

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

In the matter of Water Quality Certification for
the PACIFIC GAS AND ELECTRIC
COMPANY Poe Hydroelectric Project
(Federal Energy Regulatory Commission Project
No. 2107)

**PACIFIC GAS AND ELECTRIC COMPANY'S
RESPONSE TO BUTTE COUNTY'S PETITION FOR RECONSIDERATION
OF WATER QUALITY CERTIFICATION**

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I. INTRODUCTION

In accordance with 23 California Code of Regulations (“CCR”) § 3867.1, Pacific Gas and Electric Company (“PG&E”) hereby files this Response to the Petition for Reconsideration (“Petition”) filed by Butte County (“Butte”).

In its Petition, Butte agrees that the State Water Resources Control Board (“State Board”) used the proper “existing conditions” baseline for assessing project impacts under the California Environmental Quality Act (“CEQA”), Pub. Resources Code sections 21000 *et seq.* (See Petition at 1, 3.) Having conceded that argument, Butte nevertheless criticizes the Board for focusing on this baseline in its CEQA proceedings, asserts without support that another baseline applies to the Water Quality Certification (“WQC”) itself, ignores the extensive analysis and mitigation of ongoing project effects by both the Federal Energy Regulatory Commission (“FERC”) and the State Board, and fails to recognize that hydroelectric power generation is also a designated beneficial use for the North Fork Feather River, to be balanced under both federal and state law with other, competing beneficial uses.

The only thing new in Butte’s Petition for Reconsideration is Butte’s concession that the State Board used the proper baseline for CEQA analysis.¹ The other claims in Butte’s Petition were considered and rejected by both FERC and the State Board during their respective

¹ In doing so, Butte has dropped its claim of a separate “substantive duty” under CEQA Guidelines section 15021(a) that allegedly trumps the CEQA baseline rules (See Butte 10-11-17 Mitigated Negative Declaration (“IS/MND”) comment letter, at 1), a position unsupported by other language in the same Guideline (*see, e.g.*, § 15021 (c)) and rejected by the California Supreme Court in its latest CEQA baseline cases (*see, e.g., Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 57 Cal.4th 439, 448 (2013) and cases cited therein).

environmental reviews of the proposed relicensing project. (*See* State Board’s Draft Responses to Comments on the MND, December 2017, at 1-3 (clarifying that the MND does not fail to consider any potential impacts of the Project and that additional conditions suggested by Butte are not required); *see generally* FERC’s March 2007 Final Environmental Assessment (“EA”)² at 149-183 and 251-256; 163-165, 252 (rejecting Butte’s request for a new trail between Bardee’s Bar and Poe Beach), 182-183, 252-254 (rejecting Butte’s request for a North Fork Feather Enhancement Fund), and 177-182, 252, 254-255 (rejecting Butte’s recreational flow release proposal).) Both FERC and the State Board carefully considered Butte’s arguments, accommodating many concerns as Butte itself admits (Petition at 1, 5-6), before arriving at the balance between competing beneficial uses reflected in the final EA, MND and WQC. The WQC directly addressed the concerns raised by Butte and fully complies with the Clean Water Act, the Porter-Cologne Act, and corresponding regulations.

As Butte offers no new evidence or legal authority to justify a further rebalancing of beneficial uses already weighed by FERC and the State Board, its Petition should be denied.

II. RESPONSE

A. The State Board Used the Proper Standard of Review in Issuing the WQC

Butte’s claim that the State Board is required to ensure that the activity “will *enhance* beneficial uses of these waters” (Petition at 1) is simply not correct. Section 401 of the Clean Water Act (33 U.S.C. §1341) requires every applicant for a federal license that may result in a discharge into navigable waters to provide the licensing federal agency with certification that the project will be *in compliance with* specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313). In California, the State Board is required to ensure that the ‘activity’ – here a FERC relicensing – complies with all water quality standards and to consider steps that have been or will be taken to avoid, minimize, or compensate *for loss of or significant adverse impacts to* beneficial uses of waters of the state. (23 CCR, § 3856(h)(6).) Once

