August 8, 2007. Interior does not dispute staff's conclusion that the ESA prohibitions on incidental take would no longer apply to the bald eagle following delisting. However, Interior points out that the bald eagle remains protected under the provisions of the Bald and Golden Eagle Protection Act (Eagle Act), as amended,⁶ and the Migratory Bird Treaty Act, as amended,⁷ both of which prohibit the take of bald eagles.

⁴ 16 U.S.C. § 1536(o)(2).

⁵ Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife. Final Rule. 72 Fed. Reg. 37346 (July 9, 2007).

⁶ 16 U.S.C. §§ 668-668d.

6. Interior explains that these statutes applied to the bald eagle while it was listed under the ESA, but that FWS traditionally has not referred an action agency or applicant for prosecution under those acts as long as any incidental take was in full compliance with the terms of an issued ESA incidental take statement. Anticipating that, after delisting, it could no longer rely on ESA consultation to protect the bald eagle, FWS, on June 5, 2007, issued a final rule codifying a definition of “disturb” under the Eagle Act,⁸ a notice of availability of national bald eagle management guidelines,⁹ and a proposed rule providing permit regulations to authorize the take of bald and golden eagles under the Eagle Act, where take to be authorized is associated with otherwise lawful activities.¹⁰ Interior states that, under the Final Delisting Rule, FWS will continue to honor existing ESA authorizations, such as incidental take statements, until it completes the Eagle Act rulemaking.¹¹ Interior adds that the proposed Eagle Act take authorization regulations contemplate an expedited process to issue Eagle Act permits for take in compliance with previously-issued ESA incidental take statements.¹²

7. Interior asserts that the relicense order’s disposition of the incidental take statement terms and conditions would put the Commission and the licensee in violation of the Eagle Act and the Migratory Bird Treaty Act, since the prohibitions in those acts against taking of the bald eagle continue to apply after ESA delisting. Interior urges the Commission and the licensee to remain fully compliant with the terms and conditions of the incidental take statement until FWS finalizes a process for take authorization under the Eagle Act. At that time, Interior states, compliance with the Eagle Act processes will be necessary to ensure that take of bald eagles is not subject to prosecution under the Eagle Act or Migratory Bird Treaty Act during the license term.

8. For these reasons, Interior requests that the license order be modified to recognize the continuing applicability of the incidental take statement conditions during the interim

⁷ 16 U.S.C. §§ 703-712.

⁸ Protection of Eagles; Definition of “Disturb.” Final Rule. 72 Fed. Reg. 31132 (June 5, 2007).

⁹ National Bald Eagle Management Guidelines. Notice of Availability. 72 Fed. Reg. 31156 (June 5, 2007).

¹⁰ Authorizations Under the Bald and Golden Eagle Protection Act for Take of Eagles. Proposed Rule. 72 Fed. Reg. 31141 (June 5, 2007).

¹¹ 72 Fed. Reg. at 37353.

¹² 72 Fed. Reg. at 31141.

period after the bald eagle is delisted and before finalization by FWS of a new take authorization process under the Eagle Act and authorization pursuant to that act is obtained. Interior also requests that we modify the license to require future compliance with the Eagle Act take authorization process to ensure that incidental take will be appropriately authorized under the Eagle Act and Migratory Bird Treaty Act after the interim period. Finally, Interior requests that three of the terms and conditions be replaced by revised conditions included in an amended biological opinion that FWS filed with the Commission concurrently with the request for rehearing.

Discussion

9. The Eagle Act provides for fines and/or imprisonment for anyone who, without permission¹³

shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles . . .

Civil penalties may also be imposed on anyone who takes the above actions.¹⁴ The Eagle Act allows the Secretary of the Interior to authorize the taking of eagles, pursuant to regulations that he may prescribe, “for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes” or, when he finds it necessary, “for the protection of wildlife or of agricultural or other interests in any particular locality.” However, bald eagles may not be taken for any purpose unless a permit is first procured from the Secretary.¹⁵ “Take” is defined to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.”¹⁶

10. The Migratory Bird Treaty Act provides that it shall be unlawful to

pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or

¹³ 16 U.S.C. § 668(a).

¹⁴ 16 U.S.C. § 668(b).

¹⁵ 16 U.S.C. § 668a.

