

**WATER AND POWER  
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October 11, 2017

By Electronic Mail

Nathan Fisch  
Water Quality Certification Program  
Division of Water Rights  
State Water Resources Control Board  
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Re: **Pacific Gas and Electric Company, Poe Project (FERC No. 2107)**

Dear Mr. Fisch:

On behalf of Butte County, we comment on the “Initial Study Document, CEQA Checklist, and Proposed Mitigated Negative Declaration” (September 2017) (“IS/MND”). This letter supplements our July 17, 2017 comments on the draft water quality certification (June 2017) (“DWQC”), including the Rationale.

Thank you for this opportunity to comment on the IS/MND. We appreciate the State Water Board’s substantial progress towards a certification decision in this proceeding.

**Restoration of Beneficial Uses Impaired under Original License**

The IS/MND considers four alternatives. These are: New License Application or Applicant’s Proposal, Modifications to Applicant’s Proposal (resulting from Federal Power Act section 4(e) and 18 conditions), FERC Staff Alternative, and the State Water Board Staff Measures. See IS/MND, pp. 18-31. Each would enhance baseline conditions in the Project reaches. However, the IS/MND does not address whether the alternatives would comply with the State Water Board’s substantive duty under CEQA “... to avoid or minimize environmental damage where feasible.” 14 C.C.R. § 15021(a); see also *id.*, §§ 15126(a)(1), 15370. The Clean Water Act, and implementing actions thereunder, have a substantive goal to “...restore and maintain the chemical, physical, and biological integrity” of the nation’s waters. 33 U.S.C. § 1251. And under the Porter-Cologne Act, a request for water quality certification must describe, and the State Water Board must consider, “... steps that have been or will be taken to avoid, minimize, or compensate for any anticipated adverse effects ...” on beneficial uses. 23 C.C.R. § 3856(h)(6).

Contact and non-contact recreation are designated beneficial uses of the North Fork Feather including the Project reaches. By continuing to divert water for power generation, the Applicant Proposal would reduce by 95% the number of boatable days during summer months. Butte County, NREA Comments, pp. 19-20 and Attachment 4; IS/MND, p. 12. The IS/MND does not find that any of the alternatives would avoid, minimize, or compensate for that impact.

The IS/MND does not expressly address the alternative proposed by Butte County in our comments. See Butte County, “Recommended Conditions for a New License” (eLibrary 200504115081 (April 11, 2005) (“NREA Comments”); “Amended Comments on Draft Environmental Assessment” (eLibrary 200609195052) (September 19, 2006) (“DEA Comments”); and Water and Power Law Group PC, memoranda to State Water Board, “Proposed Conditions for the Poe Project” (August 2, 2013) and “Proposed Non-Flow Recreation Measures for the Poe Project” (October 18, 2013). The County’s alternative includes a flow schedule sufficient for boating at least one weekend per month in July, August, September, and October, and associated improvements in recreational facilities, in order to establish a robust ecotourism use of the North Fork Feather.

The IS/MND offers an implicit rationale for not considering measures to minimize the Project impacts on recreation. It states: “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. This rationale is inconsistent with applicable laws, if it means that any enhancement in baseline conditions would suffice in this relicensing proceeding. We discuss CEQA and the Porter-Cologne Act, above. Similarly, under the Federal Power Act, a 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). A continuing impact which first arose under the original license is not a given – indeed, is subject to the requirement to avoid, minimize, or compensate - in this relicensing proceeding.

In other relicensing proceedings, the State Water Board has required consideration of feasible measures to address continuing impacts of power generation. The Board has defined “CEQA project objectives” to include modification or even removal of a project as needed to comply with water quality objectives. See “Notice of Preparation and of Scoping Meetings for an Environmental Impact Report,” Klamath Hydroelectric Project (FERC no. 2082), pp. 5-7. Similarly, the Board has required consideration of fish passage facilities as mitigation for a project’s continuing blockage of volitional passage. See “Study Requests and Comments on Pre-Application Document,” Potter Valley Project (FERC no. 77) (September 4, 2017), Attachment B, p. 1.

