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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2013-

In the Matter of Petition for Reconsideration of Water Quality Certification for the
PACIFIC GAS AND ELECTRIC COMPANY
CHILI BAR HYDROELECTRIC PROJECT
FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2155

SOURCE: South Fork American River

COUNTY: El Dorado County

1. INTRODUCTION

Pacific Gas and Electric Company (PG&E or Licensee) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Executive Director's certification for a new Federal Energy Regulatory Commission (FERC or Commission) license for PG&E's existing Chili Bar Hydroelectric Project, FERC Project No. 2155 (Project) as complying with the requirements of section 401 of the Clean Water Act (33 U.S.C. § 1341). The State Water Board finds that portions of the petition for reconsideration have merit, and thus modifies the certification as described below, and approves the certification as modified. (Cal. Code Regs., tit. 23, § 3869.)

2. FACTUAL BACKGROUND

PG&E filed an application with FERC for a new license for the Project on July 15, 2005. The Project is located on the South Fork American River in El Dorado County and is capable of generating seven megawatts of hydroelectric power.

The Executive Director of the State Water Board issued a water quality certification for the Project on November 8, 2012. On December 7, 2012, PG&E filed a petition for reconsideration pursuant to California Code of Regulations, title 23, section 3867. PG&E requests several changes to the certification, focused primarily on deletion or modification of the conditions reserving to the State Water Board the authority to amend the conditions of the certification under certain circumstances.

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PG&E also requests deletion or clarification of the condition making certification contingent on compliance with all applicable requirements of the Central Valley Regional Water Quality Control Board's (Central Valley Water Board) *Water Quality Control Plan for the Sacramento and San Joaquin River Basins* (Basin Plan). The State Water Board issued a notice regarding the petition on December 21, 2012, specifying that comments or responses to the petition must be received within 20 days. Two comment letters were received before the end of the 20 day period from: (1) the National Marine Fisheries Service (NMFS); and (2) American River Recreation Association, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Foothill Conservancy, Friends of the River, Hilde Schweitzer, and Theresa Simsiman (together, Conservation Groups). PG&E submitted a response to the comment letters after the 20 day comment deadline.

3. APPLICABLE LAW

An interested person may petition the State Water Board for reconsideration of the Executive Director's action or failure to act in connection with a request for water quality certification. (Cal. Code Regs., tit. 23, § 3867.) Following a petition for reconsideration, the State Water Board may:

- (1) refuse to reconsider the action or failure to act if the petition fails to raise substantial issues that are appropriate for reconsideration;
- (2) deny the petition upon a finding that the original action or failure to act was appropriate and proper;
- (3) set aside or modify, if possible, the previous action or take new appropriate action; or
- (4) direct the executive director to take appropriate action.

(Cal. Code Regs., tit. 23, § 3869, subd. (a).)

4. ARGUMENTS AND DISCUSSION

4.1 The Included Reservations of Authority are Permissible Expressions of the State Water Board's Authority Under Section 401 of the Clean Water Act

PG&E contends that "Conditions 12, 17, 18, 19, 20, 21, 26, 32 and 33 contain reservations of authority that purport to allow the State Water Board to change unilaterally the requirements of PG&E's FERC license." (Petition, p.3.) In making this contention PG&E misconstrues the reservations of authority contained in the referenced conditions. Specifically, these reservations of authority do not allow the State Water Board to *change unilaterally* the requirements of PG&E's

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license; they allow the Board to exercise its authority granted by the Clean Water Act to protect water quality at an appropriate time in the future.

The Clean Water Act recognizes and maintains states as the primary authority over water quality within their boundaries. (33 U.S.C. § 1251 (b).) Section 401 of the Clean Water Act anticipates that water quality certifications will not only set limits on operations, but will also monitor operations on an ongoing basis. (33 U.S.C. § 1341 (d).) It would be counter to the Clean Water Act to read into it a limitation that states are prohibited from acting to ensure that a facility continues to comply with water quality standards.

