

July 14, 2017

VIA ELECTRONIC MAIL (Nathan.Fisch@waterboards.ca.gov)

Mr. Nathan Fisch
State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Draft Water Quality Certification for Pacific Gas and Electric Company's Poe Hydroelectric Project, FERC Project No. 2107

Dear Mr. Fisch:

Pacific Gas and Electric Company ("PG&E") hereby respectfully submits comments on the June 14, 2017 Draft Water Quality Certification ("DWQC") issued by the State Water Resources Control Board ("SWB") for PG&E's Poe Hydroelectric Project, FERC Project No. 2107 ("Poe" or "Project"). The DWQC was issued in response to PG&E's June 27, 2016 application for a water quality certification ("WQC") for the Project pursuant to Section 401(a)(1) of the Clean Water Act ("CWA") (33 U.S.C. § 1341(a)(1)).

As discussed below, PG&E has concerns with some statements included in Parts 2 (Regulatory Authority) and 3 (Rationale) of the DWQC and with several of the conditions set forth in the DWQC ("Draft Conditions").

I.

COMMENTS ON PART 2 (REGULATORY AUTHORITY) AND PART 3 (RATIONALE)

A. Section 2.2: Water Quality Standards and Water Quality Control Plans

This section of the Regulatory Authority discussion states as follows:

The State Water Board has listed the North Fork Feather River, upstream of Lake Oroville, on the Clean Water Act Section 303(d) list. The North Fork Feather River is impaired for temperature.

PG&E requests that the SWB provide clarification of the basis for classifying the lower elevation sections of the North Fork Feather River ("NFFR") as temperature impaired.

Specifically, has the SWB taken into account the fact that climate change is resulting in warmer water temperatures? If the warming trend associated with climate change continues, the temperature regime in the NFFR will change considerably during the course of the new license for the Project, and it will be impossible to achieve any of the current 'cold water' targets. As such, any operational manipulations at Poe Dam will not lower water temperatures downstream of the Dam. As noted in the DWQC itself (at page 5), even the Federal Energy Regulatory Commission's ("FERC") 2007 Final Environmental Assessment ("EA") on the new license for Poe determined (at page 239) that increased instream flows would have only a limited ability to address water temperature concerns.

B. Section 3, 1st Paragraph: Rationale Introduction

The opening paragraph of the Rationale states as follows:

When preparing the conditions in this certification, State Water Board staff reviewed and considered (a) PG&E's final FERC license application; (b) comments on the final license application submitted by agencies and interested parties; (c) United States Forest Service (Forest Service) 4(e) Conditions (16 U.S.C. § 797(e)); (d) FERC Environmental Assessment (EA) prepared pursuant to the National Environmental Policy Act (42 U.S.C §§ 4321 et seq.); (e) PG&E's application for water quality certification; and (f) comments by interested parties.

This statement does not indicate whether the SWB considered the increasing evidence of a warming climate and extreme precipitation events, and a reduction in the snow pack. All of these have, in the past two decades, been increasingly reported in the scientific literature. PG&E requests that the SWB clarify whether such information was considered in preparing the Draft Conditions.

C. Section 3, 2nd Paragraph: Rationale Introduction

The second paragraph of the introductory portion of the Rationale states in part as follows:

Any conditions that require development of a plan will require review, modification (if necessary), and approval by the Deputy Director. In addition, other regulatory agencies have specific authorities to approve plans and reports.

PG&E appreciates the SWB's recognition that other agencies like FERC may also have to approve plans and reports. However, PG&E is concerned that the Draft Conditions do not always recognize this possibility and the fact that PG&E will not be able to implement plans and reports approved by the Deputy Director unless and until FERC (and possibly other agencies)

has also approved them. As the SWB should be aware, when FERC issues licenses containing mandatory conditions from WQCs, FERC includes an article in the licenses requiring any plans/reports required by those WQC conditions to also be submitted to FERC for its review, possible amendment, and approval, with the expectation that such plans/reports not be implemented until that FERC process is completed. Condition 3 of the Draft Conditions (at page 13) includes language specifying that PG&E is not expected to implement the plan referenced therein until other necessary regulatory approvals are obtained (“The Licensee may implement the revised operation plan upon receiving Deputy Director and other necessary regulatory approvals.”). However, other conditions of the Draft Conditions do not contain such clarifying language. To avoid confusion, and to avoid the possibility of PG&E being found in violation of the conditions included in the final WQC issued by the SWB for Poe by not implementing plans/reports approved by the Deputy Director while awaiting FERC and other necessary regulatory approvals, PG&E requests that the SWB add to that final WQC either as a separate condition or in the preamble to the conditions a statement indicating that PG&E will not be required to implement plans/reports required by any condition unless and until it has received any necessary approvals thereof by FERC and other regulatory authorities.