¹⁶ 16 U.S.C. § 668c.

imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions . . .

between the United States and several named foreign countries.¹⁷ However, the Secretary is authorized to determine when, to what extent, and by what means it is compatible with the terms of the conventions to allow hunting, taking, capture, and other such acts in respect to any such bird, or any part, nest, or egg thereof, and to adopt regulations permitting and governing those actions.¹⁸ The act provides for fines and imprisonment for violations.¹⁹

11. In its 2003 incidental take statement, FWS anticipated that, during the license term, incidental take of the bald eagle might occur in the form of harassment, due to project activities while eagles foraged or perched in the project area, and harm, if individual health and fitness and/or reproductive success were affected by the project. While expecting that incidental take of the bald eagle would probably be difficult to detect or quantify, FWS did not anticipate that more than one dead or injured bald eagle would result over the term of the license. In light of FWS's findings, it is possible that actions taken by the licensee during the term of the license might result in a taking of the bald eagle that violates either the Eagle Act or the Migratory Bird Treaty Act, or both. In this respect, it is especially relevant that FWS has now defined "disturb," the broadest of the actions prohibited under the Eagle Act.²⁰

12. The proposed regulations implementing the Eagle Act provide for an expedited process for permits authorizing take of bald eagles that complies with the terms of a

¹⁷ 16 U.S.C. § 703(a).

¹⁸ 16 U.S.C. § 704(a).

¹⁹ 16 U.S.C. § 707.

²⁰ The final rule issued June 5, 2007, modifies 50 C.F.R. § 22.3 to define "disturb" as "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior." 72 Fed. Reg. at 31140.

previously granted ESA section 7 incidental take statement.²¹ In the final rule defining “disturb,” FWS states that take permits issued under the Eagle Act regulations would also provide any necessary authorization under the Migratory Bird Treaty Act.²² Unless and until it receives a permit under the proposed regulations, PG&E’s operation of the project could risk violating the take prohibitions of these two acts.

13. Although we recognize PG&E’s potential liability during this interim period, we will not require PG&E to continue complying with the incidental take statement terms and conditions until it receives an Eagle Act permit. Further, although we do not dispute that PG&E will have to comply with the Eagle Act permit process and whatever permit FWS may issue if PG&E is to ensure that any take of bald eagles would not violate the Eagle Act or Migratory Bird Treaty Act during the license term, we will not make such compliance a requirement of the license.

14. Neither the Eagle Act nor the Migratory Bird Treaty Act requires Commission involvement as does the ESA. Section 7(a)(2) of the ESA requires federal agencies to consult with Interior to ensure that any actions that they authorize are not likely to jeopardize the continued existence of a listed species. This provision thus applies to our authorization of hydropower project operations. By contrast, the Eagle Act and Migratory Bird Treaty Act prohibit the actions cited above (taking, possessing, selling, purchasing, transporting, etc.) as to bald eagles and other migratory birds but do not impose requirements on federal agencies in respect to their authorization of activities. In the course of operating its project, PG&E might take actions that would be prohibited by these two acts in the absence of a permit, but the Commission, in issuing a license and enforcing its provisions, neither takes nor authorizes any such prohibited action. Nevertheless, the Commission expects PG&E to cooperate with Interior in satisfying the requirements of the Eagle Act and the Migratory Bird Treaty Act.

15. Because the bald eagle has been removed from the list of threatened species, there is no longer any substantive basis to require compliance with incidental take statement terms and conditions that were imposed as license requirements only to avoid liability under the ESA. As noted earlier, staff determined, and we agree, that the license already contains sufficient protection for bald eagles through the inclusion of applicant-proposed

²¹ Under the proposed regulations, at 50 C.F.R. §22.26, an application for such a take permit would consist only of a copy of the applicable section 7 incidental take statement and a certification that the applicant is fully complying with the terms and conditions of the ESA authorization. In deciding whether to issue the permit, FWS would evaluate and determine only whether the applicant is in full compliance with those terms and conditions. 72 Fed. Reg. at 31153-4.

²² 72 Fed. Reg. at 31134.

measures, staff recommendations, and Forest Service conditions. Further, as staff noted in the relicense order, some of the measures included in the incidental take statement terms and conditions, specifically, revision of the existing Interagency Bald Eagle Management Plan and development of a fire management and response plan, will be implemented by other license conditions.²³ The only measures that would not be included in the new license in the absence of the incidental take statement are those that staff concluded were problematic or unwarranted.

16. In the revised biological opinion submitted with the rehearing request, FWS has modified the conditions to which staff objected, and Interior requests that we substitute the modified conditions for the original ones. Under ordering paragraph (F), the licensee is required to comply with the terms and conditions of the incidental take statement, included as Appendix C to the relicense order, only as long as the bald eagle remains listed. Since we are not revising that ordering paragraph, none of the take statement terms and conditions are license requirements any longer, and there would be no point in revising Appendix C to adopt the modifications. Nevertheless, we think it is worth commenting on them.