Conditions of certification must be reviewed by the state court system. (See *American Rivers Inc. v. FERC* (2nd Cir. 1997) 129 F.3d 99 [overruling FERC’s refusal to incorporate conditions of water quality certification, including reservations of authority].) Although the State Water Board has routinely included reservations of authority in the water quality certifications it issues, the authority to do so has not previously been challenged in a petition for reconsideration and the issue has not reached the California appellate courts, so there is no California precedent specifically addressing the issue. There are precedents in other states, however. The high courts of Maine and New York have upheld conditions allowing the reopening or amendment of water quality certification. (*S.D. Warren Co. v. Bd. of Environmental Protection* (Me. 2005) 868 A.2d 210, 218-220 *aff’d* on other grounds (2006) 547 U.S. 370; *de Rahm v. Diamond* (1973) 295 N.E.2d 763.) Similarly, federal agencies with mandatory conditioning authority over FERC licenses may adopt conditions that reserve authority to require additional approvals under specified conditions. (See, e.g. *Southern California Edison Co. v. FERC* (D.C. Cir. 1997) 116 F.3d 507, 519.)

To support its contention that the Board’s reservations of authority “appear to contravene the express terms of the Federal Power Act,” PG&E quotes, in part, language from section 6 of the Federal Power Act. (16 U.S.C. § 799.) Section 6, in addition to the language quoted by PG&E regarding alteration of licenses, makes it clear that every license “shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license.” (*Id.*) PG&E also points the Board to section 401 of the Clean Water Act. According to the plain language of section 401, “Any certification provided under this section ... shall become a condition on any Federal license or permit subject to the provisions of

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this section.” (33 U.S.C. § 1341 (d).) Read together, conditions of a water quality certification issued pursuant to section 401 of the Clean Water Act are conditions of a licensee’s acceptance of the Federal Power Act license. As such, exercise of those conditions does not constitute *unilateral* alteration of the license such that section 6 requires “mutual agreement” between the licensee and the Commission.

Furthermore, the courts have already addressed reservations of authority in the context of section 6 of the Federal Power Act. In *State of California v. Federal Power Commission* (1965) 345 F.2d 917, the 9th Circuit Court of Appeal addressed, in part, the contention that the Federal Power Commission’s reservation of authority to modify stream flows at some time in the future violated section 6. In that case, Turlock and Modesto Irrigation Districts asserted that the Federal Power Commission violated section 6 “by ordering the issuance of a license which did not state all of its terms and conditions.” (*Id.*, at p. 924.) The court, in upholding the license condition reserving the Federal Power Commission’s authority to modify the license under certain circumstances in the future, concluded:

The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees’ rights to test the validity of any future action taken.

The principle applicable here is analogous to that which obtains in determining whether the Commission order must contain specific findings of fact as to future conditions. We dealt with that problem in *Portland General Electric Co. v. F.P.C.*, 9 Cir., 328 F.2d 165, 175. We there held that it is not arbitrary, unreasonable, or a deprivation of due process to refrain from making findings as to what conditions may be in the future, at least where no present burden is imposed.

(*Id.*, at pp. 924-25. See also *Wisconsin Public Service Corp. v. FERC* (7th Cir. 1994) 32 F.3d 1165, 1168-69 [upholding reopener clauses requiring construction and operation of fishways as may be prescribed in the future by the United States Fish and Wildlife Service.]) PG&E cites to no legal authority supporting a different conclusion.

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The alternative would be that the Board conditions its water quality certifications in such a way that ensures the construction and operation of a project under a 30- to 50-year FERC license would be protective of water quality for the duration of that license, taking into account potential changes to the baseline assumptions and current conditions. The conditions of such a certification would likely be prohibitively burdensome and be tantamount to a denial of water quality certification in many cases.

4.2 It Is Appropriate and Not Inconsistent With the Clean Water Act that the Certification Is Subject to Modification Or Revocation Upon Administrative or Judicial Review

PG&E disagrees in part with Condition 33 of the certification, namely with the fact that the certification is subject to “modification *or revocation* upon administrative or judicial review....” To support this contention, PG&E cites section 401 of the Clean Water Act, though without further explanation or direct citation.