² Butte’s dismissal of the FERC EA as “a 10-year-old document which FERC produced under the Federal Power Act” (Petition at 6) is odd, given that the EA is from the same licensing process at issue here and that PG&E applied for the WQC required for the federal license in 2005. Butte offers no evidence that the conclusions in the federal EA are inaccurate or outdated. The State Board can properly rely upon and cite with approval FERC’s analysis of project impacts to independently determine whether the project will comply with Clean Water Act and other requirements.

considered, the State Board is required to add conditions “if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements” and to provide “*reasonable protections*” for designated beneficial uses – including hydroelectric power generation – pursuant to applicable Water Quality Control Plan and other requirements. (See 23 CCR, § 3859; Water Code §§ 13241, 13050(f) and (h).) As described further below, the State Board has met these standards, has specifically addressed Butte’s claims and concerns, and has issued a comprehensive WQC that protects beneficial uses and ensures compliance with water quality standards.

Butte’s main contention is that the WQC does not incorporate all of the specific measures it has requested over the years. Butte supplies no new evidence or authority to suggest that these conditions are necessary to ensure compliance with water quality standards (see 23 CCR § 3859), or that beneficial uses have not been properly examined. The State Board is not required to – and should not – use the certification process as a vehicle to fix all problem that may exist on a particular waterway; it is required to confirm whether the proposed discharge activity complies with applicable water quality standards and to reasonably protect beneficial uses, which it has gone to great lengths to do in this certification process.

B. Butte’s Backdoor Baseline Argument Is Unsupported

Butte acknowledges that “the Certification will enhance water quality relative to the analytical baseline under CEQA,” but suggests that some higher standard is required in the WQC forum. (Petition at 1-3.) Butte urges the State Board to consider the environment occurring prior to the first hydroelectric dam at this location to justify certain conditions it wants added to the WQC. However, the suggestion that the environmental baseline should include historical pre-project conditions is not supported by either federal or California law.

In *American Rivers v. FERC*, 201 F.3d 1186, 1195-99 (9th Cir. 1999), the Ninth Circuit made it clear that agencies need not employ a pre-project baseline of the river’s environment to evaluate a FERC relicensing. The court indicated that it would be more “reasonable. . . for the Commission to conduct its ‘evaluation and consideration of the appropriateness of requiring enhancement measures . . . in the context of today’s environment and not in the context of the world as it existed 50 years ago.’” (201 F.3d 1186, 1198). The court went on to clarify that the Federal Power Act “does not mandate that all past damage to fish and wildlife caused by a project . . . be ‘mitigated’ in a relicensing proceeding.” (*Id.*; see also 54 Fed. Reg. at 23,792;

Conservation Law Foundation v. FERC, 216 F.3d 41, 45-46 (D.C. Cir. 2000) (affirming FERC's decision to use current conditions as the environmental baseline, not a pre-project baseline.)

The *American Rivers* court also clarified the limited application of *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC* (“*Yakima*”), the case cited by Butte for the proposition that “[e]ach relicensing proceeding results in a new decision whether a project will continue its power operations.” (Petition at 3; 746 F.2d 466, 476 (9th Cir. 1984).) The Ninth Circuit stated: ‘*Yakima* at most imposes on the Commission the duty to consider and study the environmental issues before granting a license. . . . *Yakima* simply endorses the unstartling principles that an agency must establish a record to support its decisions and that a reviewing court, without substituting its own judgment, must be certain that the agency has considered all factors required by the statute. (*American Rivers*, 201 F. 3d 1186, 1199; *see also* *DOI v. FERC* 952 F.2d 538, 546 (D.C. Cir. 1992).)

In any case, there is no similarity between the State Board's actions here and those of FERC in *Yakima*. In *Yakima*, FERC issued a new 40-year license to operate a hydropower project without holding hearings on the relicensing or pursuing environmental review, deferring resolution of fisheries issues to a 5-year study in a parallel proceeding. In contrast, the State Board here issued the WQC for the Poe project only after completing a comprehensive analysis of all factors related to beneficial uses *including those proffered by Butte*, and establishing a detailed record to support its finding that the activity would comply with water quality objectives. Butte does not provide any new evidence to suggest otherwise.