The North Fork Feather is listed as impaired for water temperature under Clean Water Act section 303(d), due to PG&E's hydropower system. The IS/MND correctly concludes that the flow schedule in DWQC Condition 1 would lower water temperatures relative to the original license. See, e.g., pp. 9, 26, and 44. However, it does not estimate resulting water temperatures (expressed as averages, ranges, or frequencies); does not demonstrate that the Project would comply with applicable water quality objectives, including the designation as coldwater habitat or the requirement that an activity (such as the new license) must not increase receiving water temperature by more than 5 degrees Fahrenheit; and does not demonstrate that the State Water Board Staff Measures would avoid, minimize, or compensate for the Project's continuing impacts on water temperatures. The IS/MND does not address the cumulative impacts of PG&E's hydropower system on water temperatures in Project reaches. For prior analysis of this impact, see Butte County, DEA Comments, Exhibit 1; California Sportfishing Protection Alliance, "Comments on the Draft Environmental Impact Report for the North Fork Feather Project" (March 26, 2015).

### **Analysis of Significance of Impacts**

CEQA requires disclosure of the reasons for finding that a potentially significant impact is not significant. 14 C.C.R. § 15063(c)(3)(C). In finding that the Project as modified by State Water Board Staff Measures would not have significant impacts on recreation and water temperature, the IS/MND appears to rely on the rationale that continuing impacts would decrease by comparison to baseline. That rationale could improperly permit the State Water Board to certify a new license which would violate water quality objectives, as long as the violations are less than baseline. In addition to the requirements of the CEQA and the Porter-Cologne Act, the Clean Water Act section 401(a) provides that a certification must provide a reasonable assurance of compliance with water quality objectives. 33 U.S.C. § 1341(a).

### **Analysis of Alternative Mitigation Measures**

CEQA requires comparative analysis of alternative mitigation measures for an impact. 14 C.C.R. § 15126.4(a)(1)(B). As discussed in our July 14, 2017 comments, the IS/MND does not specifically analyze the County's proposal of a flow schedule, certain facility improvements (such as a new trail from Bardees Bar Road to Poe Beach), funding for law enforcement related to recreation, the North Fork Feather Enhancement Fund (for off-site mitigation), and other measures to avoid, minimize, and compensate for the Project's continuing impacts on recreation. See NREA Comments, pp. 4 - 22. To emphasize one example, the IS/MND does not analyze a maintenance measure to correct the erosion and other degradation resulting from PG&E's use of Bardees Bar Road. See Butte County, DEA Comments, Exhibit 17. Attachment 1 shows the marginally passable conditions of the road. That said, we are very grateful for the several facility improvements proposed in DWQC Condition 8.

DWQC Condition 6 provides for an advisory group to meet to develop a permanent recreation flow schedule. We will participate in such a group. However, the IS/MND does not explain why 6,000 acre-feet per year would be sufficient for protection of this beneficial use, or

why the State Water Board has not resolved the terms of this flow schedule while this proceeding has been pending. The potential conflict between power, recreation, and foothill yellow-legged frogs has been discussed at length during that period; and the implementation of the new license for the Rock Creek-Cresta Project has provided helpful guidance how to square these uses. CEQA prohibits deferral of mitigation measures until a future time. 14 C.C.R. § 15126.4(a)(1)(B).

### Conclusions

Butte County supports the State Water Board's convening a workshop to address disputed factual and legal issues. We are confident that the issues raised above are resolvable in an expeditious manner, in light of the extensive record in this proceeding, the available models, and the helpful stakeholder discussions over the past 15 years.

Butte County supports relicensing this Project. That said, we request that the water quality certification avoid, minimize, or compensate for the Project's continuing impacts on recreation and coldwater fisheries, along with other beneficial uses. We seek to establish robust ecotourism use of the Project reaches. Beginning in 2005, we have submitted extensive expert evidence that that result is consistent with economical and reliable power generation. See, e.g., NREA Comments, Attachment 6.

Thank you for considering these comments.

Respectfully submitted,

Bruce Alpert  
Butte County Counsel



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Counsel for Butte County

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Attachment 1. Bardees Bar Road (October 11, 2017)

Cc: Service list, P-2107

**Attachment 1**  
**Bardees Bar Road (October 11, 2017)**