Condition 33 of the certification reflects one of the State Water Board’s standard conditions listed in California Code of Regulations, title, 23, section 3860, specifically subdivision (a). Inclusion of these terms in water quality certifications is not discretionary. (Cal. Code Regs., tit. 23, § 3860 [“The following *shall* be included as conditions of all water quality certification actions....”].) It is not clear why “or revocation” was removed from the water quality certifications referenced by PG&E, however PG&E does not present a compelling reason why the Board should not follow its regulations here.

Nothing in section 401 of the Clean Water Act supports a different conclusion. To the contrary, the condition is consistent with the principles of federalism embodied in Section 401 the Clean Water Act. Review of state water quality certification orders is in state court. (See *American Rivers Inc. v. FERC*, 129 F.3d at p. 108.) A reviewing court with authority to review the validity of an administrative order may require the agency to set aside that order. (See Code Civ. Proc., § 1094.5, subd. (f).) Denying a reviewing court that power, under circumstances where the court determines that revocation is the appropriate remedy under state law, would be inconsistent with respect for state law, state procedures and state institutions.

4.3 Condition 21 (Climate Change) Is Appropriate and Related to the Project

PG&E contends that Condition 21 inappropriately requires PG&E to mitigate for a harm to which the Project is not contributing, namely, climate change in general, suggesting that, because “the Project is not a cause of climate change” there is no nexus between the Project and the condition. PG&E misses the point of this condition.

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Future changes in climate projected to occur during the license term may significantly alter the baseline assumptions used to develop the conditions of this certification. The State Water Board reserves authority to modify or add conditions in this certification to require additional monitoring and/or other measures, as needed, to verify that Project operations meet water quality objectives and protect the beneficial uses assigned to Project-affected stream reaches.

(Certification, p. 26.) This condition does not hold PG&E responsible for causing climate change through its Project operations; this condition, like the other reservations of authority discussed above, reflects the fact that the baseline assumptions upon which the conditions of the certification are based are likely to change over the duration of the license term. As such, and in order to verify that the Project will continue to meet water quality objectives and protect the beneficial uses assigned to Project-affected stream reaches *for the duration of the license term*, the Board needs to reserve its authority to modify or add conditions to the certification as environmental conditions beyond the control of PG&E change. Thus, Condition 21 has not been included to require PG&E to mitigate for the impacts of climate change, but to mitigate the impacts of its Project on the environment under a changed-climate scenario. Because the Board cannot determine with any reasonable degree of specificity at this time what modifications may be necessary in the future, it has left that question to be answered when and if relevant information becomes available. State Water Board Resolution 2008-0030 “Directs Water Boards’ staff to require sustainable water resources management such as LID [low impact development] and climate change considerations, in all future policies, guidelines, and regulatory actions.” Condition 21 adheres to the State Water Board’s direction by including climate change considerations and the associated need for adaptive management in the certification.

As with the other reservations of authority, it is entirely possible that there will be no need during the term of the FERC license, and any subsequently issued annual licenses, for the Board to exercise this reserved authority. However, by reserving the authority in case it is needed, the Board is able to certify that the Project will meet water quality objectives and protect the beneficial uses for the duration of the license.

4.4 Condition 32 - Due Process

PG&E requests that Condition 32, which states “The State Water Board may provide notice and an opportunity to be heard in exercising its authority to add or modify any of the conditions of this certification,” be modified to replace “may” with “shall.” The Board agrees that this condition was

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issued in error and will revise Condition 32 to read “The State Water Board shall provide notice and an opportunity to be heard in exercising its authority to add or modify any of the conditions of this certification.”