Nor does Butte offer any California legal precedent to support abandoning the baseline required by CEQA, which Butte acknowledges is based on existing conditions (Petition at 3). The State Board weighed all relevant factors under the California Water Code in concluding that the project complies with water quality standards and reasonably protects beneficial uses. The Board also properly followed CEQA law. Any suggestion by Butte that *more* requirements should be imposed on PG&E based on an historic baseline for certain uses flouts the well-settled principle that the activity to be certified must be viewed in terms of the existing baseline, which includes current environmental conditions. (*See. e.g., In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th 1143, 1167-1168 (2008) (existing problems are part of the environmental baseline rather than impacts to be addressed by the project).)

C. The WQC Minimizes the Continuing Impacts of Project Operations on Designated Beneficial Uses

Butte's primary complaint is that "Staff have not shown that the Certification will minimize³ the continuing impacts of Project operation on designated beneficial uses." (Petition at 4). This is simply not the case. The WQC discussed the continuing impacts of project operations in detail and, in some cases, considered impacts of past operations when designing its flow schedule. (*See* WQC, at 6-8.) For example, the State Board analyzed the sedimentation resulting from past operations and included a pulse flow condition to address this potential continuing impact. (*Id.* at 7-8, and Condition # 4.) Moreover, the Board analyzed potential ongoing impacts to beneficial uses, and included a flow regime – recommended in part by Butte – to protect certain beneficial uses. The State Board also properly relied on the extensive analysis performed by FERC during its licensing proceedings, which resulted in "recommended measures to mitigate the ongoing effects of the project." (*See* FERC Final EA, at C-25, Resp. #59.) It is disingenuous for Butte to now suggest that the State Board did not address the continuing impacts of project operations on designated beneficial uses.

1. Cold Water Habitat Will Be Protected

Butte raises concerns regarding cold water habitat impacts and suggests that the WQC does not meet the narrative objective in the applicable Water Quality Control Plan requiring that "the natural receiving water temperature . . . not be altered unless it can be demonstrated to the satisfaction of the Regional Water Board that such alteration in temperature does not adversely affect beneficial uses." (*See* Petition at 4; Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (July 2016), at III-8.) State Board staff has been analyzing the impacts associated with changes in water temperatures in the Poe Bypass Reach since 2006, when water temperature was identified as an impairment to the North Fork Feather River. The State Board incorporated a number of conditions into the WQC to ensure the protection of cold water habitat and to avoid any significant adverse effects from changes in water temperature associated with ongoing project activities. Conditions #1 and #2 in the WQC implement a detailed flow regime to "better mimic the unimpaired annual hydrograph of the North Fork Feather River" (WQC, at 6). These greater instream flows "will reduce water temperatures for cold freshwater habitat during the summer and improve the [weighted usable area] for native fish

³ Butte indicates in fn 2 that, for "simplicity" it is using "minimize" to refer to "avoid, minimize or compensate for."

species while providing for hydropower generation.” (WQC, at 7.) As acknowledged in the Petition, this flow schedule is identical to Butte’s flow proposal and will enhance existing conditions. (Petition at 5, fn 4.) Condition #5 requires ramping flows to protect aquatic resources (WQC, at 17). Condition #9 requires biological monitoring in Poe Bypass Reach and Condition #10 requires specific temperature monitoring and adaptive management measures to ensure that there are no adverse impacts associated with changes in water temperature. In sum, State Board staff completed a comprehensive analysis and incorporated conditions to protect cold water habitats. As stated clearly by Butte “the Certification will substantially improve baseline conditions in the Poe Bypass Reach.” (Petition at 7.)

And yet, Butte is not satisfied with these extensive measures and suggests that the State Board must analyze whether there are any other “more effective measures” to further protect cold freshwater habitat and recreation. That is not the question or analysis required by the State Board under the Clean Water Act or the Water Code. The Water Code requires that “[c]onditions . . . be added to any certification, if necessary, to ensure that all activities . . . comply with applicable water quality standards and other appropriate requirements.” (23 CCR 3859.) The law does not require the State Board to implement the best possible measure for enhancing every single beneficial use that may, or may not, conflict with another beneficial use or may, or may not, have anything to do with the relicensing activity at hand. The State Board provided extensive measures to protect cold water habitats, to address potential continuing impacts from conflicting beneficial uses, and to ensure that the continued operation of the license will comply with applicable water quality standards. State law requires nothing more.

