

128 FERC ¶ 61,252
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

PacifiCorp

Project No. 2630-037

ORDER ON REHEARING

(Issued September 17, 2009)

1. On June 23, 2009, Commission staff issued an order modifying and approving licensee PacifiCorp's whitewater boating flow release plan and whitewater boating access monitoring plan required by Articles 413 and 414 of its license for its Prospect Nos. 1, 2, and 4 Project No. 2630. The project is located on the Rogue River, Middle Fork Rogue River, and Red Blanket Creek in Jackson County, Oregon. On July 20, 2009, the Oregon Department of Fish and Wildlife (Oregon DFW) filed a timely request for rehearing of staff's order as it relates to the Article 413 plan. For the reasons discussed below, we deny rehearing but modify the plan in certain respects.

Background

2. The Commission staff issued a new license for the Prospect Nos. 1, 2, and 4 Project on April 8, 2008.¹ As pertinent to this proceeding, the project has a 2.5-mile-long bypassed reach that is the upper end of a 6-mile-stretch of the Rogue River that is used for whitewater boating. To enhance whitewater boating opportunities, Article 413 of the license required PacifiCorp to file for Commission approval a whitewater boating flow release plan for the 2.5-mile-long Rogue River bypassed reach between the project's North Fork diversion dam and Prospect No. 2 powerhouse. The plan is to provide for scheduled releases from the North Fork diversion dam (between 85 and 500 cubic feet per second (cfs)) for eight days each summer for three years in order to determine an appropriate permanent schedule and the precise flows to be released.

3. The plan must include measures, prepared in consultation with Oregon DFW and other entities, to assess the effect of the whitewater flow releases on fishery and aquatic

¹ *PacifiCorp*, 123 FERC ¶ 62,021 (2008).

resources in the bypassed reach. The plan must also include recommendations and comments from consulted entities, and if the plan does not adopt a recommendation from a consulted entity, it must include PacifiCorp's reasons for not doing so.

4. On December 30, 2008, PacifiCorp filed its proposed plan with the Commission.² Under the plan, PacifiCorp would make whitewater releases on eight weekend days in the summer for three consecutive years. The flows would range from 85 cfs to 500 cfs. The plan called for initial releases to occur this past July during a "controlled flow event" over two consecutive days in which four different flows would be released.³ All flow releases would be subject to a maximum ramping rate of 100 cfs per half hour.⁴

5. PacifiCorp would evaluate the potential impacts of whitewater flows on fishery and aquatic resources in the bypassed reach by: (1) reviewing any existing fishery and aquatic studies on conditions in the bypass reach,⁵ (2) using professional fisheries biologists and river ecologists to qualitatively assess flow impacts to fish and aquatic resources during the two-day "controlled flow event," (3) measuring turbidity during the controlled flow event,⁶ and (4) monitoring temperatures in the bypassed reach during each of the planned flow release events.⁷

6. PacifiCorp would file annual reports for the first two years and a final summary report after the third study year. The summary report would include recommendations for permanent whitewater flow releases, taking into account any identified impacts on fishery and aquatic resources and any potential measures to mitigate such impacts.⁸

² The filing included the licensee's proposed Article 414 boater access plan.

³ PacifiCorp's proposed plan at Section 2.2.1.

⁴ A ramping rate is the rate of change in a flow release. *See* ramping rates specified in Appendix A (mandatory water quality certification conditions) to the order issuing PacifiCorp's license, 123 FERC at 64,071.

⁵ The plan did not identify the studies that would be used. We are requiring that the first annual report include this information.

⁶ Turbidity would be measured upstream of the project's Prospect No. 2 Powerhouse as flows initially rise, peak, and diminish during the four test releases.

⁷ *See* PacifiCorp's plan at Sections 1 and 2.2.9. Temperature would be measured at five locations, with test probes programmed to measure average water temperature at fifteen-minute intervals during flow releases.