4.5 Condition 22 – Basin Plan Compliance

As issued, Condition 22 of the certification reads, in part, “This certification is contingent on compliance with all applicable requirements of the Basin Plan.” PG&E objects to this condition as unduly vague. In making this contention, PG&E suggests that it cannot determine “which of the literally hundreds of requirements contained in that Basin Plan are in fact applicable” and that it would “have to guess as to what the ‘applicable requirements’ were at any given time.” (Petition, p. 5.) Compliance with the applicable terms of the relevant Basin Plan is a common condition of certification and it is not unreasonable for the Board to require the owners and operators of projects subject to certification to determine which conditions of the relevant Basin Plan are applicable to their project.

PG&E also suggests it is “unfair for a compliance determination to hinge on the opinion of future regulators as to what may or may not have been intended as an ‘applicable requirement’ of such a lengthy document, particularly one that is routinely changed from time to time.” (Petition, p. 5.) All requirements of a certification depend to some degree upon the opinion of future regulators as to what may or may not have been intended when the original requirements were imposed. This is no different. Furthermore, PG&E has the same opportunity to comment on any changes to the Basin Plan that could implicate its Project as any other member of the regulated community. Amendments to Basin Plans are quasi-legislative activities and as such are afforded significant process before action is taken. If PG&E believes that a requirement of the Basin Plan may be applicable to its Project and thus compliance with that requirement is a condition of this certification, it can comment prior to adoption of any such requirement or change to a requirement.

Upon further review of this condition, the State Water Board does, however, find it appropriate to require that the certification *require* compliance with all applicable requirements of the Basin Plan, rather than making the certification *contingent on compliance*. This is consistent with the other conditions of the certification in that violations of the conditions are subject to appropriate enforcement and penalties, but noncompliance does not negate the Board’s certification. Condition 25 notes that any violation or threatened violation of the conditions of the certification is subject to any remedies, penalties, process or sanctions as provided for under state or federal law, and that the applicability of

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such remedies, penalties, process or sanctions is a limitation necessary to assure compliance with the water quality standards and other pertinent requirements incorporated in the certification. As such, Condition 22 should be modified to read:

This certification *requires* compliance with all applicable requirements of the Basin Plan. The Licensee must notify the Deputy Director and Central Valley Water Board's Executive Officer (Executive Officer) within 24 hours of any unauthorized discharge to surface waters.

4.6 Condition 12 – Reintroduction of Anadromous Fish

Another condition that PG&E specifically objects to is Condition 12, by which the Board reserves the authority to modify or add conditions and requires PG&E to consult with other agencies regarding restoration of fish passage at Nimbus and/or Folsom Dams. As noted in that condition, "it is possible that anadromous fish passage will be restored at Nimbus and/or Folsom Dams on the American River downstream of the Project during the course of the Commission license term." (Certification, Condition 12, p. 24.) PG&E objects to Condition 12 on the grounds that the NMFS Biological Opinion (B.O.) requiring fish passage has been remanded to NMFS for further action, and that the condition is unduly vague.

As discussed above, conditions in the certification reserving the Board's authority to modify or add to the certification are based on the long duration of the FERC license and the real possibility that the baseline assumptions used to develop the conditions of the certification may change. In regards to the reintroduction of anadromous fish into the American River above Nimbus and Folsom dams, this is more than just a speculative possibility; although the NMFS B.O. was remanded to NMFS, in doing so, the court ordered NMFS to submit a revised B.O. by February 1, 2016. (In *re Salmonid Consolidated Cases* (E.D.Cal. Dec. 12, 2012, 1:09-CV-01053 LJO DLB, Doc. 655.) And as noted by NMFS in its comment letter on the petition for reconsideration, while parts of the B.O. were remanded to NMFS, the court did not vacate the B.O.'s Reasonable and Prudent Alternative (RPA) that includes development of a Fish Passage Program, which "would aid in the recovery of [California Central Valley (CCV)] steelhead by reintroducing CCV steelhead past Nimbus and Folsom dams and into the upper American River." (NMFS comment letter, p. 1, citation omitted.)

