

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

DATE: April 1, 2008

RE: 1) FERC PROJECT NO. 12781-000, PACIFIC GAS AND ELECTRIC COMPANY (PG&E), APPLICATION FOR PRELIMINARY PERMIT FOR THE MENDOCINO WAVECONNECT PROJECT, FERC NOTICE DENYING LATE INTERVENTIONS DATED MARCH 5, 2008; and 2) FERC PROJECT NO. 12779-000, PG&E, APPLICATION FOR PRELIMINARY PERMIT FOR THE HUMBOLDT WAVECONNECT PROJECT, FERC NOTICE DENYING LATE INTERVENTION DATED MARCH 4, 2008

SUBJECT: REQUESTS FOR REHEARING BY FISHERMEN INTERESTED IN SAFE HYDROKINETICS (*FISH Committee*)

1. This is a Request for Rehearing by *Fishermen Interested in Safe Hydrokinetics*, an unincorporated association based in Fort Bragg, California, hereinafter referred to as the *FISH Committee*. The *FISH Committee* currently consists of representatives of the North Coast Fishing Association, the Salmon Trollers Marketing Association, the Recreational Fishing Alliance, the California Sea Urchin Harvesters Commission, the Sonoma County Abalone Network, the Salmon Restoration Association, Caito Fisheries, and the Fishermen's Marketing Association.

The *FISH Committee* requests that the Federal Energy Regulatory Commission (FERC) reconsider its decisions to deny the *FISH Committee's* Motions for Late Intervention that were filed in FERC Docket Nos. P-12781 (PG&E, Mendocino WaveConnect Project) and P-12779 (PG&E, Humboldt WaveConnect Project) on February 11, 2008 and February 27, 2008, respectively. FERC issued a Notice Denying Late Intervention in Docket No. P-12779 (Humboldt WaveConnect Project) on March 4, 2008; a Notice Denying Late Interventions in Docket No. 12781 (Mendocino WaveConnect Project) was issued on March 5, 2008. FERC's

Notice Denying Late Interventions in Docket No. P-12781 denied motions for late intervention filed by the County of Mendocino and the City of Fort Bragg, as well as the *FISH Committee's* motion. FERC issued preliminary permits for both projects on March 13, 2008.

2. This Request for Rehearing is filed pursuant to the Federal Power Act (FPA) at 16 USC 8251(a) and FERC's Rule of Practice 713 (18 CFR 385.713).

3. **Alleged Error:** Both of FERC's Notices Denying Late Intervention rely on the same reasoning. FERC's rationale is that 1) FERC issued legal notice of PG&E's preliminary permit applications in the Federal Register and local newspapers of record, the Ukiah Daily Journal and the Eureka Times Standard, in April and May of 2007, so "the movants therefore were on notice of PG&E's application . . . , but failed to timely respond to it"; 2) Movants' issues are premature because a preliminary permit does not authorize construction, but rather preserves "the priority of application for a license while the permittee obtains data and performs feasibility studies"; and 3) "allowing late intervention at this point in the proceeding would create prejudice and additional burdens on the Commission and the applicant."

The FERC regulation governing its consideration of motions for late intervention at 18 CFR 385.214(d) states that FERC may consider 1) whether the movant had good cause for failing to file the motion within the time prescribed; 2) any disruption of the proceeding that might result from permitting intervention; 3) whether the movant is adequately represented by other parties in the proceeding; and 4) any prejudice to, or additional burdens upon, the existing parties that might result from permitting the intervention.

The first error alleged by the *FISH Committee* is that FERC failed to consider, or failed to consider adequately, the factors set forth in 18 CFR 385.214(d). The second error alleged by

the FISH Committee is FERC's conclusion that the *FISH Committee's* issues are premature at the preliminary permit stage of the proceedings.