2. Recreational Uses Will Be Protected

Butte claims that “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” (Petition at 6.) However, by Butte’s own admission, that is exactly what Staff has done. While Butte argues that the State Board did not *correctly evaluate* potential recreational impacts, the Petition acknowledges that, not only did Staff assume a 75%-100% potential increase in use of the Poe Bypass Reach by boaters,⁴ but Staff also incorporated

⁴ Butte extols its “expert evidence” that recreational uses “could far exceed that estimate,” only admitting in a footnote that this “expert” estimate relied on “suitable flows and facilities” and recreational uses under ideal conditions. (Petition at 5, fn 5.) The State Board could properly weigh these facts and conclude that PG&E’s

Butte's recommendations word for word into the minimum flow schedule in Conditions #1 and #5 to address recreational impacts. (*See* Petition at 5, fn 4.)

Butte acknowledges and applauds the additional recreational improvements required by Staff in Condition #8, including parking facilities and other recreational facility improvements (Petition at 6), but then requests *additional* measures, including extended trails and offsite mitigation funds, without providing new legal or factual justification for why the balancing of interests undertaken by both FERC and the State Board should be revisited once again. Similarly, Butte has not presented any new justification for its contention that a release for recreational boating purposes of 6,000 acre-feet of water per year is inadequate. (*See* Condition #6 of the WQC and Condition #27 of the USFS' May 28, 2007 Final Section 4(e) Conditions.) And, as it has done before, Butte again attempts to include portions of Bardees Bar Road that are outside the project area in PG&E's Road Management Plan in order to shift maintenance responsibilities from the County to PG&E. (*See* Petition at 6.) FERC rejected this same effort after doing extensive analysis of project roadways, indicating that only 1.9 miles closest to Bardee Bar should be PG&E's responsibility:

We also recommend that the last 1.19 miles of Bardee's Bar Road located on PG&E land be included in the project boundary. *We do not recommend including all of Bardee's Bar Road in the project boundary* because it is also used for Union Pacific Railroad operations and to access private dwellings, as well as NFS land, and *is used only incidentally for project purposes*. (FERC Final EA, at 256 (*emphasis added*).)

The WQC incorporates the same project boundaries. (WQC at 32.) Only those portions of the access road that are inside of FERC project boundaries are considered "roads associated with the project" and only those portions will be included in the Road Management Plan required by Condition #12. (*See also* FERC Final EA at 144, 158-163, 189-192, 221 #57, and 251- 256.)

As indicated above, the State Board is not required to incorporate mitigation measures at the whim or request of interested parties. A petition for relicensing must include necessary conditions to avoid, minimize, and mitigate actual project impacts; it is not the forum for opportunistic parties to leverage proceedings and request legally-unsupportable conditions that may benefit their constituents. Conditions must meet constitutional standards, including the requirement that there be an essential connection or "nexus" between the condition and a public need or burden created by the proposed project. (*See, e.g., Nollan v. California Coastal*

estimate was likely more accurate. Moreover, the WQC also requires a Recreation Improvement and Monitoring Plan that will include "triggers for sanitation and recreation upgrades based on use" (*see* WQC, at 9, §3.8).

Commission, 483 U.S. 825, 837 (1987); *see also* FERC Final EA, at C-25, Resp. #59 (recreation fund and associated services and facilities requested by Butte “do not have a clear nexus to the Poe project”).) The proposed condition must be “related both in nature and extent to the proposed development’s impact.” (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391.) Butte would have the State Board go beyond what is legally permissible and beyond the effects of the proposed project to an historic baseline with physical circumstances that have not existed for many, many years.

III. CONCLUSION

Butte’s Petition for Reconsideration provides no new legal or factual support to undo the careful balancing of beneficial uses achieved by FERC in its relicensing proceedings and by the State Board in its associated WQC proceedings. The record is replete with evidence that the ongoing effects of the project were considered by both agencies. For these reasons and the reasons stated above, PG&E requests that the Petition be denied.

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 “**Pacific Gas and Electric Company’s Response to 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.

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Dated at San Francisco, California this 20th day February, 2018



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