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While NMFS notes that the RPA for the Fish Passage Program was not remanded and is currently being implemented in its entirety, that degree of certainty is not necessary for the Board to include a condition in its certification reserving authority to address the issue should it come up. Even were the Fish Passage Program not being currently implemented, the fact that it is reasonably foreseeable that fish passage could be required during the term of the license is sufficient for the Board to include a condition in its water quality certification reserving the authority to address that scenario when it comes up. The South Fork American River is designated for cold freshwater habitat and cold freshwater spawning, reproduction and/or early development. (See Basin Plan, II-6.00.) Condition 12 is a proper condition of the Board's certification because it allows the Board to ensure protection of listed designated uses during the term of a new FERC license.

In regards to PG&E's concern that the condition, as issued, is unduly vague, PG&E contends that it will be unable to determine when to consult with the listed resource agencies "prior to the restoration of fish passage." (Petition, p. 7, quoting Certification, Condition 12, p. 24.) It proposes instead that, if the condition remains, PG&E consult with the resource agencies and the State Water Board "within 120 days after physical completion and initiation of operation of fish passage facilities at Nimbus and/or Folsom Dams." (Petition, p. 7.) While this proposal is indeed less vague, it is also less likely to ensure protection of the Basin Plan beneficial uses discussed above. In order to provide "a comprehensible standard" as requested by PG&E while still providing appropriate protection for the beneficial uses, Condition 12 shall be modified, as follows:

Condition 12 - It is possible that anadromous fish passage will be restored at Nimbus and/or Folsom Dams on the American River downstream of the Project during the course of the Commission license term. **Per the LF [Long-Term Fish Passage Action] 2 of the NMFS B.O., "[Bureau of] Reclamation and partner agencies shall submit a plan to NMFS on or before December 31, 2016, which shall describe planned long-term upstream and downstream fish passage facilities and operations, based on the best available information at that time."**

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Within 90-days of ~~a determination by a state or federal agency~~ submittal of the plan referenced in LF 2 or an equivalent plan to restore anadromous fish passage to the waters above Folsom Dam,⁴ the Licensee shall consult with CDFW [California Department of Fish and Wildlife¹²], USFWS [United States Fish and Wildlife Service], NMFS and State Water Board staff to determine whether changes are needed in the certification conditions to protect beneficial uses associated with anadromous fish. The State Water Board recognizes that the timelines associated with the NMFS B.O. and the NMFS B.O. provisions may change over the term of the license. The State Water Board reserves authority to modify or add conditions to this certification based on the outcome of the consultation process or to clarify the trigger for consultation based on new or updated biological opinions or determinations by state or federal agencies ~~that~~ which would have a bearing on anadromous fish reintroduction.

As proposed, consultation would be tied to a more readily-identifiable event, after which fish passage would be reasonably certain, and the Board's exercise of its reserved authority would follow such consultation.

5. CONCLUSION

For the reasons discussed above, the petition for reconsideration is granted in part. The certification will be amended as described in this order. As amended by this order, the certification is appropriate and proper.

⁴ ~~Per the LF [Long-Term Fish Passage Action] 2 of the NMFS B.O., “[Bureau of] Reclamation and partner agencies shall submit a plan to NMFS on or before December 31, 2016, which shall describe planned long-term upstream and downstream fish passage facilities and operations, based on the best available information at that time.” The State Water Board recognizes that the timelines associated with the NMFS B.O. and the NMFS B.O. provisions may change over the term of the license. Based on the existing NMFS B.O., identification of passage above Folsom Dam in the plan referenced in LF 2 would serve as a “determination” by a state or federal agency to restore anadromous fish passage, and would be a trigger to initiate consultation as outlined in Condition 12.~~

¹² The California Department of Fish and Game (CDFG) is now the California Department of Fish and Wildlife (CDFW). To reflect the current name and be consistent, all references to CDFG in the certification shall be changed to CDFW.

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6. ORDER

IT IS HEREBY ORDERED that the certification of PG&E's new license for FERC Project No. 2155 for purposes of compliance with section 401 of the Clean Water Act is amended as attached to this order.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 7, 2013.

Jeanine Townsend
Clerk to the Board

Attachment