STATEMENT OF ISSUES

4. Surrounding Circumstances Make It Equitable for FERC to Reconsider Whether the *FISH Committee* Had Good Cause for Failing to Intervene Within the Time Prescribed

In a "Letter to the Editor" published in the Christian Science Monitor newspaper on March 12, 2008, FERC Commissioner Philip D. Moeller states that FERC aims "to ensure that the potential development of new hydrokinetic technologies balances the interests and needs of all stakeholders," and "to ensure that the process for the development of hydrokinetic projects is a public one." The *FISH Committee* takes Commissioner Moeller at his word, and hereby respectfully requests that FERC reconsider its decision to deny late intervention in these proceedings by the *FISH Committee*.

a. Background: The *FISH Committee* is based in the incorporated City of Fort Bragg, California, a town of 7,000 situated on the Pacific Ocean on the California coast about 150 miles north of San Francisco. Noyo Harbor is a boat harbor for fishing vessels and pleasure craft just south of Fort Bragg. The City of Fort Bragg is located in Mendocino County, but is not the county seat. The county seat is the City of Ukiah, which is about 60 miles inland from Fort Bragg, east of the coastal mountain range. The County's governing body is a Board of Supervisors; the City of Fort Bragg is governed by a City Council; Noyo Harbor is governed by the Noyo Harbor District,¹ which is a separate local governmental entity. The unincorporated

¹ The Noyo Harbor District owns all of the tide and submerged lands situated in Noyo Harbor and along the Noyo River within the boundaries of the Noyo Harbor District. "An act to convey certain tide and submerged lands, situated in Mendocino County, to the Noyo Harbor District, in furtherance of navigation, commerce, and fisheries upon certain trusts and conditions, and

historic coastal town of Mendocino lies eight miles to the south of Fort Bragg. The coastal county to the north of Mendocino County is Humboldt County, where the City of Eureka located.

Fort Bragg and the surrounding coastal areas are rural and isolated. For more than a century, the Fort Bragg economy depended primarily on logging, secondarily on fishing. The Fort Bragg lumber mill is now closed. Downturns in salmon and groundfish stocks have left local fisheries² dependent on remaining salmon and groundfish stocks, Dungeness crab, pink shrimp, sea urchins, eels, abalone, and edible seaweed on the Mendocino and Humboldt coasts.

Fishing-related businesses represented by the *FISH Committee* depend on fisheries conducted along both the Mendocino and Humboldt coasts. The condition of Sacramento River salmon stocks, traditionally a mainstay of the Fort Bragg fisheries, are of particular, extreme concern now. On March 12, 2008, the San Francisco Chronicle reported in a front page headline that the entire salmon season would probably face an unprecedented closure in 2008, and could be declared a federal disaster. Numbers of returning fall chinook salmon, which over the past decade have never gone below 250,000, fell to 63,900 in fall 2007, far below spawning escapement requirements for the fishery.³

providing for the government, management, use and control thereof,” effective September 15, 1961.

² The term “fish” or “fisheries” is used in a broad sense herein to include all forms of marine animal and plant life other than marine mammals and birds, and any fishing for such fish. *See*, 16 USC 1802(12) and (13).

³ March 12, 2008, San Francisco Chronicle, “Feds Warn Entire Salmon Season Could Be Closed”; *see*, also, March 17, 2008, New York Times, “West Coast Enigma as Salmon Vanish Without a Trace.”

For the people of the Mendocino County coastal areas, it has been said that “every aspect of our lives is connected to the ocean because it is the most important aspect of where we live.”⁴ The ocean seaward of the Mendocino coast is the home of the California current, which is one of the world’s four major productive oceanic upwelling centers.⁵ Thanks to the Coastal Zone Management Act, and local vigilance, the coastal area has been preserved from extensive development, and still stands today as one of the most beautiful coastlines in the United States. Local efforts to maintain the Mendocino coastal environment received national recognition in the 1980’s when offshore oil exploration was proposed by the Department of the Interior.⁶ Current federal moratoria on oil and gas leasing have kept drilling out of most California waters for the past twenty-seven years.⁷

b. These Proceedings

PG&E submitted its applications for the Mendocino and Humboldt projects in February of 2007. FERC issued its “Notices of Application Accepted for Filing and Soliciting Motions to Intervene, Protests, and Comments” for both the Mendocino and Humboldt projects in April of 2007. In April of 2007, FERC published these notices in the Federal Register. It also published the Humboldt notice in a Eureka newspaper, the Eureka Times Standard, and the Mendocino notice in a Ukiah newspaper, the Ukiah Daily Journal, in April and May of 2007. The 60-day

⁴ Rachel Binah, panelist, Wave Energy Forum, Fort Bragg, California, January 19, 2008. Film available on DVD. See, infra, for further details.

⁵ Richard Charter, panelist, Wave Energy Forum, Fort Bragg, California, January 19, 2008. Film available on DVD. See, infra, for further details.