D. Section 3.1: Minimum Instream Flows

This section of the Rationale states as follows (emphasis added):

In 2006, as part of comments on the Draft EA, resource agencies participating in the relicensing process requested that FERC evaluate all new information and proposed flow regimes. This included higher instream flow proposals to support cold water fisheries, as a result of the 2006 303(d) listing of the North Fork Feather River for temperature. *FERC’s 2007 Final EA included an increased instream flow schedule that would increase the weighted usable area (WUA) for many aquatic resources, but would not address the water temperature concerns in the Poe bypass reach.*

The variable instream flow requirements outlined in Condition 1 are expected to lower mean daily temperatures and create a thermal and geomorphic dynamic similar to the historical record of the North Fork Feather River.

The above conclusion that the Condition 1 instream flows are expected to lower mean daily water temperatures contradicts FERC’s 2007 Final EA, as noted above. PG&E requests that the SWB provide clarification on the analysis that it used to draw the conclusion that the flow requirements outlined in Condition 1 are expected to lower mean daily water temperatures. Further, PG&E requests that the SWB provide clarification as to the meaning of “thermal and geomorphic dynamic” as used above and specifically identify the referenced “historical record.”

E. Section 3.2: Water Year Types

This section of the Rationale states as follows:

Climate change has the potential to increase ambient temperatures and affect precipitation patterns in California. This potential change in timing and availability of water resources may make it necessary to revise water year type criteria during the 30-50 year license term.

PG&E notes that climate change could also warrant a revision of the Section 303(d) listing (temperature impaired). PG&E requests that the SWB clarify how the SWB plans to assess and potentially revise the Section 303(d) listing of the NFFR in the future, given the documented and ongoing impacts of a warming climate.

F. Section 3.5: Ramping Rates

This section of the Rationale states as follows:

PG&E will be required to operate the Project to mimic the non-Project recession flows of the East Branch of the North Fork Feather River.

PG&E requests that the SWB provide clarification on what aspect of the recession flows will need to be mimicked (*i.e.*, pattern, magnitude, duration, timing recession rate). PG&E also requests clarification as to whether this must be done in real time.

G. Section 3.9: Poe Bypass Reach Biological Monitoring

This section of the Rationale states as follows:

Increased flows are expected to lower the summer mean daily temperature in the Poe bypass reach.

PG&E requests that the SWB specifically identify the source of the information supporting this statement.

H. Section 3.11: Riparian Vegetation Monitoring Plan

This section of the Rationale states as follows:

Returning the Poe bypass reach to a more natural instream flow regime is expected to reduce water temperatures, mimic past geomorphic processes, and reduce riparian encroachment (Mount, 1995).

PG&E requests that the SWB clarify whether the Mount 1995 reference specifically addresses the Poe bypass reach, as implied in the above sentence. If it does not, PG&E requests that this sentence be removed.

II.

COMMENTS ON DRAFT CONDITIONS

A. Draft Condition 1, 2nd Paragraph

This paragraph states in part as follows:

The minimum instream flow requirements (outlined in Condition 1) are subject to temporary modification if required by equipment malfunction, as directed by law enforcement authorities, or in emergencies.

PG&E is concerned that the above list of allowable activities for temporary modifications does not specifically reference FERC-ordered activities, such as FERC-required testing and/or maintenance of large spill gates at the dam. For example, 5-year full-travel testing of spill gates and/or annual part-travel testing of the gates required by FERC could result in a “temporary modification” of stream flows under this provision. In order to address this possibility, PG&E requests that the above-quoted sentence be revised by inserting “or by FERC” after “law enforcement authorities”.

B. Draft Condition 4, 1st Paragraph

This paragraph provides in part as follows:

The Sediment Management Plan shall outline goals and objectives for the management of fine-grained sediment and organic material within the Poe bypass reach, including implementation of pulse flows.

This language is inconsistent with Condition 24, Part 3 (Sediment Management in the North Fork Feather River) of the set of final mandatory conditions the United States Forest Service (“USFS”) submitted to FERC on May 28, 2007, pursuant to Section 4(e) of the Federal Power Act (“FPA”) (16 U.S.C. § 797(e)). To conform Draft Condition 4 to the text of the USFS § 4(e) condition, PG&E requests that Draft Condition 4 be modified by inserting therein the italicized text below:

The Sediment Management Plan shall outline goals and objectives for the management of fine-grained sediment and organic material

in riffles and spawning sized stream substrate within the Poe bypass reach, including implementation of pulse flows.