⁸ *Id.* at Sections 2.2.10 and 3.

7. The proposed plan included comments and recommendations from Oregon DFW and other consulted entities and PacifiCorp's responses to the comments and recommendations.⁹ Oregon DFW's comments agreed with the proposal to measure temperature and turbidity, but argued that using professional fisheries biologists and river ecologists to qualitatively assess flow impacts to fish and aquatic resources was inadequate. Oregon DFW recommended instead that the plan require additional measures. Specifically, it recommended mask and snorkel surveys and aquatic invertebrate surveys in the bypassed reach before and after each flow release for the three study years to determine pre- and post-flow adult and juvenile fish and aquatic invertebrate abundance, location in each habitat type, and species identification. In addition, Oregon DFW recommended that the plan require fish stranding surveys just after the whitewater flows are released and just after they are stopped, and surveys of bedload (streambed gravel) movement.

8. PacifiCorp in its responses to comments on the plan stated that the recommended studies of fish and invertebrates and fish stranding were not warranted because the ramping rate required by the license would sufficiently protect fishery and aquatic resources and prevent stranding and because invertebrates in the bypassed reach have adapted to flows much higher than the plan's test flow releases. It also asserted that the plan's proposed turbidity measurements, coupled with qualitative visual assessments, could sufficiently monitor bedload movement.¹⁰

9. Commission staff's June 23 order approved the licensee's plan with minor modifications not pertinent to this rehearing.¹¹

10. On July 20, 2009, Oregon DFW filed a timely request for rehearing of the Article 413 plan, arguing that PacifiCorp and Commission staff ignored its

⁹ The National Park Service, the Oregon Department of Parks and Recreation, the Oregon Department of Environmental Quality, and American Whitewater also commented on PacifiCorp's plan as entities required to be consulted under Article 413.

¹⁰ See table in the last attachment to PacifiCorp's plan filed on December 30, 2008, containing PacifiCorp's responses to comments on its plan, PacifiCorp response to Oregon DFW Comment Nos. 3 and 4.

¹¹ *PacifiCorp*, 127 FERC ¶ 62,225 (2009). The order also approved the Article 414 plan.

recommendations and that the measures in the approved plan to assess impacts of the boating flows on fishery and aquatic resources are insufficient.¹²

Discussion

11. On rehearing, Oregon DFW contends that the approved plan's proposal to allow PacifiCorp to have professional biologists visually assess whitewater flow impacts on fishery and aquatic resources is too vague a method to assess impacts adequately. It argues that PacifiCorp instead should be required to conduct mask and snorkel surveys, during the three-year study period, both before and after each flow release, in order to collect site-specific data on adult and juvenile fish and aquatic invertebrate abundance, location in each habitat type, and species identification. Oregon DFW also reiterates its arguments that the plan must require fish stranding surveys just after the whitewater flows begin to be released and just after they are stopped, and surveys of bedload (streambed gravel) movement.

12. Data that PacifiCorp collects on water temperature throughout each release period will show what changes, if any, the releases have on water temperature at the downstream locations. Data on turbidity will show what changes, if any, the releases have on turbidity downstream of the release point. Substantial increases in turbidity have the potential to affect fish activity, and changes in water temperature have the potential to impact invertebrate production (colder water could slow down normal summer production while warmer water could increase production). High turbidity levels associated with higher flow releases could be an indication that flows are potentially flushing invertebrates downstream. Comparing this physical data for each event, as well as throughout the season, will show whether there is any potential for the flow releases to impact either fish and/or invertebrates.

13. Under the approved plan, PacifiCorp must measure turbidity only during the controlled flow event in the first weekend of the first study year. To ensure that any flow impacts on turbidity are properly identified, we are modifying the plan to require that PacifiCorp measure turbidity during the flow releases in the remaining study years.