17. Condition 2E specified that any new owners of lands in the project area previously owned by the licensee, including holders of any conservation easements, must agree in writing to abide by the terms and conditions. In the EIS and the relicense order, staff explained that the Commission lacks authority to impose conditions on licensee-owned land that is removed from or is outside of the project boundary. Staff also explained that the Commission cannot compel non-licensees to abide by the terms and conditions of a biological opinion and that inclusion of this incidental take condition would not grant the Commission authority that has not been given to it by Congress.²⁴

18. FWS has now modified Condition 2E to require the licensee to ensure that any such new owners, as well as holders of leases or licenses from PG&E, agree in writing to abide by the terms and conditions. Essentially, FWS has shifted the requirement from the Commission to the licensee. However, if this revised condition were a requirement of the license, the Commission would have to ensure the licensee's compliance with it, and we cannot impose conditions on a licensee's transfer of lands that are not within the project boundary. Therefore, the modification would not overcome the problems underlying the original condition.

19. Condition 2B required the licensee to file, for Commission approval, a water quality monitoring plan, in cooperation with FWS and other interested stakeholders, that

²³ 120 FERC ¶ 62,001 at P 43.

²⁴ 120 FERC ¶ 62,001 at P 45.

would include sampling of water, sediment, invertebrates, and fish. The plan was to be designed to adequately characterize areas of methylmercury production as well as mercury loading into the ecosystem, with the former goal to include a focus on identifying those aspects of project operations and management that may affect methylmercury dynamics in the ecosystem of Lake Britton, the Pit 3 development's impoundment. In the relicense order, staff, citing its EIS, stated that the presence of mercury in Lake Britton is the result of factors beyond PG&E's control, that the mercury monitoring program would be very costly, and that it was unclear what specific action the Commission could require of PG&E based on the monitoring results. Although staff included this term and condition as a license requirement to avoid the risk of unauthorized incidental take, it noted that a water quality monitoring plan without the mercury monitoring provision had been recommended by staff and was required by conditions of California's water quality certification and of the Forest Service. Staff advised the licensee that it could file one water quality monitoring plan to comply with these overlapping requirements.²⁵

20. FWS has now replaced condition 2B with a more extensive condition that is no less objectionable than the original condition.²⁶ Given, especially, that FWS has estimated incidental take of no more than one bald eagle over the term of the license, we do not think this more elaborate and burdensome term and condition would be warranted, for the reasons staff explained in its EIS and license order, as indicated above.

21. Condition 2F specified that all protective measures in the EIS prepared for the license application for the northern spotted owl and valley elderberry longhorn beetle be fully implemented and enforced. In the amended biological opinion, FWS states that this condition was mistakenly included in the incidental take statement and requests that it be deleted from Appendix C. We agree that deletion of this condition would be appropriate

²⁵ *Id.* at P 46.

²⁶ In brief, the water quality monitoring program is to be developed in two phases. The first phase is to be an interim monitoring program to establish a comprehensive baseline assessment of mercury contamination over a three-to-five-year period, to be followed by the development and implementation of best management practices to manage and minimize risks in the Lake Britton ecosystem. The second phase would be development of a long-term monitoring program to monitor the implementation and effectiveness of the best management practices over the license term. The revised condition also provides for, among other things, filing deadlines for final study design and project sampling plans for the two monitoring programs, specific sampling intervals, and periodic licensee reviews of the effectiveness of the best management practices. The revised condition requires certain approvals by FWS before submission for Commission approval.

if we were continuing to make the incidental take statement terms and conditions requirements of the license. Since we are not doing so, deletion of the condition is unnecessary.

22. With the delisting of the bald eagle, PG&E is now solely responsible for any taking of the bald eagle that may occur in violation of the Eagle Act and Migratory Bird Treaty Act pending issuance of a permit under the proposed Eagle Act regulations. It is within PG&E's discretion to determine what interim measures it should adopt to avoid any unauthorized taking. PG&E is free to consult with FWS on those measures and to comply voluntarily with the terms of the proposed revised incidental take statement, to the extent that they do not involve Commission oversight or action. However, we will not make these terms and conditions interim requirements of the license.

23. Similarly, we will not impose any license requirement regarding future compliance with the Eagle Act permitting process. PG&E would be directly responsible to FWS for complying with the Eagle Act permit regulations and any permit issued to it under them, as would any other person to whom such a permit is issued.²⁷ Unless a licensee's fulfillment of permit conditions would conflict with its license requirements, we see no intermediate role for the Commission under the Eagle Act and Migratory Bird Treaty Act in respect to compliance with such a permit.²⁸

PG&E's Request For Clarification

24. Ordering Paragraphs (D) and (E) incorporated into the license mandatory conditions set out in Appendices A and B, reflecting, respectively, conditions contained in California's water quality certification and conditions submitted by the Forest Service under section 4(e) of the Federal Power Act (FPA).²⁹ PG&E requests clarification of some of the provisions of these conditions.

