

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the matter of Water Quality Certification for:)
)
)
Pacific Gas and Electric Company,)
Poe Project (FERC No. 2107))
)

**BUTTE COUNTY’S PETITION FOR RECONSIDERATION
OF WATER QUALITY CERTIFICATION**

Pursuant to 23 C.C.R. § 3867(a)(1), Butte County hereby petitions for reconsideration of the Executive Officer’s issuance of the water quality certification for the Poe Hydroelectric Project (December 28, 2017) (“Certification”), along with the “Initial Study and Mitigated Negative Declaration” (“IS/MND”) and “Responses to Comments on the Draft Initial Study Document and Mitigated Negative Declaration.”

**I.
INTERESTS OF BUTTE COUNTY**

The project occupies lands and waters of the North Fork Feather River entirely within Butte County. This river is one of the County’s most valuable natural resources. The County has direct and substantial interests in assuring that the new license, including this water quality certification, will enhance beneficial uses of these waters, in addition to protecting power generation. Among other things, the County seeks to assure that the new license will contribute to substantial enhancement of recreation and cold freshwater habitat in the Poe Bypass Reach, a 7.6-mile reach between Poe Dam and Poe Powerhouse. Such ecotourism will benefit the County, which has one of the lowest per capita household incomes in the State. See Butte County, “Amended Comments on Draft Environmental Assessment” (September 19, 2006), p. 34. Since 1953, the Project has impaired these beneficial uses, as the original license permitted diversion up to 3,000 cubic feet per second (cfs) for power generation while requiring only 50 cfs of minimum flow release into the Poe Bypass Reach.

**II.
GROUNDNS FOR RECONSIDERATION**

The Staff found that the Certification will enhance the baseline water quality conditions of the North Fork Feather and thus will not have significant adverse impacts on environmental quality under the California Environmental Quality Act (CEQA). IS/MND, pp. iii – iv. Butte County agrees that the Certification will enhance water quality relative to the analytical baseline under CEQA. Indeed, we are very grateful to your Staff, who have worked diligently for 13

years to advance this good result. That said, Staff made legal error by *de facto* equating baseline enhancement with attainment of water quality standards for protection of recreation and cold freshwater habitat.

We begin with necessary context.

Pacific Gas and Electric Company (“PG&E”) owns and operates three hydroelectric projects on the North Fork Feather above Oroville Facilities. These are: North Fork Feather Project (FERC no. 2105), Rock Creek-Cresta Project (FERC no. 1962), and the Poe Project (FERC no. 2107). The North Fork Feather and Poe Projects are in relicensing, while FERC issued the new license for Rock Creek-Cresta in 2001. PG&E operates the 11 powerplants in this system in an integrated manner. See Federal Energy Regulatory Commission (“FERC”), *Final Environmental Assessment: Poe Hydroelectric Project (2007)* (“FEA”), p. 3.

In December 2003, PG&E submitted its “Application for New License: Poe Hydroelectric Project” (“New License Application”). It proposed a minimum flow schedule of 150 cfs. IS/MND, p. 18. FERC’s staff recommended a minimum flow schedule of 150 to 275 cfs, varying by month and year-type. FEA, p. 231. FERC’s final action is pending this Certification.

PG&E filed its request for water quality certification on February 18, 2005. Staff issued a draft Certification on June 14, 2017, followed by this final Certification on December 28, 2017. This Petition concerns Certification conditions which will regulate the minimum flows in the Poe Bypass Reach. Condition 1 requires a minimum flow release of 180 to 500 cfs, varying by month and year-type; Condition 5 specifies hourly ramping rates, when power generation starts or stops; and Condition 6 requires 6,000 acre-feet per year of additional flow release for recreation. This Petition also addresses conditions that regulate PG&E’s of lands for Project purposes. Condition 8 requires improvements in sanitation and other facilities for recreation, and Condition 12 requires a Road Management Plan.