Identifying riffles and spawning substrate properly narrows the focus of the plan to the impacts of the Project on spawning habitat.

C. Draft Condition 4, 2nd paragraph

This paragraph provides in part as follows:

Baseline monitoring shall occur the year following development of the Sediment Management Plan. The initial baseline sediment accumulation monitoring shall be performed three- to six-months following a flow event with a mean daily magnitude of at least 2000 cfs.

PG&E requests that the SWB clarify whether the referenced flow event can be either a natural or operations-created pulse flow event with a mean daily magnitude of at least 2000 cfs.

D. Draft Condition 4, 1st Bullet in 2nd Paragraph

This bullet provides as follows:

The pulse flow shall be implemented before the temperature of the North Fork Feather River exceeds 10°C mean daily water temperature at Gage 23 on two successive days.

For clarity, PG&E suggests modifying this sentence to read as follows: “The pulse flow shall not be implemented after the temperature of the North Fork Feather River exceeds 10°C mean daily water temperature at Gage 23 on two successive days.”

E. Draft Condition 4, 2nd Bullet in 2nd Paragraph

This bullet provides as follows:

For the protection of FYLF populations, the pulse flow shall occur prior to the onset of frog breeding in the Poe bypass reach.

PG&E suggests qualifying the onset of the frog breeding season as starting when water temperature in the Poe bypass reach exceeds 10 °C.

F. Draft Condition 5

As drafted, Draft Condition 5 does not recognize that PG&E may not be able to maintain the specified ramping rates when it is restoring the radial gates at Poe Dam. To address this issue, PG&E requests that the following provision be added to the condition:

Ramping rates do not apply when the radial gates are being restored to normal position. For example, after a storm event when the powerhouse has been shut down and the gates were raised, it is necessary to restore the elevation of the reservoir before generation from the units can be reinitiated. While the radial gates are being lowered, Licensee shall minimize large fluctuations in flows by restoring the radial gates in a short period of time (e.g., less than 6 hours).

This language is comparable to a provision included in the license for PG&E's upstream Rock Creek-Cresta Project No. 1962. See *Pacific Gas and Electric Co.*, 149 FERC ¶ 62,164 (footnote 1 to Table A.3) (2014).

G. Draft Condition 5, 1st Paragraph

This paragraph states in part as follows (emphasis added):

Where facility modification is required to implement the requirements of this condition, the Licensee shall complete such modifications as soon as reasonably practicable and *no later than two years* after license issuance.

This language is inconsistent with Condition 24, Part 5 of the USFS' May 28, 2007 set of §4(e) conditions. To conform Draft Condition 5 to the text of the USFS § 4(e) condition, PG&E requests that the emphasized language above be changed to read "*no later than three years.*"

H. Draft Condition 5.3(a)

This portion of the condition provides as follows:

Pressure Relief Valves (PRVs). Use the existing PRVs at the Poe Powerhouse for short durations (no more than 48 hours). If use of the PRVs are needed for longer durations, the Licensee shall evaluate whether any repairs/upgrades are needed to use the PRVs for longer durations. Any such evaluation shall be provided to the Deputy Director.

Meeting the requirements of this provision may not always be possible. The need to suddenly bypass water is likely caused by a unit trip at Poe Powerhouse. Depending upon the nature of the

outage, the PRV may or may not be available. Also, the PRV cannot be operated remotely, so an operator must be in the powerhouse at the time of operation. Depending on the circumstances, it could take several hours for a dispatched operator to arrive at the powerhouse. While PG&E does not object to the practice of using the PRV in these situations, its use should be considered a “Best Practice,” and PG&E should be required to use the PRV only when reasonably possible.

I. Draft Condition 5.3(c)(i)

Draft Condition 5.3(c)(i) provides as follows:

In the event that a generator upstream of the Project is lost, the Licensee shall coordinate operations upstream as practicable so the flows in the Poe bypass reach continue with minimal fluctuations.

The above-referenced provision is outside the SWB’s authority under § 401(a)(1) of the CWA and should be deleted. Specifically, this provision would impose requirements on PG&E with respect to operations of a project other than Poe (*i.e.*, PG&E’s upstream Rock Creek – Cresta Project No. 1962). The SWB, however, cannot use conditions in a WQC for Poe to impose requirements at Rock Creek – Cresta, since the activity and discharges for which PG&E is currently seeking a WQC pertain solely to Poe. That the exercise of mandatory conditioning authority at a project cannot be used to impose requirements at a different project has been confirmed by FERC, which in 1994 deleted from PG&E’s license for its Phoenix Project No. 1061 a condition submitted by the USFS for that project pursuant to § 4(e) of the FPA because the condition impermissibly set minimum flows at a different PG&E project. *See Pacific Gas and Electric Co.*, 69 FERC ¶ 61,070 (1994). For this reason, Draft Condition 5.3(c)(i) should be deleted.

