

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Water Right)	
Permit 20864, (Application 26780))	
)	
PACIFIC GAS AND ELECTRIC COMPANY,)	ORDER: WR 96-05
)	
Permittee,)	SOURCE: North Fork
)	Feather River
)	
CALIFORNIA DEPARTMENT OF FISH AND)	
GAME, CALIFORNIA TROUT, INC.,)	COUNTY: Plumas and
PLUMAS COUNTY, CALIFORNIA)	Butte
SPORTFISHING PROTECTION ALLIANCE,)	
and NORTHERN CALIFORNIA COUNCIL)	
FEDERATION OF FLY FISHERS,)	
)	
Petitioners.)	

ORDER AMENDING PERMIT AND DENYING PETITIONS
FOR RECONSIDERATION OF ISSUANCE OF PERMIT

1.0 INTRODUCTION

The State Water Resources Control Board (SWRCB) issued Water Right Permit 20864 (Application 26780) to Pacific Gas and Electric Company (PG&E) on July 31, 1996. Permit 20864 augments PG&E's previous water rights under License 9871 (Application 9800) for direct diversion of water for hydroelectric power production at four existing powerhouses on the North Fork Feather River. The SWRCB received three petitions for reconsideration of issuance of Permit 20864 from: (1) the California Department of Fish and Game (DFG), (2) California Trout, Inc. (Cal Trout) and Plumas County, and (3) the California Sportfishing Protection Alliance (CSPA) and the Northern California Council Federation of Fly Fishers (NCCFFF). For the reasons discussed below, this order denies the petitions for reconsideration.

2.0 BACKGROUND

2.1 PG&E's North Fork Feather River Hydroelectric Project

PG&E operates a series of reservoirs and powerplants for generation of hydroelectric power on the North Fork Feather River and its tributaries.¹ Water for the projects is diverted under a combination of pre-1914 rights and appropriative water rights issued by the SWRCB and its predecessors. Prior to issuance of Permit 20864, Water Right License 9871 authorized direct diversion of 2,465 cubic feet per second (cfs) at Belden Dam, 2,896 cfs at Rock Creek Dam, 3,500 cfs at Cresta Dam, and 3,500 cfs at Poe Dam. The Belden, Rock Creek, Cresta and Poe Powerhouses are located on the North Fork Feather River downstream of Lake Almanor. The petitions for reconsideration of issuance of Permit 20864 involve the SWRCB's approval of increased rates of diversion of water for power production at those four locations.

2.2 Application 26780

On April 7, 1981, PG&E filed Application 26780 to obtain additional direct diversion rights at each of the four dams. Application 26780 proposed to increase the authorized rate of diversion for the existing powerhouses and to obtain rights to divert water to new generating units to be constructed near the existing units at the Rock Creek Powerhouse and the Cresta Powerhouse. As originally filed, Application 26780 requested the right to divert an additional 500 cfs at the Belden Powerhouse, an additional 1600 cfs at the Rock Creek Powerhouse, an additional 1800 cfs at the Cresta Powerhouse, and an additional 2,000 cfs at the Poe Powerhouse. Application 26780 was protested

¹ In addition to the diversion facilities referred to in Permit 20864, PG&E operates a series of upstream reservoirs and powerhouses including Mountain Meadows Reservoir, Lake Almanor, Butt Valley Reservoir, Butt Valley Powerhouse and Caribou Powerhouses 1 and 2.

by DFG, Cal Trout, the U.S. Forest Service and the NCCFFF.² The protests raised issues concerning the environmental impacts of the PG&E projects and alleged that the proposed appropriation of water would not be in the public interest. None of the protests alleged that approval of Application 26780 would result in injury to holders of prior water rights.

The SWRCB's processing of Application 26780 was delayed for a combination of reasons, including allowing time to complete streamflow and fishery studies and uncertainty over what elements of the project the applicant intended to pursue. The extent of the SWRCB's jurisdiction over federally licensed hydropower projects was the subject of extensive litigation during the period between when Application 26780 was filed and Permit 20864 was eventually issued.³

By letter dated February 8, 1996, PG&E advised the SWRCB that PG&E no longer intended to add any new powerhouses and it amended Application 26780 to reduce the rate of diversion requested at each of the four specified locations. As amended, Application 26780 requested the right to divert 135 cfs for use at the Belden Powerhouse, 604 cfs for use at the Rock Creek Powerhouse, 600 cfs for use at the Cresta Powerhouse, and 800 cfs for use at the Poe Powerhouse. PG&E advised the SWRCB that the revised rates of diversion were not intended to cover any new diversion of water at the four powerhouses in question. Rather, the revised rates of diversion covered by amended Application 26780 were intended

² The "Northern California Council of Fly Fishing Clubs" filed a protest against Application 26780 on July 29, 1981. The SWRCB assumes that organization is the same entity or a predecessor to the "Northern California Council Federation of Fly Fishers" (NCCFFF), which submitted a petition for reconsideration of issuance of Permit 20864.