⁶ October 15, 2007, Ukiah Daily Journal, “25 years ago, Thursday March 18, 1982, A Vow to Fight New Offshore Drilling Proposal”; May 24, 1988, New York Times, “Has Bush Lost California?”; June 7, 1988, New York Times, “Plan for Oil Drilling Off California Is Halted;” October 18, 1988, New York Times, “On California’s North Coast, Oil Is the Only Issue”; Dwight Holing, Coastal Alert: Ecosystems, Energy, and Offshore Oil Drilling (Island Press 1990).

⁷ March 3, 2008, Santa Rosa Press Democrat, “North Coast Closer to Permanent Protection.”

deadlines for responses to the notices fell in June 2007. Timely motions to intervene were submitted in the Mendocino project by the National Marine Fisheries Service, the U.S. Fish & Wildlife Service, and the City and County of San Francisco. The FISH Committee submitted its Motions for Late Intervention for both projects in February 2008. In March of 2008, FERC denied both motions for the reasons described infra.

c. The Notice Issue

FERC relies on the fact that it gave legal notice of the deadlines for motions to intervene in order to find that the *FISH Committee* did not have good cause for filing its intervention motions late. However, “good cause” is a flexible, equitable concept that allows FERC to look beyond legal technicalities, and to allow intervention by local stakeholders, albeit late, if FERC wants to. The *FISH Committee* urges FERC to re-examine the context in which the FISH Committee was formed and filed its motions to intervene, to determine whether there is good cause for the motions to be late.

Although FERC gave legal notice that the motions were due by June 2007, neither of the means of legal notice provided actual notice to the local fishing community. As mentioned above, Mendocino County, which covers a land area larger than Rhode Island, is rural and isolated. The coastal areas are even more distant from modern communications than valley communities like Ukiah. Television is not universal, and broadband Internet is rare. When storms blow through, the electric power goes out, sometimes for many days, and roads to and from the coast are closed by flooding and fallen trees.

The coast consists of small towns, communities, and settlements, mostly separated by miles of winding, sometimes impassable, two-lane roads. A fact of life here is that most information is transmitted by fishermen communicating on their radios and in the harbor; people

meeting each other at the post office (many people still receive mail only through post office boxes), or other public places like the grocery store; local radio stations; and whatever informational events and/or public hearings are organized by local governmental units. Life moves more slowly here than in other places.

It is probably safe to say that there is no one in Mendocino County who regularly – or even irregularly -- monitors the Federal Register. Readership of the Ukiah Daily Journal and the Eureka Times Standard is mostly limited to their own communities. The Ukiah Daily Journal “has very little readership in the Fort Bragg-Mendocino area.”⁸ News of FERC’s call for interventions was not reported in the two coastal weekly newspapers, the Fort-Bragg Advocate and the Mendocino Beacon, that are most read in the local communities. It is also safe to say that only a handful of local residents have ever even heard of FERC, and would not understand the significance of its involvement in the area if they did.

Normal communications channels on the coast did not address wave energy development until, to their great credit, on January 19, 2008, the City of Fort Bragg and the County of Mendocino organized a full-day “Wave Energy Forum,” which was held in the multi-purpose room of the Fort Bragg elementary school. Materials from the Wave Energy Forum are available on the City of Fort Bragg Web site at <http://ci.fort-bragg.ca.us>. The event was also filmed, and the film is available in a 2-DVD set from the City of Fort Bragg.

The Forum has since been described as “the most important ocean energy meeting to date in California.”⁹ It was considered important enough that FERC sent a representative from Washington, D.C. Representatives from numerous other federal, state, and local agencies in

⁸ March 13, 2008, Fort Bragg Advocate-News, “FERC Rejects Involvement in Future Wave Energy Study.”

⁹ <http://city.fortbragg.com/pages/viewpage.lasso?pagename=11|Wave%20Energy>

California and Oregon, and community and fishing groups, also appeared. About 150 members of the public attended, which was standing room only for the meeting facility.