¹² Only a party to a proceeding may request rehearing. 18 C.F.R. § 385.713 (2009). In post-licensing proceedings, such as the one here, where there was no opportunity to intervene, motions to intervene filed by entities required to be consulted on the matters at issue in such proceedings are deemed timely if filed within the period for requesting rehearing. See *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035, at n. 13 (1987). On July 17, 2009, Oregon DFW, an entity required to be consulted on the Article 413 plan, filed a timely motion to intervene, which was unopposed and, thus, automatically granted pursuant to section 385.214 of the Commission's regulations. 18 C.F.R. § 385.214 (2009).

14. As noted, in addition to the physical data collected, PacifiCorp will use professional fisheries biologists and river ecologists to qualitatively assess flow impacts to fish and aquatic resources during the controlled flow event of the first study year. Such qualitative visual assessments of fish and invertebrate populations are a professionally accepted practice, which is appropriate in this case, given the limited occurrence (eight days per year) and duration of the flow releases to be studied.¹³ These qualitative assessments will provide valuable information that, together with temperature and turbidity data, should be sufficient to assess impacts to fishery and aquatic resources of the flow releases.

15. While PacifiCorp's plan does not specifically identify the information that would be recorded, we expect that its report for the first study year will include, at a minimum, information on weather conditions during each event (amount of sun/cloud cover, precipitation, air temperature, wind speed), river conditions prior to the releases and after the releases (general description of water clarity upstream of the release point and water clarity in the downstream reaches prior to the releases to show whether any other variables are affecting water clarity not associated with the flow releases), description of the flow patterns at the various locations downstream (i.e., where the main flow channel is in relation to each side of the river with each of the flow releases encountered during each event), and discussion of any visible boulder or substrate movement during periods of increasing flows. In addition, the Commission directs PacifiCorp to provide this information for the second study year. The data collected should provide important information on the potential impacts of the flow releases.

16. PacifiCorp, as of the date of this order, is expected to have completed its studies for the first study year. Nevertheless, to ensure that the plan's assessment of impacts is successful, we are modifying the plan to require PacifiCorp to repeat its qualitative assessments of impacts in the bypassed reach during the upcoming 2010 second study year, as provided in Ordering Paragraph (B) of this order.

¹³ See *Midwest Hydro, Inc.*, 113 FERC ¶ 61,125 (2005), where the Commission on rehearing upheld a licensee's use of a visual Instream Flow Evaluation (IFE) of a bypassed reach. The IFE in that case identified the site and river characteristics and the species of fish that would inhabit the reach, and observed the visual characteristics of four different flows released during a one-day period over the dam into the reach and their likely effect on aquatic habitat and then determined which of the flows was sufficient to protect the habitat requirements of the most common fish species of concern. PacifiCorp's use of visual observations during the planned two-day evaluation of flow impacts will allow for a similar review to determine the potential impacts of flow releases on aquatic resources.

17. With respect to the mask and snorkel surveys requested by Oregon DFW for fish and aquatic invertebrates, even if these measures were adopted, variability in factors such as turbidity and underwater visibility, whether data is collected early or late in the summer, or the time of day during flow events occurring weeks apart would prevent any reliable confirmation of impacts for a particular season, or in the long term.

18. Regarding aquatic invertebrates, Oregon DFW contends that abundance data are needed to show impacts on the invertebrate community because the summer months (when the whitewater releases are made) are coincident with optimal water temperatures for aquatic invertebrate and fish production. However, while such surveys will provide data on the presence of species at that particular time, it would be difficult to determine whether any observed changes in abundance over the season, or at the end of the three-year study, are related to the flow releases, changes in water temperature, increase or decrease in predation, or some other non-flow-release factor that could influence aquatic invertebrate abundance.

19. With regard to its other two recommendations for fish-stranding and bedload-movement surveys, Oregon DFW argues that both are needed to determine the impact of the whitewater releases on spawning redds in the bypassed reach. It asserts that such impacts were not considered during project relicensing and that turbidity monitoring alone will not adequately detect bedload movement. Oregon DFW contends that the surveys should include data on stranding or redd disturbance location, species and size affected, number stranded, type of stranding habitat.