³ The litigation did not involve a dispute over Application 26780, but the resultant court decisions help define the scope of SWRCB jurisdiction over Application 26780.

to ensure that PG&E's existing diversions of water at the four powerhouses are fully covered by recognized water rights.⁴

2.3 Dismissal of Protests and Issuance of Permit 20864

By letter dated April 2, 1996, SWRCB staff advised the protestants to Application 26780 that recent federal court decisions regarding preemption of state law by the Federal Power Act limit the SWRCB's jurisdiction. (See Section 5.0 below.) The protestants were advised that, under recent court decisions, the SWRCB's jurisdiction over single-purpose, federally licensed hydroelectric power projects does not include the authority to review the public trust resource issues raised in the protests. The protestants were advised that issues involving fishery bypass flows and environmental mitigation measures for the projects are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) and not the SWRCB.

The April 2, 1996, letter also informed the protestants that their protests were dismissed and that no further action would be taken on the protests. Following dismissal of the protests and verification that PG&E had paid applicable permit fees, Permit 20864 was issued on July 31, 1996.

3.0 SUBSTANCE OF PETITIONS

3.1 DFG Petition

DFG contends that Permit 20864 was issued without granting DFG (as a protestant) the opportunity for a fair hearing on the questions of: (1) the availability of water for appropriation under Application 26780, (2) the subject of PG&E's authorized rates of diversion under Federal Power Licenses 2105, 1207, and 1962, and (3) whether appropriation of water under water right

⁴ PG&E also continues to assert its claim of riparian rights for diversions at each of the facilities.

Permit 20864 is dependent upon prior appropriation at Lake Almanor. DFG contends that there was not substantial evidence before the SWRCB to substantiate the SWRCB staff's conclusion that Application 26780 did not represent any new diversion of water, but merely represented current diversions at the existing powerhouses. DFG requests that the SWRCB set aside Permit 20864 and grant a hearing on the issues of law and fact raised in the DFG petition and DFG's original protest to Application 26780.

3.2 Cal Trout and Plumas County Petition

Cal Trout and Plumas County filed a petition which asks for reconsideration based on the following allegations:

- (1) failure of the SWRCB to re-notice Application 26780 following the revisions to the application in 1996;
- (2) failure of the SWRCB to make findings as to the availability of water for appropriation;
- (3) failure of the SWRCB to consider prior water rights and competing water right applications;
- (4) lack of substantial evidence that the project was in conformance with PG&E's federal power licenses;
- (5) absence of SWRCB consideration of remedies for past violations of the diversion rates specified in License 9871; and
- (6) failure to provide Cal Trout and Plumas County a hearing on disputed issues of law and fact.

Cal Trout and Plumas County request that the SWRCB set aside issuance of Permit 20864 and hold a hearing on the issues raised in their petition.

3.3 CSPA and NCCFFF Petition

CSPA and NCCFFF cite several reasons in support of their request for reconsideration including the following contentions:

- (1) PG&E did not act diligently in pursuing Application 26780 since filing it in 1981. Due to the passage of time since the application was filed, the SWRCB should have re-noticed the application;
- (2) It was a violation of due process for the SWRCB to dismiss the NCCFFF protest without providing an opportunity for hearing;
- (3) The SWRCB should have taken enforcement action against PG&E due to SWRCB staff's previous conclusion that PG&E's water diversions at its North Fork Feather River facilities exceed its water rights;
- (4) The SWRCB should have exercised its authority under Section 401 of the Clean Water Act to require PG&E to provide bypass flows necessary to protect instream beneficial uses;
- (5) The SWRCB should have prepared an environmental document on the projects covered by Application 26780 pursuant to the California Environmental Quality Act ("CEQA," Public Resources Code section 21000 et seq.);
- (6) SWRCB staff erred when it failed to consider other pending applications for water rights on the North Fork Feather River before acting on Application 26780;

- (7) Neither the SWRCB nor its staff made a finding that water is available for appropriation under Application 26780;
- (8) SWRCB staff and PG&E should have consulted with DFG and the U.S. Fish and Wildlife Service regarding impacts to species protected under the state and federal Endangered Species Acts.