For the past 14 years, Butte County has participated in the relicensing and certification proceedings for this Project. This Petition incorporates the following filings which we have made before the State Water Board, or made before FERC and concurrently served on the State Water Board. We note that most of these filings do not appear in the Certification website, https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/poe_ferc_2107.shtml, for this Project.

| Butte County’s Filing | Venue | Date |
|--|--------------|-------------------|
| Comments on the Draft Initial Study and Proposed /Mitigated Negative Declaration | SWRCB | October 11, 2017 |
| Comments on Draft Water Quality Certification | SWRCB | July 17, 2017 |
| Comments on the Upper North Fork Feather Draft Environmental Impact Report | SWRCB | February 11, 2015 |
| Proposed Non-Flow Recreation Measures for the Poe Project | SWRCB | October 18, 2013 |

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| Proposed Conditions for the Poe Project (“Proposed Conditions”) | SWRCB | August 2, 2013 |
| Amended Comments on Draft Environmental Assessment (“DEA Comments”) | FERC | September 19, 2006 |
| Comments in Response to Notice of Readiness for Environmental Analysis; Recommended Conditions for a New License (“NREA Comments”) | FERC | April 11, 2005 |
| Comments on Scoping Document 1 | FERC | May 3, 2004 |
| Additional Study Request Regarding Boating Demand on Project Reach | FERC | February 17, 2004 |

We now turn to the grounds for reconsideration.

The IS/MND finds: “in a CEQA analysis of an existing hydroelectric project, reauthorizing the project is not likely to yield many environmental impacts because most of the impacts have already occurred, and, when compared to the current condition, do not register as significant. Environmental impacts that may or could occur are usually the result of new conditions necessary to bring the Proposed Project into compliance with existing laws including the CWA and ESA.” IS/MND, p. 35. We agree with this description of the analytical baseline under CEQA. But enhancing that baseline does not assure that the Project will attain water quality standards in the Poe Bypass Reach under the new license, which will be in effect for 30 years or longer.

The purpose of the Clean Water Act (“CWA”) is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a), cited in Certification, p. 2. Under CWA section 401, a certification must provide a reasonable assurance that the water discharge and facility as a whole will comply with applicable water quality standards. 33 U.S.C. § 1341(a), (d). Designated beneficial uses, along with the narrative and numeric objectives, are water quality standards. Certification, p. 4. Such uses for the Poe Bypass Reach include contact recreation, noncontact recreation, canoeing and rafting, and cold freshwater habitat and spawning.¹ *Id.* A water quality certification may require minimum flow releases as appropriate to protect beneficial uses, not simply to attain objectives that relate to pollutants. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994); *S.D. Warren Company v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006).

Each relicensing proceeding results in a new decision whether a project will continue its power operations. *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 476 (9th Cir. 1984). Continuing impacts which arose under an original license are not a given in a new license – indeed, the State Water Board must consider measures to avoid,

¹ For simplicity, this Petition uses the terms, “recreation” and “cold freshwater habitat,” to refer to these beneficial uses.

minimize, or compensate for, such impacts. 23 C.C.R. § 3856(h)(2).² Ultimately, the certification must attain water quality objectives, which provide “reasonable protection” for designated beneficial uses. Water Code §§ 13241, 13050(h).

At certain other projects, the Staff are fully addressing continuing impacts which arose under an original license. For example, Staff are considering significant modifications or even removal of the Potter Valley Project, as needed to correct the blockage of volitional passage of anadromous fish that began in 1905. See State Water Board, “Study Requests and Comments on Pre-Application Document,” Potter Valley Project (FERC no. 77) (September 4, 2017), Attachment B, p. 1.³

In our July 17 and October 11, 2017 comments, Butte County asked to Staff to modify the draft Certification (including incorporated Rationale) and draft IS/MND, to show that the Certification will attain water quality standards in the Poe Bypass Reach. In December 2017, Staff responded that the Certification minimizes any new impacts relative to the analytical baseline under CEQA, which is February 18, 2005, when PG&E submitted its first request for Certification for this Project. See Responses to Comments, Item 1, p. 1. Even so, our fundamental comment was and remains that the Staff have not shown that the Certification will minimize the continuing impacts of Project operation on designated beneficial uses. Under Water Code section 13241, such impacts are all adverse impacts on water quality resulting from the Project’s continuing diversion of up to 3,000 cfs around this reach.