For the first time, at the Forum, local fishermen heard about the importance of organizing and forming a stakeholder group, and obtaining the right to full participation in the proceedings through intervention. This participation was publicly encouraged by the FERC representative, by PG&E, and by every other agency in attendance. Stephen Bowler, the FERC representative, stated that FERC's approach was to "find ways to work together and involve state and local interests early on," and requested people "with an idea on how we can improve public process and local stakeholder involvement" to please let FERC know. He also asked local stakeholders to provide any special knowledge that they might have.¹⁰

The Wave Energy Forum was also addressed by Terry Thompson, County Commissioner, Lincoln County, Oregon, who has been active in coordinating initial development of wave energy projects off Oregon with local fishing interests. As reported in a local Lincoln County newspaper, the Newport News Times, on August 15, 2007:

Fishermen Involved In Natural Energy (FINE), a 19-member advisory committee established in February by the Lincoln County commissioners, played a key role in test site selection process. The county commissioners assigned the group two specific tasks: to develop a siting plan for wave energy projects off the Lincoln County coast, not just within Oregon's three-mile territorial sea limit, but as far as 12 miles out; and to review any applications made for those projects.

'It's vital for fisheries and wave energy to co-exist,' Commissioner Thompson noted at the time. 'What I'm worried about is we'll trade off a renewable food resource for a renewable power resource. As a community, it doesn't benefit us to lose one to gain another. We're trying to make it possible to do both well.'

Following the Wave Energy Forum, a nucleus of Fort Bragg-based fishing organizations met, and decided to work together as "Fishermen Interested in Safe Hydrokinetics," otherwise

¹⁰ Stephen Bowler, FERC panelist, Wave Energy Forum film (DVD Vol. 2).

known as the *FISH Committee*. The purpose of the *FISH Committee* is to represent all ocean harvesters and fishing related businesses in negotiations over wave energy projects that affect their interests. Subsequently, the *FISH Committee* filed its motions for late intervention in PG&E's Mendocino and Humboldt WaveConnect projects.

Under these circumstances, the *FISH Committee* believes that the timing of their motions is forgivable, and that FERC should affirm the principles of public participation that it advocates by permitting the *FISH Committee*'s late interventions in these projects.

5. The Proceedings Will Not Be Disrupted By Permitting Late Intervention

There is recent FERC precedent for allowing late intervention in a wave energy preliminary permit proceeding, where FERC found that the proceedings would not be disrupted. In Project No. P-12713, the Reedsport (OR) OPT Wave Park, in FERC's "Order Issuing Preliminary Permit" dated February 16, 2007, there is extensive discussion of a motion for late intervention filed by the National Marine Fisheries Service (NMFS). The motion was late in part because NMFS failed to receive actual notice of the project application. While FERC said that "we cannot accept that as an excuse for missing deadlines, nor do the FPA or our regulations require that NMFS be served notices of applications for preliminary permits," nevertheless "we agree that NMFS' late intervention will not prejudice any party or disrupt the proceeding, and that NMFS, as an agency with jurisdiction over resources that could be affected by the proposed project, has a unique interest in the proceeding." Late intervention was therefore granted.

As in the Reedsport proceeding, the *FISH Committee* believes that its late intervention would not prejudice any party or disrupt the proceeding, that its members have unique interests in the proceeding, and that late intervention is thus warranted.

Other parties to this proceeding are the permit holder -- PG&E -- and parties that filed timely motions to intervene, namely NMFS, the U.S. Fish and Wildlife Service, and the City and County of San Francisco. None of the parties but FERC has objected to late intervention by the *FISH Committee*. In fact, a PG&E spokesperson has said that he regrets FERC's decision because of the feelings that it has generated in the community.¹¹

The proceedings are at such an early stage that there is nothing to disrupt at this point. PG&E is still awaiting their funding approval from the California Public Utilities Commission before moving forward with the projects. The PG&E project manager, William Toman, was only hired at the beginning of the year. As he told the audience at the Fort Bragg Wave Energy Forum in January, he is at the beginning of the learning curve for his job. PG&E has not yet designed the studies they will undertake with respect to the projects, or even decided which technologies they wish to test.

According to a report in the Santa Rosa Press Democrat on March 23, 2008, PG&E spokesperson Jana Morris reaffirmed that PG&E has not chosen which devices or how many it will use, and that feasibility and economic studies will not begin until after the California Public Utilities Commission approves its renewable energy program, an action expected by the end of 2008. According to Bill Toman, PG&E Project Manager, "we are not budgeted to do much on the project until then."¹² PG&E also has a pending lease nomination for the project area outside three miles with the Minerals Management Service, U.S. Department of the Interior, which has taken no action yet.