Based on the contentions cited above, CSPA and NCCFFF request that the SWRCB grant the following relief: (a) rescind Permit 20864, (b) prepare or have prepared an environmental document pursuant to CEQA, (c) "re-notice" Application 26780 as amended, (d) require PG&E to consult with state and federal fish and wildlife agencies to determine whether the application will have adverse impacts on protected species or their habitat, (e) take enforcement action against PG&E for the unauthorized diversion and use of water, and (f) hold a hearing on the application as amended following preparation of an environmental document.

4.0 TIMELINESS OF PETITIONS

Water Code Section 1357 provides:

"The board may order reconsideration of all or part of a decision or order on the board's own motion or on petition of any person interested in any application, permit, or license affected by the decision or order. The petition shall be filed within 30 days after adoption by the board of a decision or order. The authority of the board to order reconsideration on its own motion shall expire 30 days after it has adopted a decision or order. The board shall order or deny reconsideration on a petition therefor within 90 days after the adoption of the decision or order."

In this instance the "decision or order" for which petitioners seek reconsideration is the decision of the Chief of the Division of Water Rights, acting pursuant to delegation of authority from the SWRCB, to issue Permit 20864 following dismissal of the protests to Application 26780. Sections 4.1 through 4.3 below address the timeliness of each of the three petitions for reconsideration.

4.1 DFG Petition

As stated in Section 2.3 above, DFG was advised that its protest to Application 26780 was dismissed on April 2, 1996. DFG did not request reconsideration of the April 2, 1996, dismissal of its protest to Application 26780 prior to filing its petition for reconsideration of the issuance of Permit 20864. Permit 20864 was issued on July 31, 1996. On August 20, 1996, the Division of Water Rights issued a report on applications received and actions taken during the preceding month. The DFG petition for reconsideration is dated and was filed 31 days later on September 20, 1996.

The record raises a question regarding the timeliness of DFG's petition for reconsideration. Certainly DFG's September 20, 1996, request for reconsideration of the dismissal of its protest on April 2, 1996, cannot be considered timely. With respect to DFG's request to reconsider issuance of Permit 20864, there is no information in the file from which it can be determined when DFG first received notice of the issuance of Permit 20864. However, in view of the fact that DFG did not contest the dismissal of its protest, the SWRCB had no obligation to notify DFG of further SWRCB action on the application.⁵ Consequently, in order for a

⁵ Chapter 659 of the Statutes of 1996 adds Chapter 4 (commencing with section 1120) to Part 1 of Division 2 of the Water Code. The new section 1121 of the Water Code, effective on January 1, 1997, provides that the SWRCB shall serve a copy of a decision or order on the "parties" by personal delivery or
(continued...)

DFG petition for reconsideration of the issuance of Permit 20864 to be considered timely pursuant to the provisions of Water Code Section 1357, the request should have been filed within 30 days of the issuance of Permit 20864, i.e., on or before August 30, 1996. The DFG petition was not filed within the time allowed by statute and the petition should therefore be dismissed.

4.2 Cal Trout and Plumas County Petition

Cal Trout's protest to Application 26780 was dismissed on April 2, 1996. The letter dismissing the petition was sent to an outdated address, however, thereby preventing Cal Trout from receiving notice. Information in the Division of Water Rights file indicates that, following the Postal Service's return of the April 2, 1996, letter to the Division of Water Rights, the letter dismissing Cal Trout's protest was sent by facsimile to Mr. Michael Boen, 870 Market Street, Suite 859, San Francisco CA 94102 on May 9, 1996. Cal Trout's petition confirms that this is the current address of Cal Trout headquarters. There is no indication that this letter was not received. Assuming that the letter was received by Cal Trout's headquarters on May 9, 1996, Cal Trout would have had 30 days from that date to request reconsideration of the dismissal of its protest. The SWRCB received no request for reconsideration of its dismissal of Cal Trout's protest. Therefore, at the time that Permit 20864 was

⁵(...continued)
registered mail. The service requirements of Water Code section 1121 were not in effect at the times in question regarding the petitions for reconsideration addressed in this order. It is noteworthy, however, that even under the more stringent notice requirements of Water Code section 1121, the SWRCB is not required to provide notice that it has issued a water right permit to persons who are not considered "parties" to the proceeding in question. An agency or organization which files a protest to a water right application, but does not contest the written dismissal of its protest, would not normally be considered a "party" to any further proceedings on that application, and would not be entitled to written notice of SWRCB action.

issued, Cal Trout was not considered a protestant and the SWRCB was not required to notify Cal Trout of issuance of the permit.⁶

Similarly, the SWRCB was not required to provide notice of the issuance of Permit 20864 to Plumas County because the county was never a protestant to Application 26780, nor was it otherwise considered a party to proceedings on the application. Pursuant to the requirements of Water Code section 1357, any petition for reconsideration filed by Cal Trout or Plumas County should have been filed within 30 days of the issuance of Permit 20864, i.e., on or before August 30, 1996. The Cal Trout/Plumas County petition was filed after the period allowed by statute and should therefore be dismissed.