20. As explained above, PacifiCorp's use of professional fisheries biologists and river ecologists to qualitatively assess flow impacts to fish and aquatic resources should yield the type of information that Oregon DFW seeks, though not to the degree of detail that it might desire. We expect PacifiCorp to have recorded, during each event for the first study year, the presence of any areas (e.g., gravel bars, boulder fields) that have the potential to become altered as a result of increasing flows or have the potential to strand fish as flows are decreased. Consistent with this conclusion, the Commission directs PacifiCorp to provide this information for the second study year. In the event that fish become stranded, observations should be recorded on the number of stranded fish observed and their location.

21. Finally, the annual reports and final summary report to be filed with the Commission will contain, among other things, the results of these studies. We are requiring that these reports include comments and recommendations from Oregon DFW and the other entities required to be consulted under Article 413. The reports must include PacifiCorp's reasons for not adopting any recommendation submitted. The Commission, under Article 413, may modify the plan's required studies for assessing impacts to the bypassed reach accordingly if findings, comments, or recommendations in the reports warrant changes to the plan.

22. For the above reasons, we believe that PacifiCorp's plan, with the modifications described in this order, employs an adequate combination of both quantitative and professionally acceptable qualitative methods of assessing impacts.¹⁴

The Commission orders:

(A) The request for rehearing filed July 20, 2009, by the Oregon Department of Fish and Wildlife, is granted as set forth below, and is denied in all other respects.

(B) During the second study year, PacifiCorp shall perform the qualitative assessments required by the plan at least once for each of the flow increments between 85 and 500 cfs that are released during the second year. The qualitative assessments shall include, at a minimum, information on weather conditions during each event (amount of sun/cloud cover, precipitation, air temperature, wind speed), river conditions prior to the releases and after the releases (general description of water clarity upstream of the release point and water clarity in the downstream reaches prior to the releases to show whether any other variables are affecting water clarity not associated with the flow releases), description of the flow patterns at the various locations downstream (i.e., where the main flow channel is in relation to each side of the river with each of the flow releases encountered during each event), and discussion of any visible boulder or substrate movement during periods of increasing flows. Also as part of the qualitative assessment, the licensee shall record, during each event, the presence of any areas (e.g., gravel bars, boulder fields) that have the potential to become altered as a result of increasing flows or have the potential to strand fish as flows are decreased. In the event that fish become stranded, observations shall be recorded on the number of stranded fish observed and their location.

(C) In addition to the water temperature measurements required by the plan, turbidity measurements shall be made during all three study years to ensure that any flow impacts are properly identified.

(D) The licensee's annual study reports and the final summary report required to be filed with the Commission pursuant to Sections 2.4 and 3 of the licensee's Prospect Whitewater Feasibility Study Plan (study plan) filed on December 30, 2008, shall include, at a minimum, temperature and turbidity data and information collected in the qualitative assessments. The reports shall be prepared after consultation with the entities required to be consulted under Article 413 of the project license.

¹⁴ On July 17, 2009, Oregon DFW filed a motion asking that implementation of PacifiCorp's plan be delayed pending action on its rehearing request. The motion is dismissed as moot.

The licensee shall include with the reports its recommendations, for Commission approval, on any proposed changes to the plan for the upcoming year based on the results from the previous year and include documentation of consultation, copies of comments and recommendations on completed reports after they have been prepared and provided to the entities required to be consulted, and specific descriptions of how the entities' comments are accommodated by the report. The licensee shall allow a minimum of 30 days for the entities to comment before filing a report with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information. The Commission reserves the right to require changes to the study plan based on review of the study plan and the reports.

(E) The motion filed on July 17, 2009, by Oregon DFW, asking that implementation of PacifiCorp's plan be delayed pending action on its rehearing request, is dismissed as moot.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.