¹¹ Ian Caliendo, PG&E, Fort Bragg City Council Meeting, March 24, 2008, film available on DVD. A local protest march had already been scheduled when Mr. Caliendo spoke. March 27, 2008, Fort Bragg Advocate-News, "Wave energy blogger plans local march."

¹² March 27, 2008, Fort Bragg Advocate-News, "WaveConnect's project manager Toman speaks."

While PG&E awaits its funding, this is an ideal time for FERC to allow intervention by the *FISH Committee*, and for PG&E to take advantage of the special knowledge, skills, and experience of local fisheries interests in planning the studies it will undertake.

6. The *FISH Committee* Is Not Adequately Represented By Other Parties To the Proceeding

As pointed out in its motions, the *FISH Committee* should be permitted to intervene in these proceedings because its members have unique economic stakes in fisheries in the project area, and its members also have specialized knowledge of fisheries, and ocean and seabed conditions, that are not available from any other source. It is the only organization that represents fisheries stakeholders from the Mendocino coast.

Among the membership of the *FISH Committee* are people with thirty or more years of experience fishing in the project areas, and who can provide detailed information on local fish and whale migration routes, and the locations of fisheries for different species. Basically anything that happens in the local ocean -- as well as economic and ecological impacts -- can be described by some member of the group. For example, fishermen know local fish behavior, bottom conditions, transit lanes, fisheries-related economics, and fisheries-related laws better than other sources. They have knowledge of the physical ocean -- including how it reacts during storms, and different seasons of the year, that goes beyond weather forecasts. They also have vessels -- some as long as 90 feet -- that can be used as platforms for various purposes; some local businesses own and operate work boats, and have provided support to the Army Corps of Engineers, various construction companies, and environmental studies around Noyo Harbor. Local marine vegetable harvesters have special knowledge concerning the health and condition of the rocky shore ecosystem, and one has even kept annual written logs on each rock and ledge that he has harvested.

Most local commercial fishing enterprises are family businesses that derive their primary incomes from the fisheries. Each enterprise may have several employees who support their own families from the income they earn in the fisheries. Fishermen purchase gear, fuel, and groceries up and down the coast, and pay federal and state income taxes and property taxes. Some of the fishing businesses have been passed down from father to son over generations. They have already suffered declines in their fisheries from big hydro projects and other causes, and they fear further adverse impacts from wave energy arrays.

Many shoreside businesses also depend on the fisheries. These include marine supply stores, work docks, fish unloading facilities, and boatyards that cater to both commercial and recreational vessels. Noyo Harbor also supports numerous wholesale and retail fish businesses, and charter boats that are used for recreational salmon and groundfish fishing, abalone diving, and whale watching cruises. The fortunes of these businesses depend on the health of the fisheries. If fisheries are negatively impacted by wave energy arrays, these businesses will also suffer.

In the process of preparing this Request for Rehearing, we polled *FISH Committee* members on fisheries issues that relate to wave energy development. The issues described by the fishermen need to be addressed specifically and in detail during the preliminary permit phase of the projects. It is clear from their responses that extensive fisheries take place in the wave energy project areas, and that the potential for conflict is high. A sampling of their responses follows.

a. Commercial Fisheries

Pink Shrimp: A pink shrimp fishery occurs in the Mendocino WaveConnect project area from the three-mile line seaward to 75 fathoms, from 39°30' N. latitude to the north. Placing buoys in

this area would disrupt pink shrimp harvesting with the only gear that is used (trawl). It could also disrupt pink shrimp spawning habits. In the Humboldt WaveConnect area, pink shrimp trawling occurs in a portion of the area from April 1 to October 31. Pink shrimp spawn in this area during the rest of the year.

Groundfish trawl gear: The area from the three-mile line seaward to the western boundary of the Mendocino WaveConnect project area is used by trawl fisheries to harvest petrale sole, English sole, sanddabs, skates, and rockfish. The Humboldt WaveConnect area, from 40 fathoms to the seaward border of the site, is used mainly in the spring and summer months by the trawl fisheries to harvest petrale sole, English sole, sanddabs, Dover sole, skates, sablefish (black cod), and lingcod. Many of these species move into this area during the spring and summer, and move out to deeper water in the winter.