4.3 CSPA and NCCFFF Petition

NCCFFF's protest to Application 26780 was dismissed on April 2, 1996, and the Division of Water Rights mailed notice of the protest dismissal to the past president of the NCCFFF who originally submitted the protest, Roy Haile. Mr. Haile is deceased and the NCCFFF/CSPA petition for reconsideration states that the current president of the NCCFFF did not receive notice that the NCCFFF protest was dismissed. In addition, the Division of Water Rights files contain a document filed by CSPA dated November 22, 1985, indicating that the NCCFFF's protest was assigned to CSPA in 1983. There is no record in the file that

⁶ The Natural Heritage Institute has served as Cal Trout's representative in some, but not all, matters in which Cal Trout has appeared before the SWRCB. Cal Trout acknowledges that the Natural Heritage Institute did not file a written notice of representation of Cal Trout with respect to its protest to Application 26780. Cal Trout's 1981 protest to Application 26780 lists the then-current president of Cal Trout as the representative of Cal Trout with regard to the protest. With the passage of time and the change in presidents of Cal Trout, it was reasonable for the Division of Water Rights to notify the present president of Cal Trout of the dismissal of Cal Trout's protest. The Division of Water Rights did this on May 9, 1996. In the absence of a written notice that the Natural Heritage Institute was Cal Trout's representative with respect Application 26780, the SWRCB had no obligation to notify the Natural Heritage Institute of the dismissal of Cal Trout's protest.

notice of the April 2, 1996, dismissal of the NCCFFF protest was sent to CSPA. Thus, it appears that neither NCCFFF nor CSPA received the April 2, 1996, notice dismissing the NCCFFF protest. Assuming that the NCCFFF protest was assigned to CSPA as indicated by the record, CSPA should have been notified of the dismissal of the protest on April 2, 1996. Having not received notice of the dismissal of the protest, CSPA was not obligated to request reconsideration of the dismissal of the protest within 30 days of the April 2, 1996, letter.

There is no information in the record to indicate that CSPA received notice of the issuance of Permit 20864 prior to the August 20, 1996, report from the Division of Water Rights. As the apparent assignee of an accepted protest to Application 26780, CSPA could reasonably assume that it would be notified of any action taken regarding that protest prior to issuance of a water right permit. Not having received notice of the dismissal of the protest or issuance of Permit 20864 prior to August 20, 1996, CSPA and NCCFFF filed a petition for reconsideration of issuance of the permit on September 18, 1996. Under the circumstances described, the SWRCB concludes that the petition for reconsideration should be considered timely with respect to petitioner CSPA.

NCCFFF did not petition for reconsideration of the issuance of Permit 20864 within 30 days of the issuance of the permit on July 31, 1996. Having assigned its protest to CSPA in 1983, petitioner NCCFFF was no longer entitled to be notified of action taken with respect to that protest or Application 26780 and is subject to the normally applicable statutory requirement of requesting reconsideration within 30 days of SWRCB action. Since NCCFFF did not request reconsideration of issuance of Permit 26780 within 30 days of issuance of the permit, the NCCFFF request for reconsideration should be denied.

4.4 Conclusions Regarding Timeliness of the Petitions

Based on the facts discussed above, the SWRCB concludes that any petitions for reconsideration of issuance of Permit 20864 filed by DFG, Cal Trout, Plumas County, and NCCFFF should have been filed within 30 days of issuance of the permit on July 31, 1996. Petitions for reconsideration filed by those parties after August 30, 1996, should be dismissed as untimely filed. However, as explained in Section 4.3, the petition for reconsideration filed on behalf of CSPA and NCCFFF should be regarded as timely filed with respect to petitioner CSPA.

To a large extent the issues raised by CSPA substantially overlap issues raised by other petitioners. In order to clarify the basis for the SWRCB's action in issuing Permit 20864, the discussion below addresses the major issues raised in the petitions for reconsideration without regard to timeliness or lack of timeliness of a particular party's petition for reconsideration.

5.0 LIMITED JURISDICTION OF SWRCB REGARDING SINGLE-PURPOSE FEDERALLY LICENSED HYDROPOWER PROJECTS

It is helpful to begin a review of the issues raised by the petitions for reconsideration with a discussion of the general scope of the SWRCB's jurisdiction over single-purpose federally licensed hydroelectric projects as established by recent federal court decisions.

