

180 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Pacific Gas and Electric Company

Project No. 77-312

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 28, 2022)

1. On April 21, 2022, the Commission issued Pacific Gas and Electric Company (PG&E) an annual license to operate and maintain the Potter Valley Hydroelectric Project No. 77. On May 20, 2022, Friends of the Eel River, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Trout Unlimited, and California Trout (collectively, Petitioners) filed a timely request for rehearing, reconsideration, and/or discretionary action regarding the issuance of the annual license to PG&E, alleging that the annual license is not in compliance with the Endangered Species Act (ESA).
2. Pursuant to *Allegheny Defense Project v. FERC*,¹ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),² we are modifying the discussion in the April 21 annual license issuance and continue to reach the same result in this proceeding, as discussed below.³

¹ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

² 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

³ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the April 21 annual license issuance. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

I. Background

A. License

3. The Potter Valley Project is located on the Eel River and the East Branch Russian River in Mendocino and Lake Counties, California.⁴ The project occupies land within the Mendocino National Forest. The 9.4-megawatt project's features include Lake Pillsbury, a 2,300-acre storage reservoir impounded by Scott Dam; the 106-acre Van Arsdale Reservoir, impounded by the Cape Horn Diversion Dam; and a tunnel and penstock across a natural divide to the project's powerhouse located in the headwaters of the Russian River Basin.⁵

4. PG&E has operated the Potter Valley Project for approximately 120 years. On October 4, 1983, the Commission issued a new license for its continued operation and maintenance,⁶ with a license term expiring on April 14, 2022.⁷ On January 25, 2019, PG&E notified the Commission that it did not intend to relicense the project. Subsequently, the Commission directed PG&E to file, by July 11, 2022, a plan and schedule for filing an application to surrender the project license.⁸

5. Section 15(a)(1) of the Federal Power Act (FPA) requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the licensee under the terms and conditions of the prior license until a new license is issued, or the

⁴ *Pacific Gas & Elec. Co.*, 25 FERC ¶ 61,010, at 61,059 (1983).

⁵ The project was constructed in 1907. It was originally licensed by the Federal Power Commission for 50 years on April 15, 1922. From 1972 to 1983, the project operated on annual licenses during the extended relicensing period. The Commission issued a new license for the project in 1983, which was amended in January 2004 and expired on April 14, 2022. *See Pac. Gas & Elec. Co.*, 25 FERC ¶ 61,010, at 61,059 n.14 (1983); *Pac. Gas & Elec. Co.*, 106 FERC ¶ 61,065, at P 2 n.1 (2004).

⁶ *Pacific Gas & Elec. Co.*, 25 FERC ¶ 61,010 (1983) (Order Issuing License).

⁷ *Pac. Gas & Elec. Co.*, 106 FERC ¶ 61,065, at P 2 n.1 (2004) (Order Amending License).

⁸ Commission Staff Letter to PG&E, Docket No. P-77-000 (issued May 11, 2022) (requesting plan and schedule for surrender application).

project is otherwise disposed of.⁹ Accordingly, the Commission granted PG&E an annual license as required by statute on April 21, 2022.¹⁰

B. ESA Concerns

6. On March 17, 2022, the National Marine Fisheries Service (NMFS) filed a letter requesting that the Commission consider interim protective measures necessary to protect listed salmonid species and reinitiate consultation.¹¹ NMFS states that these interim measures are needed because its 2002 Biological Opinion (BO) for the project, which included reasonable and prudent alternatives and incidental take authorization, by its own terms expired on April 14, 2022 when the license did. Additionally, NMFS describes current project activities that were not included in the Description of the Proposed Action of the BO. NMFS states that, as a result, the project is causing take of ESA-listed fish in a manner not anticipated or addressed in the BO.

7. On April 12, 2022, Petitioners joined by the Wiyot Tribe, Native Fish Society, Sierra Club Redwood Chapter, California Sportfishing Protection Alliance, Save California Salmon, the Nature Conservancy, and Northern California Council Fly Fishers International, filed comments urging the Commission to timely decommission the project as well as amend PG&E's license pending decommissioning to include the interim measures identified by NMFS. On April 14, 2022, Russian Riverkeeper submitted similar comments. On April 15, 2022, Petitioners submitted a notice of intent to sue under the ESA and request for the Commission to take action to remedy PG&E's alleged past and ongoing ESA violations.