Dungeness crab: Starting at the northern end of the Mendocino WaveConnect project area, the crab fleet fishes from three fathoms out to 60 fathoms, from Kibesillah Rock down to Laguna Point, and from Laguna Point south to 39°22' (Casper), from 30 fathoms to 60 fathoms. In the Humboldt WaveConnect area, the whole site is used by the crab fleet during the season from December 1 to July 15. Most of the activity occurs from the inside boundary out to 50 fathoms. The season is closed during the molting season when the crabs are most vulnerable. There are 50 to 70 boats that fish in this area each year, and that depend on it for a large part of their yearly incomes. In the words of one fisherman, “the loss of these fishing grounds would be devastating to me and the entire fishing fleets from Eureka, Trinidad, Crescent City and ‘out of town’ boats.”

Slime eel (hagfish): This is a fairly new fishery that utilizes the outer area of the Humboldt WaveConnect site. It is described as a “godsend” to the many salmon fishermen whose incomes have been drastically reduced due to the closures of their salmon seasons. Ten to twenty boats

currently participate in this fishery.

Salmon: The commercial fleet trolls in both permit areas during their seasons.

Nearshore fisheries: The nearshore fishery area off Fort Bragg runs from Cleone to Beaver Point, from the shore out to 15 fathoms, in rocky areas throughout. Many small boats (20 to 45 feet) are involved, which creates heavy boat traffic. Most of the boats have no radar. Crabbing takes place off Pudding Creek, Hare Creek, and Ten Mile Beach, from 5 fathoms out to 40 fathoms.

b. Recreational Fisheries

The general area for sport fishing is offshore from the City of Fort Bragg, in front of the cliffs where the old lumber mill property is located. The fishing grounds extend from the lighthouse south of Fort Bragg to Ten Mile River to the north. Fishing takes place in approximately 100-350 foot depths, which are about 0.5 mile to 4.5 miles offshore.

Sports fishermen are very concerned about the impacts of the anchoring systems used for proposed wave energy arrays. As an example, Finavera Renewables, which will probably provide test technology to PG&E, recently received a FERC license for the following wave energy array at a project in Makah Bay, Washington¹³:

The ocean surface occupied by the four AquaBuOYs and ten surface buoys¹⁴ will be about 60 feet by 240 feet. The ten surface buoys will be connected to sub-surface mooring buoys, located just above the seafloor. The mooring system for each buoy will end with a line running from the sub-surface mooring buoy to a connection to the seabed, placed approximately in a square pattern on the ocean floor with the AquaBuOY approximately centered on the water surface above. The connection to the sea-bed will be achieved through vertical load anchors (VLAs).¹⁵ The mooring anchor system will cover a rectangular area of the ocean floor approximately 625 feet by 450 feet.

¹³ Project No. P- 12751.

¹⁴There will be ten surface buoys (not 16) because adjacent AquaBuOYs share two surface buoys each.

¹⁵VLAs are a recent development in the offshore industry, frequently used for mooring oil drilling platforms.

This description indicates that the area covered by the anchoring system is almost twenty times the size of the surface area covered by the devices. An array using many of these devices – PG&E’s proposed WaveConnect projects each consist of 8 to 200 wave conversion buoys¹⁶ -- could completely close off the majority of recreational fishing grounds since the fishermen could not troll for fish without snagging their lines.

The Mendocino coast also supports a thriving recreational harvest of abalone that attracts tourists who help support the local economy. The Sonoma County Abalone Network, which is a member of the FISH Committee, often serves as the voice of the estimated 40,000 abalone divers in California. Anything that affects their ability to access abalone – whether at land or at sea -- is a major concern. In addition, abalone feed on kelp and algae, and are affected by wave and tidal action, so they are subject to impacts from wave arrays.

c. Whale Watching

From long experience in observing their migrations along the Mendocino coast, we know that gray whales travel from 0.5 miles offshore to three to five miles offshore. It is obvious that the migrating whales cannot travel through a wave buoy array without hitting the submerged cable and anchor systems. Contact with the subsurface structures will either kill or injure the whales, or force them to travel farther out to sea, beyond their customary migration route. In addition to implicating the federal protections provided by the Marine Mammal Protection Act, this result would adversely affect the local tourist economy, which is supported by annual Whale Festivals in both Mendocino and Fort Bragg, and whale watching cruises.

d. Sea Vegetable Harvesting

¹⁶ Orders Issuing Preliminary Permits dated March 13, 2008.