Prior to the 1990 U.S. Supreme Court decision in *California v. Federal Energy Regulatory Commission*, 495 U. S. 490, 110 S. Ct. 2024, (the *Rock Creek* decision) the SWRCB exercised jurisdiction to include instream beneficial use protection conditions in water right permits and licenses for hydroelectric projects. Those conditions set minimum instream flows and other measures to reduce or mitigate impacts on environmental and public trust

resources. The *Rock Creek* decision, however, established that, in the case of a single-purpose federally licensed hydroelectric project, the Federal Energy Regulatory Commission has preemptive authority to set minimum instream flow requirements. (Id., 110 S. Ct. at 2033-2034.)

In *Sayles Hydro Association v. Maughan*, 985 Fed. 2d 451, (1993), the U.S. Court of Appeal for the Ninth Circuit further addressed the scope of federal preemption, under the Federal Power Act, with respect to state regulation of a single-purpose federally licensed hydroelectric project. In the *Sayles Hydro* case, as in the present proceeding, there were no protests to the water right application which were based on injury to prior water rights. The court held that:

"Since forcing [the applicant] to provide environmental impact reports to the State Board has nothing to do with determining proprietary rights in water, federal preemption bars the state requirement." (Id., 985 Fed. 2d at 455.)

The court went on to state that the only authority states have over federal power project relates to allocating proprietary rights to water. With the exception of state regulation of proprietary rights, the court held "federal laws have occupied the field, preventing state regulation."⁷ The *Sayles Hydro* decision ended with a caution that further litigation reflecting an unwillingness to accept federal preemption may expose

⁷ The project involved in the *Sayles Hydro* litigation was a single-purpose hydroelectric project for which FERC had issued a federal power license. In instances in which generation of hydroelectric power is one of multiple purposes of a project, the existence of a federal power license would not preempt state authority to condition a water right permittee's diversion and use of water for other purposes upon the permittee complying with requirements necessary to protect the environment or the public interest.

litigants or their attorneys to sanctions. (Id., 985 Fed. 2d at 446.)

In the present case, the SWRCB's dismissal of the protests to Application 26780 does not reflect a lack of concern on the part of the SWRCB for the environmental and public interest values which the protestants wish to protect. Rather, the protests were dismissed in recognition of the restrictions on SWRCB water right jurisdiction over single-purpose federally licensed hydroelectric projects as set forth in the *Rock Creek* and *Sayles Hydro* decisions. Condition 19 of Permit 20864 expressly provides that the SWRCB reserves jurisdiction to re-examine fishery and public trust uses as they relate to the permit and to modify the permit accordingly if the law governing the respective authority of the SWRCB and FERC is changed. In addition, as discussed in Section 6.7 below, the SWRCB's jurisdiction when acting upon an application for water quality certification under Section 401 of the federal Clean Water Act is broader than its authority when acting upon applications to appropriate water.

6.0 DISCUSSION OF ISSUES RAISED BY PETITIONS FOR RECONSIDERATION

6.1 Request to Re-Notice Application

The CSPA/NCCFFF and the Cal Trout/Plumas County petitions both contend that the SWRCB was obligated to re-notice Application 26780 following amendment of the application by PG&E.

The SWRCB acknowledges that, in some instances, changes to a proposed project make it necessary or desirable to provide public notice of the project a second time. In this case, however, the amendments to the application significantly reduced the proposed rate of diversion and the amount of water sought to be appropriated under the application. In addition, the amendments to the application deleted certain new facilities proposed in the original application and did not add any facilities which were

not described in the original application. Reducing the scope of the proposed water diversions could only reduce, not increase, any hypothetical impact of the project upon other holders of proprietary water rights. Since there were no "prior rights protests" filed against the application as originally submitted, there is no basis for assuming that a modified, smaller project would prompt protests from claimants of prior rights.

As discussed previously, the SWRCB has no authority to address, in a water right order, the environmental and public interest concerns raised in the protests to Application 26780. Even if the SWRCB did have the authority to address those issues, however, a reduction in the rate and quantity of water diversion would be expected to have less impact on the values the petitioners seek to protect. There is no logical basis for concluding that the amendments to Application 26780 required re-noticing the application.

6.2 Availability of Water for Appropriation

The petitioners all request reconsideration on the basis that the SWRCB did not adequately address (or did not allow the petitioners to address) the availability of water for appropriation under Application 26780. The following points are relevant with respect to the petitioners' contentions concerning water availability:

- (1) None of the petitioners protested Application 26780 on the basis of prior rights; and
- (2) Permit 20864 does not authorize diversion of water at any facilities which were not already constructed and in operation at the time Application 26780 was amended. PG&E's stated purpose in amending the application on February 8, 1996, was to reduce the rate and quantity of water specified

in the application to conform with the ongoing operation of the projects as authorized in PG&E's federal power licenses.