8. On May 11, 2022, staff sent a letter to PG&E requiring, in part, to file, by July 11, a response to the March 17th NMFS letter, and explaining that, to the extent PG&E was not willing to adopt NMFS's proposed interim measures by filing a voluntary amendment application, the Commission would be required to consider whether there were sufficient grounds to start a proceeding to reopen and amend the license to require these measures.¹²

⁹ 16 U.S.C. 808(a)(1).

¹⁰ *Notice of Authorization for Continued Project Operation*, 87 Fed. Reg. 25,011 (2022).

¹¹ NMFS Comments, Docket No. P-77-000, at 1 (filed Mar. 17, 2022).

¹² Commission Staff Letter to PG&E, Docket No. P-77-000, at 3-4 (issued May 11, 2022).

9. On May 20, 2022, Petitioners timely requested rehearing of the issuance of the annual license to PG&E, alleging that the annual license is not in compliance with the ESA.

II. Discussion

10. Petitioners allege that the Commission issued the annual license for the project under terms and conditions that harm, kill, or otherwise take ESA-listed salmonid species.¹³ They argue that the Commission, in issuing the annual license, failed to: (1) ensure the project is consistent with the conservation of three threatened species of fish; (2) ensure the project is not likely to jeopardize the continued existence of these species or to destroy or adversely modify their critical habitat; and (3) initiate or reinstate consultation with NMFS.¹⁴ Petitioners request that the Commission amend the annual license to include the interim protective measures identified by NMFS, make any additional changes to the annual license as necessary, and reinstate consultation with NMFS.¹⁵ Due to the non-discretionary nature of annual licenses as discussed below, we affirm staff's April 21 issuance of the annual license.

A. Issuance of an Annual License Is Non-discretionary

11. Petitioners state that the ESA's Section 7 requirements apply "to all actions in which there is discretionary Federal involvement or control," and that the Commission had a duty to comply with the ESA provisions because the Commission had "discretionary involvement and control" of the terms and conditions in PG&E's annual license.¹⁶ They argue that the Commission had the authority to modify the terms and conditions of the license through reopener provisions in the license relating to the conservation of fish and wildlife resources, the protection and enhancing of environmental resources and values, and the flow regime.¹⁷

12. Petitioners' argument misinterprets the non-discretionary nature of annual licenses. Section 15(a)(1) of the FPA provides that, if an existing license expires and no

¹³ Petitioners' Rehearing Request at 4.

¹⁴ *Id.* at 1-2.

¹⁵ *Id.* at 33.

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 28, 29. Petitioners also provide formal notice of Petitioners' intent to initiate litigation under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), if the Commission fails to remedy all identified violations of the ESA. *Id.* at 3.

decision has yet been made about federal takeover or relicensing, the Commission *shall* issue an annual license for the project “under the terms and conditions of the existing license.”¹⁸ The language is mandatory, and legal precedent has consistently found that issuing an annual license is a ministerial and non-discretionary act that the Commission must perform.¹⁹ That statutory provision was designed to “preserv[e] the status quo at the expiration of a long-term license.”²⁰ The issuance of an annual license springs from the expiration of the existing license; it is not part of a relicensing proceeding.²¹ Accordingly, the Commission cannot amend a license at issuance of an annual license.

13. Moreover, because of the non-discretionary nature of the issuance of an annual license, ESA consultation is not appropriate with respect to such an issuance. Although termed a “license,” an annual license is not subject to other provisions of the FPA that apply to license issuance, such as a comprehensive development determination, except as necessary by reference to the underlying expired license.²² In essence, “an annual license is a statutory mechanism that continues the original license in effect, thus tolling its expiration date, until the Commission issues a new license or otherwise provides for the

¹⁸ 16 U.S.C. § 808(a)(1) (emphasis added). *See also Hoopa Valley Tribe v. FERC*, 629 F.3d 209, 212 (D.C. Cir. 2010) (noting the Commission’s statutory obligation to issue annual licenses “under the terms and conditions of the existing license”); *S. Cal. Edison Co.*, 106 FERC ¶ 61,212, at PP 25-27 (2004) (denying rehearing after the Commission issued an annual license despite the hydroelectric project having ceased power generation operations, as “Section 15(a)(1) must be read as a means of preserving the ‘option of making a careful, deliberate judgment concerning disposition of a project at the end of an initial license term.’”).

¹⁹ *Cal. Trout, Inc. v. FERC*, 313 F.3d 1131, 1136 (9th Cir. 2002) (*Cal. Trout*); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 114 (D.C. Cir. 1989) (*Platte River I*); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d 198, 198 (D.C. Cir. 1975) (*Lac Courte Oreilles*).