There are four sea vegetable harvesting businesses in the Fort Bragg area. Six different species of edible seaweed are harvested: sea palm (*Postelsia palmaeformis*), wakame (*Alaria marginata*), kombu (*Laminaria digitata*), nori (*Prophyra perforata*), fucus (*Fucus vesiculosus*), and bull kelp (*Nereocystis luetkeana*). Edible seaweed harvests take place along the rocky shorelines of the Mendocino coast from McKerricher State Park north of Fort Bragg, south to the town of Elk.

Edible seaweeds are sold wholesale to large food chains in all the Western states, as well as hundreds of smaller food stores. These foods are consumed by many ethnic cultures in the United States, are increasingly popular in different cuisines, and are highly nutritious whole food. As an example of the local employment opportunities provided by these businesses, one company employs seven full and part time workers year round, and adds five seasonal workers during the summer harvests.

The sea vegetable harvesting industry requires healthy rocky shore ecosystems. These ecosystems may be adversely affected by wave energy arrays that diminish wave action. It is believed that the effects from wave energy arrays could be similar to El Nino effects, which cause marine plants to become very stressed. When El Nino ends, and wave action picks up, nutrient-rich waters return and the plants revive. Wave energy structures have the potential to create a permanent El Nino effect on wave action, and to reduce permanently the nutrient density that a healthy rocky shore habitat depends upon. The rocky shore habitats of the Mendocino coast are among the most productive of any ecosystem in the world, and are vital to healthy fish populations, as well as other marine plant and animal life.

e. Additional Issues

Issues of concern to fishermen that are not related to specific fisheries include navigation

impediments and hazards; exclusionary zones; electromagnetic fields affecting salmon migration; possible changes in predator-prey relationships due to wave buoys acting as fish-attraction devices; electric shocks; impossibility of removing anchor bases; increased gas consumption in transit to remote fishing grounds; gear entanglement; and gear loss.

The issues being raised by members of the *FISH Committee* are serious and important. Understanding the issues and achieving successful solutions to the problems depends on the fishermen's full participation and cooperation in these proceedings. Members of the FISH Committee do not wish to be treated as second class citizens, but rather as full participants and partners. This can only be achieved by granting them the intervenor status that they have requested.

7. Allowing Late Intervention at This Point in the Proceeding Would Not Create Prejudice or Additional Burdens on the Commission or the Applicant

This topic has already been addressed under paragraph 5. above, where we pointed out that this is a very early stage of the proceedings, that PG&E has not yet undertaken project planning or environmental studies, and that none of the other parties has objected to late intervention by the FISH Committee. In addition, we requested written confirmation from PG&E that our participation as a late intervenor is not objectionable to them. By letter dated March 21, 2008, PG&E provided such assurance. The PG&E letter is appended hereto as Attachment A.

8. The *FISH Committee's* Issues Are Not Premature at the Preliminary Permit Stage of the Proceedings

In both of its notices denying our late interventions motions, FERC asserts that the issues raised are premature because preliminary permits only authorize PG&E to obtain data and perform feasibility studies, and do not authorize project construction. However, as the FISH

Committee understands these issues, they are important now, and not premature by any means.

a. Studies: Obtaining data and performing feasibility studies, both of which occur at the preliminary permit stage, are activities where participation by the local fishing community can provide considerable assistance to project developers. The fishing community can help identify and define issues, contribute to study design and execution, and even provide vessel platforms to conduct studies that are necessary to support an eventual license application. The desirability of participation by coastal fishing communities in the early planning stages has already been recognized in other wave energy projects.

In the Reedsport project, for example, the project stakeholders conferred on numerous occasions during the preliminary permit period in order to reach agreement on moving forward. As memorialized in the “First Six-Month Project Report” filed with FERC on July 31, 2007,

In the context of the Reedsport OPT Wave Park, the parties identified and discussed issues pertinent to the project, the FERC licensing and state permitting process, available relevant information and how best to approach the development of study plans. This process helped drive a consensus among the stakeholders on the optimal licensing process and embodied a discussion of the issues, as well as each party’s agreement to participate in the FERC process.