Water Code Section 1375 provides that a condition for issuance of a water right permit is that there must be unappropriated water available to satisfy the applicant. Based on the applicant's operational history (see Section 6.4 below) and the absence of any protests or complaints from other water right holders, it is reasonable to conclude that there is often water available for diversion under Permit 20864.

The issuance of a water right permit is not a guarantee that there will always be water available for diversion at the rate or in the quantity authorized in the permit. Rather, a permit provides authorization to divert water, subject to stated conditions, up to the specified rate and quantity. Permit 20864 is for direct diversion of water at the rates and locations specified in the permit, and the permit does not authorize diversion to storage. In particular, the permit does not authorize diversion of water to storage at Lake Almanor.⁸ The actual availability of water at a particular time at the points of diversions specified in the permit will depend upon a number of factors including tributary inflow to the North Fork Feather River, upstream project operations, and climatic conditions.

Cal Trout and Plumas County argue that issuance of Permit 20864 "directly affects the inchoate rights of protestant U. S. Forest Service, which has reserved rights superior to Permit 20864 under the *Winters* doctrine, and Petitioner Plumas County which claims area of origin rights superior to PG&E's." However, the Forest

⁸ PG&E claims to have pre-1914 rights for storage of water at Lake Almanor. A 1990 SWRCB staff report concluded that PG&E's pre-1914 rights for storage at Lake Almanor are not sufficient to cover the full amount of water stored at the lake. In 1993, PG&E submitted Application 30257 to augment its right to divert water to storage at Lake Almanor. That application has not yet been acted upon by the SWRCB.

Service did not protest Application 26780 based on claim of injury to its "inchoate" rights, and it does not now request reconsideration. To deny a pending water right application based on the possible future assertion by a third party to an "inchoate" right to divert water would be analogous to denying an application based on the possibility of an unquantified future increase in riparian diversions.

In this instance, the facilities needed for diversion and use of water under Permit 20864 are already constructed and in operation. To deny PG&E the right to divert water through those facilities based on a possible future assertion of an inchoate right would be in direct conflict with the mandate of Article 10, Section 2 of the California Constitution to maximize the reasonable and beneficial use of water. If, at some future time, the Forest Service establishes that it has a prior right to water from the North Fork Feather River which is now diverted by PG&E, then PG&E and other junior diverters would be expected to adjust their diversions accordingly.

Cal Trout and Plumas County offer no explanation and cite no supporting authority for their assertion that diversions under Permit 20864 are in conflict with Plumas County's claim of "area of origin rights." To the contrary, the diversion and use of water by PG&E at each of the four powerhouses specified in Permit 20864 involves a beneficial use of water directly at the point of diversion, rather than export of water for use in another watershed. Even where one of the statutes protecting counties or watersheds of origin is applicable, those statutes ordinarily create an "inchoate priority" for the ultimate needs of the inhabitants of the region. In the interim, water may be used outside of the watershed of origin. (25 Ops. Cal. Atty. Gen. 8, 20-22, 25-27 (1955).)

The petitions for reconsideration provide no basis for reconsidering the issuance of Permit 20864 based on the non-availability of water for diversion under the permit.

6.3 Consideration of Competing Application

Petitioners CSPA/NCCFFF and Cal Trout/Plumas County contend issuance of Permit 20864 was inappropriate because the SWRCB failed to consider competing water right applications. Specifically, the petitioners refer to Application 28468 which seeks the right to divert 180,000 acre-feet per annum to storage in Lake Almanor between October 1 and April 30, and 150 cfs by direct diversion from the North Fork Feather River from November 1 to April 30. Application 28468 was filed by Cal Trout on June 7, 1985. On May 31, 1996, Cal Trout assigned Application 28468 to Plumas County.

The SWRCB's files on Application 28468 indicate that there has been extensive correspondence between the SWRCB and the applicants regarding preparation of an environmental document for the proposed project and other issues. To date, no environmental document has been prepared. On July 11, 1996 counsel for Plumas County advised the SWRCB that the county would serve as lead agency for purposes of preparing an environmental document. In the absence of an environmental document, the SWRCB could not approve Application 28468.⁹

Due to the fact that PG&E's Application 26780 was filed approximately four years before Application 28468, PG&E's rights under Permit 20864 ordinarily would have priority over any rights which might be acquired under Application 28468. The record is not clear as to the extent to which the use of water for fishery

⁹ SWRCB files on Applications 28468 show that Cal Trout and Plumas County also have been advised of several legal issues which would have to be resolved in order for the SWRCB to approve Application 28468.