²⁰ *Lac Courte Oreilles*, 510 F.2d at 206.

²¹ *S. Cal. Edison Co.*, 106 FERC ¶ 61,212 at P 26 (citing *Lac Courte Oreilles*, 510 F.2d at 205 (stating that Commission authority to issue annual licenses derives not from its consideration of an application for a new license, but rather from the expiration of the existing license)).

²² *S. Cal. Edison Co.*, 106 FERC ¶ 61,212 at P 37.

disposition of the project.”²³ As such, it is not a licensing action under the FPA that would trigger formal consultation under Section 7(a)(2) of the ESA.²⁴

B. Interim Measures are being Considered Separately

14. We recognize that Petitioners’ primary concern is interim measures to protect fish species. Here, as the Potter Valley Project license includes reopener provisions,²⁵ the Commission has discretion to amend the existing license and impose interim measures for matters preserved by the reopeners.²⁶ However, imposing the protective measures on a license, whether it is an original, new, subsequent, or annual license, would require a separate license amendment proceeding, for which there would have to be notice and opportunity for comment.²⁷ As discussed above,²⁸ the Commission has begun the process of considering whether to take such action and has sought input from PG&E. Indeed, Petitioners acknowledge that this process has begun.²⁹ On July 12, 2022, PG&E responded to staff’s May 11 letter and: (1) contested the need to reinitiate ESA consultation; and (2) indicated that it will not propose a voluntary license amendment to adopt the eight interim measures. Accordingly, the Commission will consider whether

²³ *El Dorado Irrigation Dist.*, 99 FERC ¶ 61,362, at P 11 (2002).

²⁴ *Id.* (citing *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 32-33 n.2 (D.C. Cir. 1992) (*Platte River II*)).

²⁵ *See supra* P 11.

²⁶ *See Cal. Trout*, 313 F.3d at 1136 (“Only where the original licenses contain provisions allowing introduction of new conditions does the Commission have authority to add conditions ... without the licensee’s consent.”). *See also California Sportfishing v. FERC*, 472 F.3d 593, 599 (9th Cir. 2006) (stating, in a different context, that reopener provisions “do no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing,” and that “the reopener provisions in and of themselves are not sufficient to constitute any discretionary agency ‘involvement or control’ that might mandate consultation by FERC.”).

²⁷ *PacifiCorp*, 126 FERC ¶ 61,236, at P 23 (2009). FPA section 6, 16 U.S.C. § 799 provides that licenses may be altered only upon mutual agreement between the licensee and the Commission after 30 days’ public notice.

²⁸ *See supra* P 8.

²⁹ Petitioners’ Rehearing Request at 22.

there are sufficient grounds to start a proceeding to reopen and amend the license to require these measures.

The Commission orders:

In response to Petitioner's May 20, 2022 request for rehearing, the April 21 annual license issuance is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commission Danly is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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Pacific Gas and Electric Company

Project No. 77-312

(Issued July 28, 2022)

DANLY, Commissioner, *concurring*:

I agree with today's decision but write separately to offer a suggestion.¹ When determining whether there are "sufficient grounds"² to reopen the Potter Valley Project license, the Commission should ask the following: is it "reasonable"³ to require Pacific Gas & Electric (PG&E)—that is, California ratepayers—to pay to comply with new operational measures that are not required by law for a project that PG&E no longer seeks to operate? One must also bear in mind that compliance typically does not immediately follow an order's issuance. Orders requiring compliance frequently entail compliance plans which can take years to develop, review, and approve.⁴

For these reasons, I respectfully concur.

James P. Danly
Commissioner

¹ *Pac. Gas & Elec. Co.*, 180 FERC ¶ 61,047 (2022).

² *Id.* P 14.

³ Standard Article 15 incorporated into the Potter Valley license, *Pac. Gas & Elec. Co.*, 25 FERC ¶ 61,010, at Ordering Para. (D) (1983), only empowers the Commission to require "reasonable modifications of the project structures and operation." *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Issued Under Part I of the Fed. Power Act.*, 54 F.P.C. 1792, 1837 (1975).

⁴ For example, PG&E's Fish Passage Facility Winter Operation Plan has been pending before the Commission since November 2020. *See* PG&E November 13, 2020 Filing, Project No. 77-302 (Accession No. 20201113-5148). The most recent filing in that docket is the April 20, 2021 Commission staff Letter designating PG&E as the Commission's non-federal representative for the purpose of informal Endangered Species Act consultation. *See* Commission Staff April 20, 2021 Letter, Project No. 77-302 (Accession No. 20210420-3045).