FERC Docket No. P-12713. Local stakeholder groups for the Reedsport project include a fish and crab group, an aquatic species group, and a recreation and public safety group. All the FISH Committee seeks are similar rights of participation as a party-intervenor in the these proceedings.

b. Construction: Although FERC states that PG&E’s preliminary permits do not authorize construction, this apparently does not mean that wave energy generating equipment cannot be placed in the water for testing as part of PG&E’s feasibility studies. In fact, information available to us indicates that PG&E itself believes that it will be putting test equipment in the water. There are also recent examples of equipment tests at other projects, some

resulting in derelict equipment being left in the ocean. Siting and operation of test equipment greatly concerns the members of the *FISH Committee*, and it is urgent that the Committee be included in planning for any experiments.

John Innes, a panelist at the Fort Bragg Wave Energy Forum, reported that he met with William Toman, the new PG&E project manager, on January 18, 2008. They discussed the location of PG&E's first proposed test site for wave energy equipment, only to discover that it was located in the middle of the fishing grounds off Noyo Harbor. Mr. Innes recounted the discussion to show the value of early communication between PG&E and the fishing community. However, it also reveals that PG&E believes that it will be placing test equipment in the water.

Equipment has been placed into the water prior to project licensing in other areas of the West Coast. In an infamous incident in October 2007, the first wave energy test buoy deployed off the Oregon Coast sank to the bottom, where it remains today.¹⁷ The company (Finavera) that owned the buoy is a probable technology provider to PG&E. Although Finavera downplayed the effects of the sinking, fishermen take a different view (“We’ve got a big chunk of iron laying at the bottom of the ocean which will probably gobble up a bunch of crab gear. It’s just another place for things to collect and make a big mess.”).¹⁸

Four data buoys placed by Finavera’s predecessor company were also lost off Washington State. Although parts of the buoys were recovered, some also remain on the bottom.¹⁹

If the preliminary permit authorizes PG&E to test wave energy technology in the water (even if FERC does not define this as “project construction”), the testing poses such risks and

¹⁷ November 1, 2007, Seattle Times, “Test Buoy for Wave Energy Sinks Off Oregon Coast.”

¹⁸ Id.

¹⁹ November 15, 2007, Fort Bragg Advocate-News, “Concerns Raised About Ecological Impacts of Wave Energy Technology.”

potentially adverse consequences for fisheries that the fishing community should be allowed to participate as an intervenor in the planning process.

CONCLUSION

In this instance, FERC's allowing late intervention by the *FISH Committee* would go a long way toward promoting local goodwill, cooperation, and input on important issues such as project siting, potential user conflicts, relevant ocean conditions, and the studies necessary to develop information for PG&E's upcoming license applications. Shutting out the coastal fishing community and businesses that depend upon it at this early stage of the proceedings has no public benefits. The local fishing community will only understand that a distant federal bureaucracy has told them that it does not value their input. Permitting the *FISH Committee's* late intervention at this early but critical stage of project development is a real opportunity for FERC to advance the principles of public involvement that it says it embraces.

For the foregoing reasons, the *FISH Committee* requests that FERC grant its Motions for Late Intervention.

Submitted this 1st day of April, 2008,

Elizabeth R. Mitchell
FERC Coordinator
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March 21, 2008

Elizabeth Mitchell
Mendocino FISH Committee
17555 E Kirtlan Way
Fort Bragg, CA 95437

Dear Elizabeth Mitchell:

Pacific Gas and Electric Company (PG&E) understands that on March 5, 2008, the Federal Energy Regulatory Commission (FERC) issued a Notice Denying Late Interventions regarding the County of Mendocino, the City of Fort Bragg, and Fisherman Interested in Safe Hydrokinetics late filed Motions to Intervene in PG&E's preliminary permit application for the Mendocino WaveConnect Project. On March 13, 2008 PG&E received notice that FERC had granted the Mendocino Wave Connect preliminary permit to obtain data, begin feasibility analyses and stakeholder outreach.

PG&E did not object to any of these late filed motions and wants to assure everyone that regardless of intervener status PG&E will work cooperatively with the community during the regulatory process. Also, when PG&E files a license application all interested parties may formally intervene and actively participate in the FERC licensing process.

PG&E reiterates its commitment to working closely with local governments and stakeholders concerning activities that may be undertaken during the permit term.

Sincerely,

IAN CALIENDO
Government Relations Consultant

CC: Jim Martin, FISH Committee
John Innes, FISH Committee

ATTACHMENT A