enhancement proposed in Application 28468 would be incompatible with the diversion of water authorized under Permit 20864. However, since Application 26780 has an earlier priority than Application 28468, and the SWRCB still cannot approve Application 28468 in the absence of a completed environmental document, it was entirely appropriate for the SWRCB to act upon Application 26780.¹⁰

6.4 Relationship of PG&E's Water Rights to Provisions of its Federal Power Licenses

PG&E holds federal power licenses which authorize generation of hydroelectric power at each of the four facilities identified in water right Permit 20864. (Licenses 1962, 2105, and 2107.) Although the licenses do not specify a rate of water diversion at each of the four facilities, the licensee is required to list the nameplate rated capacity of its turbines and generators. (18 CFR 4.51 (b) (3).) The nameplate capacity of a particular facility can then be correlated with the rate of flow needed to produce the stated quantity of power.

Table 1 below shows the rate of flow associated with the nameplate capacity of each of the four powerhouses specified in Permit 20864, the maximum 14-day average flows based on historic operations at each location, the authorized rate of diversion under water right License 9871, and the authorized rate of diversion under Permit 20864. The rate of diversion specified in Permit 20864 was based on the requested rate of diversion in Application 26780 as amended on February 8, 1996.¹¹ As can be

¹⁰ Application 26780 was filed by PG&E in 1981 in an effort to bring its state-recognized water rights into conformity with actual operations under its federal power licenses and is exempt from the requirement for an environmental document under CEQA.

¹¹ Following a decision not to add additional generating capacity, PG&E amended water right Application 26780 on February 8, 1996, to delete proposed increases in water diversion which would have been needed to provide water for additional facilities.

seen from Table 1, the authorized rate of diversion under Permit 20864 is equal to the difference between the maximum 14-day average flows and the rate of diversion authorized by License 9871 at each location.

TABLE 1*

Powerhouse	Flow When Operating at Nameplate Capacity	Maximum 14-Day Average Flow Based on Historic Operation	Rate of Diversion under License 9871	Rate of Diversion under Permit 20864
Beldon	2,410	2,600	2,465	135
Rock Creek	3,250	3,500	2,896	604
Cresta	4,025	4,100	3,500	600
Poe	3,700	4,300	3,500	800

* Flows in cfs

Although FERC documents refer to the "nameplate capacity" of each turbine or generator, FERC does not consider the rated nameplate capacity of each generator or turbine to be an absolute limit on the amount of power which may be generated or the associated rate of water diversion for a particular facility. FERC licensees may, and often do, operate equipment in an overload mode in order to generate more power by using higher flows when available. In this instance, the historic flow data based on the maximum 14-day average power generation at each of the facilities in question is relatively close to the flow necessary to operate the facilities at nameplate capacity. Making a reasonable allowance for additional flow associated with operation of the facilities in an overload condition, the maximum 14-day average historic flows shown in Table 1 above appear to be within the range that would be expected for operation of PG&E's hydroelectric facilities in accordance with its federal power licenses. In these circumstances, FERC is the appropriate agency to address any

allegations that PG&E's operations have been in violation of its federal power licenses.

The rates of diversion specified in Permit 20864 represent the additional water rights needed to allow PG&E to continue to operate in accordance with its past practices of diverting water for hydroelectric power production under its federal power licenses. The SWRCB concludes that this was a proper method of quantifying the rates of diversion authorized in Permit 20864.

6.5 SWRCB Discretion with Respect to Enforcement Actions

Petitioners CSPA/NCCFFF and Cal Trout/Plumas County contend that the SWRCB erred by not undertaking enforcement action against PG&E for past diversions at the four powerhouses in excess of the rights which PG&E held under License 9871. In support of their argument that the SWRCB should have taken enforcement action against PG&E, petitioners cite a 1990 SWRCB "Staff Report of Investigation" on PG&E's water rights on the North Fork Feather River. The 1990 staff report concluded that PG&E's diversions at the four powerhouses exceeded its rights under License 9871. The report also stated, however, that PG&E had submitted additional water right applications (including Application 26780) to augment its recognized rights on the North Fork Feather River.

Although PG&E was on notice from December 1990 (if not before) that its diversions exceeded the authorized rate of diversion under the License 9871, the SWRCB recognizes that PG&E had submitted Application 26780 to augment its rights in 1981. The delay in acting upon Application 26780 was due in part to a delay in completing environmental studies which were assumed to be needed at the time the application was filed, and in part to uncertainty regarding the scope of state jurisdiction over federally licensed power projects. (See Section 5.0 above.)

The SWRCB has broad discretion with respect to enforcement actions regarding diversion and use of water. Issuing Permit 20864 would not preclude the SWRCB from imposing liability for violations that occurred before the permit was issued, if the SWRCB believed that action was appropriate. (See Water Code section 1052, et seq.) In this instance, the SWRCB does not believe that the facts warrant pursuing sanctions against PG&E for past diversions of water at the powerhouses specified in Permit 20864.