J. Draft Condition 5.3(c)(ii)

This provision provides as follows:

In the event that Poe Powerhouse is lost, the Licensee shall use the PRV at Poe Powerhouse as practicable to bypass water until the Licensee has adjusted diversion at Poe Dam to stabilize flow in the Poe bypass reach.

Again, this may not always be possible. The need to suddenly by-pass water is likely caused by a unit trip at Poe Powerhouse. Depending upon the nature of the outage, the PRV may or may not be available. Also, the PRV cannot be operated remotely, so an operator must be in the powerhouse at the time of operation. Depending on the circumstances, it could take several hours for a dispatched operator to arrive at the powerhouse. While PG&E does not object to the practice of using the PRV in these situations, its use should be considered a “Best Practice,” and PG&E should be required to use the PRV only when reasonably possible.

K. Draft Condition 6, last Paragraph

This paragraph provides in part as follows:

The Licensee shall notify the RTRG within 120 hours of when a recreation flow release is postponed due to a temporary flow modification (Condition 1).

This provision is inconsistent with the Condition 27, Part 4 of the USFS' May 28, 2007 set of §4(e) conditions, which provides as follows:

A. Emergencies: In the event of an Emergency as defined in Condition 24 Part 1. "Minimum Streamflows", Licensee may postpone any scheduled recreation river flow release. Licensee shall provide as much notice as reasonably practicable under the circumstances.

B. Postponed Recreation River Flows: To the extent reasonably practicable, Licensee shall reschedule postponed recreation river flow releases as recommended by the TRG and Forest Service.

This § 4(e) condition was written to give PG&E flexibility to respond in the case of an emergency. PG&E requests that the SWB remove the 120-hour requirement set forth in Draft Condition 6 and revise the final Condition 6 to make it more consistent with the referenced USFS § 4(e) condition.

L. Draft Condition 11

This condition provides in part as follows:

Within six months of license issuance, the Licensee shall prepare, in consultation with the State Water Board and the Forest Service, a riparian monitoring plan for the Poe bypass reach.

PG&E requests that the six-month period in Draft Condition 11 to develop the plan be extended to 1 year and suggests that the above-referenced Condition 11 language be revised for the final version of the condition to read as follows:

Within 1 year of license issuance, the Licensee shall provide a riparian monitoring plan for the Poe Bypass reach to the State Water Board. This document shall be prepared in consultation with the State Water Board and the Forest Service.

Condition 11 also provides as follows:

Surveys shall be conducted in years 1-4 following the implementation of the updated flow schedule. Following Year 4, monitoring shall be conducted at five year intervals unless other intervals are deemed necessary by the Deputy Director to evaluate the effects of flow changes on riparian vegetation.

PG&E requests that the SWB reconsider the requirement to monitor every year for the first 4 years of implementation of the updated flow schedule. Because riparian processes are long term and changes occur slowly, it will likely take at least until year 4 to adequately assess change, and annual variability may confound the analysis. PG&E also recommends an initial baseline-monitoring year following the approval of the plan, followed by monitoring every 5 years thereafter.

M. Draft Condition 23

Draft Condition 23 includes a purported reservation of authority “to add to or modify the conditions of this water quality certification to implement a total maximum daily load developed by the State Water Board or the Central Valley Regional Board.” However, Draft Condition 23 does not reference any statute authorizing this reserved authority. The State's effort to retain jurisdiction as stated in this Draft Condition would allow the SWB to change unilaterally the requirements of PG&E's FERC license for Poe, in violation of the FPA. Such reservation of authority appears to contravene the express terms of the FPA, which provides in relevant part that “Licenses . . . may be altered . . . only upon mutual agreement between the Licensee and the Commission. . . .” 16 U.S.C. § 799. Therefore, PG&E recommends that this Draft Condition be removed or substantially re-drafted to conform to the SWB's statutory authorities in connection with the issuance of a WQC under the CWA.

N. Draft Condition 24

Draft Condition 24 includes a purported reservation of authority to add to or modify the WQC under certain stated circumstances in the future. However, Draft Condition 24 does not reference any statute authorizing this reserved authority. As noted above, the State's effort to retain jurisdiction as stated in this Draft Condition would allow the SWB to change unilaterally the requirements of PG&E's FERC license for Poe, in violation of the FPA. Therefore, PG&E recommends that this Draft Condition be removed or substantially re-drafted to conform to the SWB's statutory authorities in connection with the issuance of a WQC under the CWA.