Cold Freshwater Habitat

As to cold freshwater habitat, Staff found that the Certification will lower water temperatures relative to the original license. Certification, p. 6; IS/MND, pp. 9, 26, and 44. Butte County agrees. However, Staff did not provide any estimates of the resulting water temperatures in the Poe Bypass Reach, even though Staff have access to predictive models, which they used to comment on FERC’s DEA (2006). See Butte County, DEA Comments, Exhibit 1. Staff did not analyze how often diversions for power generation will raise water temperatures in the bypass reach to an extent inconsistent with that designated use. We note that, under the Certification, the Project will continue to divert up to 75% of median flow. Compare minimum flow schedule release of 180 - 500 cfs with median flow of 2,090 cfs below Poe Powerhouse (FEA, p. 34).

Staff did not show that the Project will attain an applicable narrative objective, which is: “the natural receiving water temperature of intrastate waters shall not be altered unless it can be demonstrated to the satisfaction of the Regional Water Board that such alteration in temperature

² For simplicity, this Petition uses the term, “minimize,” to refer to the several verbs in this rule.

³ The Certification does not consider or provide any mitigation for the continuing impacts of PG&E’s Big Bend Dam and Reservoir, located downstream of Poe Powerhouse. This facility provides reregulation benefits for Poe Powerhouse. Butte County has requested mitigation for the adverse impacts, including the loss of recreation in the flooded area. Butte County, DEA Comments, pp. 17-20.

does not adversely affect beneficial uses.” *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (July 2016), p. III-8. Staff did not show that the Project will comply with additional requirements arising from the listing of the North Fork Feather under Clean Water Act section 303(d), as impaired for water temperature due to PG&E’s hydropower system.

Staff did not show that the Certification will mitigate the cumulative impacts of PG&E’s hydropower system on water temperature in the Poe Bypass Reach. This is a critical omission: this system is integrated, Staff is preparing a CEQA analysis for the North Fork Feather Project, and the State Water Board must consider “water quality conditions that could reasonably be achieved through coordinated control of all factors which affect water quality in the area” (Water Code § 13241(c)). In sum, Staff did not show that the Certification will minimize the Project’s continuing impacts on cold freshwater habitat in the Project reaches.

Flows for Recreation

Under the minimum flow schedule in the original license, the Project reduced the number of boatable days in the Poe Bypass Reach by 95%. IS/MND, p. 12. Staff found that the Certification, including Conditions 1, 5, and 6, will provide more boatable days. Certification, pp. 8-9. Butte County agrees.⁴ However, Staff did not estimate how many boatable days will occur, instead reciting broadly that all forms of recreation in the bypass reach will increase by 75 – 100% relative to the original license. Certification, p. 9. Staff did not respond to our expert evidence that the future recreation in this reach could far exceed that estimate, given rapid growth in regional demand for such recreation.⁵ We also submitted evidence that robust recreation in this reach would produce economic benefits (sales at gas stations, hotels, and

⁴ Staff stated that the minimum flow schedule adopted in Condition 1 is identical to Butte County’s proposal. Responses to Comments, Item no. 6, p. 5. We agree. See Proposed Flow Conditions, pp. 2-4; NREA Comments, pp. 5-7. The minimum flow schedule in Condition 1 may permit navigation by kayaks, which have very shallow drafts, at least by expert kayakers. Further, Condition 5, which requires ramping rates, will result in additional flows in the bypass reach. The County had proposed similar ramping rates. *Id.* The County has also proposed a supplemental flow schedule to provide at least one weekend per summer month of flows (ranging from 800 to 1,750 cfs) suitable for rafting (as well as kayaking) and for non-expert boaters. Butte County, NREA Comments, pp. 18-19. Staff did not analyze whether Condition 6 (requiring 6,000 acre-feet per year of supplemental flow), in combination with Conditions 1 and 5, will provide that benefit.