6.6 Request for Hearing on Disputed Issues of Law and Fact

The petitioners all allege it was error for the SWRCB to issue Permit 20864 without providing an opportunity for hearing on disputed issues. As explained in Section 5.0, the scope of state jurisdiction over applications to appropriate water for single-purpose federally licensed hydropower projects has been narrowly defined by applicable court decisions. None of the original protests against Application 26780 asserted that the application should not be approved due to its impact on prior rights. The protestants objected to the application on grounds which the federal courts have said the state has no jurisdiction to consider when acting upon applications to appropriate water for single-purpose federally licensed hydroelectric projects. Since the protests did not raise issues within the SWRCB's water right jurisdiction, the SWRCB was under no obligation to hold a hearing on Application 26780.

6.7 Jurisdiction of SWRCB Under Section 401 of the Clean Water Act

The petition submitted by CSPA and NCCFFF refers to a recent Supreme Court decision which holds that state water quality certification authority when acting under Section 401 of the federal Clean Water Act includes the authority to set flows necessary to protect uses, including instream beneficial uses,

that have been designated for protection. (*PUD No. 1 of Jefferson County v. Washington Department of Ecology*, (1994) 114 S. Ct. 1900.) Unlike the state's authority to act upon applications to appropriate water for single-purpose federally licensed power project, state authority under Section 401 of the Clean Water Act is not preempted by the Federal Power Act. (See *id.* at 1914.)

Based on *PUD No. 1*, CSPA and NCCFFF argue that the SWRCB erred in not exercising its authority under Section 401 of the Clean Water Act when issuing Permit 20864. The answer to this contention is simple: The SWRCB can exercise its water quality certification authority under Section 401 of the Clean Water Act only when acting upon applications for water quality certification. In this instance, there was no application for water quality certification before the SWRCB, and the exercise of water right jurisdiction was subject to the restrictions addressed in Section 5.0 above. The SWRCB will have broader authority to consider measures necessary to protect designated beneficial uses of water when considering water quality certification at the time the PG&E projects come up for relicensing pursuant to the Federal Power Act.

6.8 Preparation of Environmental Document Under CEQA

CSPA and NCCFFF contend that the SWRCB violated CEQA because it issued Permit 20864 without completing an environmental document as required by statute. The petitioners' lengthy discussion of statutory requirements and judicial decisions concerning CEQA ignores the holding of the Court of Appeal in *Sayles Hydro* as discussed in Section 5.0 above. Under *Sayles Hydro*, it is clear that, when acting upon applications to appropriate water for single-purpose federally licensed power projects, statutory requirements under CEQA have been preempted by federal law.

7.0 CONCLUSION

Water Right Permit 20864 was issued on July 31, 1996. The SWRCB has received three petitions for reconsideration of issuance of the permit, filed on behalf of DFG, Cal Trout and Plumas County, and CSPA and NCCFFF. Water Code section 1357 provides that petitions for reconsideration must be filed within 30 days after adoption of a decision or order. In this instance none of the petitions were filed within the specified 30-day period. For the reasons discussed in Section 4.3 above, however, the SWRCB concludes that the CSPA/NCCFFF petition should be considered timely with respect to petitioner CSPA. The other parties' requests for reconsideration should be denied on the basis of timeliness.

In addition to the issue of whether the specified petitions are considered timely under Water Code section 1357, the preceding sections of this order address the specific grounds for reconsideration raised in the petitions. In acting upon an application to appropriate water for a single-purpose federally licensed hydropower project, as in the case of Permit 20684, the jurisdiction of the SWRCB is limited to consideration of the availability of water for appropriation and measures necessary for the protection of prior water rights. There were no protests filed against Application 26780 based on injury to prior rights. The available information on past operations shows that there historically has been water available for diversion at the four powerhouses in question in the amounts requested by PG&E. The petitions for reconsideration provide no basis for reconsidering issuance of Permit 20864 based on non-availability of water for appropriation or injury to holders of prior water rights.

The SWRCB also finds that issuance of the permit was appropriate and proper, and the petitions for reconsideration raise no other issues which justify reconsideration. Therefore, the SWRCB finds

4. Permit 20864 is amended to include the following condition:
"This permit does not authorize storage of water at
Lake Almanor."

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 17, 1996.

AYE: John Caffrey
 James M. Stubchaer
 Mary Jane Forster

NO: None

ABSENT: None

ABSTAIN: John W. Brown
 Marc Del Piero


Maureen Marché
Administrative Assistant to the Board