O. Draft Condition 25

Draft Condition 25 includes a purported reservation of authority to modify the WQC as a result of a change in baseline assumptions caused by future climate change. However, Draft Condition 25 does not reference any statute authorizing this reserved authority. Again, the State's effort to retain jurisdiction as stated in this Draft Condition would allow the SWB to change unilaterally the requirements of PG&E's FERC license for Poe, in violation of the FPA. Furthermore, it is not appropriate to require PG&E to potentially mitigate for a harm to which

the Project is not contributing. There must be some nexus between a WQC condition and a project effect that is contributing to the identified harm. The required nexus is lacking here, since it has not been demonstrated that the Project is a cause of climate change. Therefore, PG&E recommends that this Draft Condition be removed or substantially re-drafted to conform to the SWB's statutory authorities in connection with the issuance of a WQC under the CWA and to recognize the referenced lack of a nexus.

P. Draft Condition 26

Draft Condition 26 requires compliance with “all applicable requirements of the SR/SJR Basin Plan.” It is unfair and inappropriate for a future 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 may be changed from time to time.

Furthermore, in *East Bay Municipal Utility District et al. v. State Water Resources Control Board et al.*, Alameda County Case No. RG 10512151, the SWB argued – and the court agreed – that Basin Plan provisions assigning mass-based numerical waste load allocations to named dischargers “do not by themselves prohibit any conduct or require any actions on the part of dischargers. They merely set goals. What dischargers are required to do is *specified* in the waste discharge permits (NPDES permits) that they are required to obtain from Regional Water Boards.” SWB’s December 22, 2010 Brief on the Merits, 7:11-13 (emphasis added). Thus, the SWB took the position that there could be no enforcement jeopardy associated with the Basin Plan unless and until *specific* requirements were articulated in a future approval issued to the discharger. Here, the “future approval” – a CWA § 401 WQC – does not have the requisite *specificity* to put PG&E on notice of “[w]hat dischargers are required to do.”

It is PG&E’s understanding, then, that the Basin Plan’s primary purpose is to provide guidance to permit writers as to what measures to incorporate into a permit; it is not itself intended primarily as a compliance document. Consequently, PG&E questions the propriety of purporting to incorporate wholesale “all applicable requirements” of the Basin Plan into the WQC for Poe.

The SWB agreed to delete this type of draft condition from WQCs for other PG&E hydroelectric projects. PG&E requests that Draft Condition 26 similarly be deleted here as well.

Q. Draft Condition 27

Draft Condition 27 requires PG&E to operate the Project in a manner consistent with all water quality standards and implementation plans adopted or approved pursuant to Section 303 of the CWA, and to take all reasonable measures to protect the beneficial uses of waters of the NFFR. It is unfair and inappropriate for a future compliance determination to hinge on such broad and undefined requirements. PG&E requests that Draft Condition 27 be deleted or more specifically clarified.

R. Draft Condition 34

Draft Condition 34 states that the “Deputy Director and the Executive Officer shall be notified one week prior to the commencement of ground disturbing activities.” PG&E requests that the SWB clarify the scope of this requirement, since “ground disturbing activities” can range from very minor activities to those that require permits. A sweeping notification condition can hinder the scheduling and performance of minor project activities and put PG&E at risk of non-compliance. PG&E suggests limiting the notification requirement to activities for which a permit pertaining to water quality is required.

S. Draft Condition 35

Draft Condition 35 purports to make the WQC subject to modification or revocation upon judicial or administrative review. Section 401 of the CWA does not allow a water quality certification to be withdrawn once it is issued. Therefore, this Draft Condition is contrary to the CWA and should be removed from the WQC for this Project.

III.

CONCLUSION

PG&E would like to thank the SWB for the opportunity to submit these comments and welcomes the opportunity to discuss them with the SWB. It is PG&E’s hope that it can continue to work cooperatively with the SWB to achieve reasonable solutions that fulfill all necessary water quality requirements while protecting existing beneficial uses, including the continuation of a clean, reliable, and economic energy source for California.

If you have any questions regarding these comments and/or would like to schedule a meeting to discuss them, please contact Annette Faraglia at arf3@pge.com or (415) 973-7145 or John Klobas at john.klobas@pge.com or (530) 335-5653.

Respectfully submitted,


John A. Whittaker, IV

Attorney for Pacific Gas & Electric
Company

cc: Annette Faraglia
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