⁵ PG&E estimated that existing recreation in the Poe Bypass Reach averaged roughly 35 users per day during the summer season. New License Application, p. E5-63. PG&E estimated that boating use did not exceed 7 boats at any time. *Id.*, p. E5-50. As the Certification states, PG&E projected that use will increase by 75 – 100% over the 30-year term of the new license. Certification, p. 9; see New License Application, p. E5-139. However, we submitted expert evidence that the growth in recreation would be substantially more, given suitable flows and facilities. For example, kayaking is increasing regionally by approximately 20% per year on other river reaches with suitable flows. Butte County, DEA Comments, p. 22. Commercial rafting use of the Poe Bypass Reach, which is impossible under the original license, would likely occur given suitable flows (greater than 800 cfs) on summer weekends. *Id.*, pp. 22-25, Exhibits 5-6; NREA Comments, Attachment 3.

restaurants, along with associated employment and tax revenues) far in excess of any power loss, which would be roughly 1% of generation under the original license. Butte County, DEA Comments, Exhibit 5; NREA Comments, Attachments 3, 6. In sum, Staff did not show that the Certification, through its regulation of Project operations, will minimize the Project's continuing impacts on boating and other forms of recreation in the Poe Bypass Reach.

Recreational Facilities

Condition 8 requires improvements in sanitation, parking, and other recreational facilities at 4 locations in and adjacent to the Poe Bypass Reach. We enthusiastically support these improvements. We proposed additional improvements, including new and extended trails and an off-site mitigation fund, to further enhance recreation in this reach. See NREA Comments, pp. 11-18. Staff rejected these other improvements on the ground that FERC had analyzed them in the 2007 FEA. Response to Comments, Item 7, p. 5. Relying without citation on a 10-year-old document which FERC produced under Federal Power Act, this summary dismissal is inconsistent with the State Water Board's duty of independent inquiry under the Porter-Cologne Act. Staff did not address our responses to FERC in support of these improvements. See Butte County, DEA Comments, pp. 30-34.

Bardees Bar Road

Condition 12 requires PG&E to develop a Road Management Plan for "Project roads," defined as "all roads associated with the Project." Certification, pp. 23-24. We believe that the condition applies to Bardees Bar Road, which is designated as "Bardees Access Road" on page 32. If so, we support this condition.

Below, we request confirmation that Condition 12 applies to Bardees Bar Road. We have submitted extensive evidence that the primary uses of this County road are access to Poe Powerhouse and recreation in the bypass reach, and that PG&E's heavy equipment is a primary cause for wear, poor road surface, and erosion. See Butte County, DEA Comments, pp. 31-32, Exhibit 17. The County requests confirmation that PG&E will be required to maintain Bardees Bar Road in compliance with Condition 12.C-D.

III. REQUEST FOR RELIEF

Pursuant to 23 C.C.R. § 3867(c)(9), Butte County respectfully requests that the Executive Officer compile the record of this proceeding.

Pursuant to 23 C.C.R. § 3867(c)(6), we request that the Staff undertake technical analysis (including a workshop in which the parties and their experts may participate) to address the following factual issues:

1. What water temperatures in the Poe Bypass Reach will result from Project operations under the Certification?

2. How many boatable days will result from such operations during the summer months?
3. With respect to items (1) and (2), would modifications to Certification Conditions 1, 5, and 6 provide more effective protection of cold freshwater habitat and recreation?
4. Will improvements in recreational facilities, as proposed by Butte County, be needed to address foreseeable growth in recreation in the Poe Bypass Reach, in addition to those improvements required by Condition 8?

Pursuant to 23 C.C.R. § 3867(c)(6), we request that Staff clarify whether Condition 12 includes Bardees Bar Road. Following the hearing described above, we request that Staff modify the Certification and IS/MND as appropriate to show and assure that the Project, as regulated by the Certification, will comply with applicable water quality standards.

IV. CONCLUSION

Butte County is grateful to State Water Board Staff for their diligent work to prepare the Certification, including consultation with County, PG&E, and other stakeholders. We conclude that the Certification will substantially improve baseline conditions in the Poe Bypass Reach. We file this petition for reconsideration because the record does not show that the Certification will provide reasonable protection of cold freshwater habitat and recreation, and otherwise comply with applicable water quality objectives, as required by the Porter-Cologne Act.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

**State Water Resources Control Board, Water Quality Certification
Pacific Gas and Electric Company, Poe Hydroelectric Project (FERC no. 2107)**

I hereby certify that I have this day served “**Butte County’s Petition for Reconsideration of Water Quality Certification,**” upon each person listed below, as well as each person designated on the official service list compiled by the Federal Energy Regulatory Commission for its relicensing proceeding.

State Water Resources Control Board

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Dated: January 29, 2018



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