²⁷ In other situations, licensees are similarly liable for complying with federal statutes, without the Commission either having to comply itself or requiring licensee compliance through a license condition. For example, licensees are solely responsible for obtaining and complying with permits for the discharge of dredged or fill material under section 404 of the Clean Water Act, 33 U.S.C. § 1344, and for ensuring that their public facilities are accessible to the disabled under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

²⁸ Of course, FWS may still take steps to protect bald eagles in license proceedings through submissions of fish and wildlife recommendations under sections 10(a) and (j) of the Federal Power Act, 16 U.S.C. § 803(a) and (j).

²⁹ 16 U.S.C. § 797(e).

25. The Pit 3, 4, 5 Project comprises three developments. Appendices A and B provide for reservoir level and operation protocols for the Pit 4 development. Appendix A, condition 4, paragraph 3(g), and Appendix B, condition 17 V, in its last two paragraphs, provide that each step in the protocol for avoiding a rapid cessation of spill when increasing powerhouse load “shall not exceed 50 percent of the flow passing Pit 4 Dam in excess of the required minimum streamflow for the Pit 4 reach.” PG&E requests confirmation that the measurement of “stream flow passing Pit 4 Dam” in this and in the following language in these provisions may be taken at PH-30, which is USGS gage station 11362500, downstream of Pit 4 dam, and is where stream flow passing Pit 4 dam is currently measured.

26. Appendix A also provides for reservoir level and operation protocols for the Pit 5 development. Appendix A, condition 4, in its last two paragraphs, provides that, in ensuring that a rapid cessation of spill will not occur when increasing flow from the Pit 5 powerhouse, each step “shall not exceed 50 percent of the flow passing Pit 5 Dam in excess of required minimum stream flow for the Pit 5 Reach, based on the midnight stream flow measurements.” PG&E requests confirmation that “stream flow passing the Pit 5 Dam,” in this and in the following language in these provisions, as well as in any other license conditions using this phrase, may be measured at PH-27, which is USGS gage station 11363000, downstream of Pit 5 Dam, and is where stream flow passing Pit 5 Dam is currently measured.

27. The provisions cited by PG&E do not specify where these flows are to be measured. However, the license contains no requirements for the installation of new gages appropriate to measure this flow. Therefore, we confirm that the measurements may be made at the gages identified by PG&E.

28. Ramping rates for changes in streamflow releases from the Pit 3, Pit 4, and Pit 5 Dams are set forth in Appendix A, condition 7, and ramping rates for the Pit 3 and Pit 4 Dams are also set forth in Appendix B, condition 17 III. PG&E requests clarification that the ramping rates set forth in these conditions apply only to the situations specifically listed therein, namely: ramping rate for freshet flow releases; ramping rate after spills influenced by powerhouse outages; ramping rate before and after out-of-season spills; and ramping rate for recreation stream flow releases. In particular, PG&E seeks to confirm that the ramping rates would not apply during spill season when inflows are naturally high or when the project is following the reservoir operation protocols set forth in Appendix A, condition 4, and Appendix B, condition 17 V. PG&E also requests confirmation that references in Appendix A, condition 7, and Appendix B, condition 17 III, which refer variously to ramping rates of “0.5 foot/hour” and “0.5 foot/hour or less” should be interpreted as “0.5 foot/hour or less.”

29. Condition 7 of Appendix A and condition 17 III of Appendix B do not exclude from the ramping rate prescriptions spill season or periods when the reservoir operation protocols are being followed. However, we recognize that PG&E could not comply with

the prescribed ramping rates when it cannot control natural spill flow that exceeds the hydraulic capacity of the powerhouses. Also, since the purpose of the conditions cited above is to limit the ramping rates, not to establish a minimum ramping rate, PG&E is correct in assuming that all such references should be understood as “0.5 foot/hour or less.”

30. Finally, PG&E asserts that a reference in P 12, second sentence, of the relicense order to “15 cfs” (cubic feet per second) should be corrected to read “150 cfs,” and that a reference in P 16, third sentence, to a maximum elevation of “2,735.5 NGVD” should be corrected to read “2,737.5 NGVD.” These references should be corrected as PG&E indicates.

The Commission orders:

(A) The request filed July 30, 2007, by the U.S. Department of the Interior, for rehearing of Commission staff’s July 2, 2007 Order issuing a new license for the Pit 3, 4, 5 Project is denied.

(B) The request by Pacific Gas and Electric Company for clarification of the July 2, 2007, Order issuing a new license for this project is granted to the extent indicated in this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.