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April 8, 2013

Erin Ragazzi
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Sent via electronic mail to: erin.ragazzi@waterboards.ca.gov

Re: Process for Application for Material Modification of Water Quality Certification on the Pit 1 Hydroelectric Project (P-2687).

Dear Ms. Raggazi,

In 2009, PG&E requested that the State Water Resources Control Board (“Board”) amend the 401 Water Quality Certification for the Pit 1 Hydroelectric Project. The Board has indicated that it is required to comply with the California Environmental Quality Act prior to amending the 401, and American Whitewater writes to begin a dialogue and seek clarification regarding this process.

Our research reveals that the procedure for amending a 401 is unclear, and there is little if any precedent to guide these proceedings. (We request that the Board provide examples of amendments to 401 Certifications if you are aware of any.) Based on our review of CEQA and Board rules and regulations, we outline below our understanding of what steps are required prior to materially amending a 401 Certification. We seek to understand whether the Water Board agrees with our assessment and gain clarification about where things are in the process for Pit 1. We would like to discuss this in person with Water Board Staff, and request a meeting to do so. Gaining clarification about how the Board proceeds in amending a 401 is a timely exercise, as similar questions have been raised in other proceedings currently before the Board (*see, e.g.*, PG&E’s Petition for Reconsideration of the Water Quality Certification of the Chili Bar Hydroelectric Project, FERC # 2155, December 6, 2012).

I. Background

In 2001, the Board issued a 401 Water Quality Certification for the relicensing of PG&E’s Pit 1 Hydroelectric Project. The 401 included conditions that required annual flushing flows to be held three times each year in May or June, July, and August (Condition 13), and flushing flow monitoring (Condition 14). On June 24, 2009, PG&E requested that the Board amend the water quality certification and remove Conditions 13 and 14 because of concern that the flushing flows were harming the endangered Shasta crayfish.

The Board approved a temporary suspension of the flushing flows in 2010 (Order WQ 2010-0009, July 6, 2010), and extended the suspension by one year in 2012 (Order WQ 2012-0008, June 14, 2012). In both orders, and in a letter from the Board to PG&E dated August 28, 2009, the Board stated that environmental review under CEQA is required for the proposed permanent elimination of flushing flows because potential for a significant environmental impact exists if such action is taken. The 2012 order also states that the Board entered into a memorandum of understanding with PG&E “for the preparation of environmental documents, which was executed on July 7, 2011.” Order WQ 2012-0008 (June 14, 2012); *see also* Letter from SWRCB to PG&E (Aug. 28, 2009).

Additionally, the 2012 Order stated that the temporary suspension of flushing flows “shall be dependent on PG&E’s timely completion of the required CEQA documentation (pursuant to the most recently executed MOU).” We note that the MOU contains general information about contract relationships, but lacks specificity about necessary documents and studies. We are aware that PG&E submitted a Shasta Crayfish Report on January 31, 2013, which presents the results of the Shasta Crayfish Study Plan, ordered by the State Water Board in 2010. eLibrary no. 20130131-5321. However, we are unclear about where this, and the other events outlined above, fit within the context of the necessary CEQA review.

II. Process Recommendations

The Board’s rules are not specific as to the procedures for a material amendment to a water quality certification. Further, its rules for water quality certification and environmental analysis appear incomplete or vague with regard to notice and opportunities for review. In preparing these recommended procedures, we reviewed CEQA, CEQA Guidelines, the Board’s regulations for complying with CEQA, and the Board’s regulations for issuing certification.

The following are our recommendations for a proceeding to materially amend a water quality certification. We do not recommend these procedures for a proceeding for non-material amendments. Our recommended procedures reserve the Board’s discretion to consult and hold hearings depending on the significance of concerns raised, as provided in the Board’s regulations. However, we have included procedures that call for broader notice of various steps in the Board’s processing of an amendment application and broader consultation with the interested stakeholders.

Step 1. Issue notice of amendment application received (including filing on eLibrary), and provide opportunity to be added to mailing list (23 CCR § 3858(a)).

Step 2. Issue any requests for additional information.

Step 3. Issue Initial Study (14 CCR 15063 *et seq.*) with 21 days for public comment prior to decision whether to proceed to EIR or Negative Declaration.¹

¹ We do not address the process for exempt projects because the Board has already determined that it must undertake CEQA analysis prior to acting on PG&E’s request to amend the certification: “[b]ecause a potential for a significant environmental impact exists if flushing flows are permanently suspended, the

Step 4. Comply with CEQA guidelines for preparation of EIR (14 CCR § 15080 *et seq.*, 23 CCR § 3720 *et seq.*²).

Step 4.1. Issue Notice of Preparation (14 CCR § 15082(a); Public Resources Code § 21092) to Office of Planning and Research, applicant, responsible and trustee agencies, federal agencies involved in approving or funding the project, and anyone on the mailing list established in Step 1. Notice should solicit agency and public comments due within 30 days (*id.* at § 15082(b)).

Step 4.2. Provide notice of and conduct a scoping meeting (*id.* at §§ 15082(c), 15083³). Notice should specify deadline for written scoping comments (not less than 15 days from meeting date) (*see id.* at § 15084(c)).

State Water Board cannot amend the Project's water quality certification without subjecting the proposal to a CEQA analysis...." Order WQ 2012-0008.

² The Water Board's regulations implementing CEQA encourage public participation:

The board shall take appropriate action to encourage public participation and comment in the preparation and review of environmental documents. Such action may include a public hearing, a workshop or a board meeting when such is deemed necessary by the board for proper evaluation of the project involved.

23 CCR § 3763.

³ Title 14 CCR § 15083 encourages early consultation with the interested public:

Prior to completing the draft EIR, the lead agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project. Many public agencies have found that early consultation solves many potential problems that would arise in more serious forms later in the review process. This early consultation may be called scoping. Scoping will be necessary when preparing an EIR/EIS jointly with a federal agency.

- (a) Scoping has been helpful to agencies in identifying the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and in eliminating from detailed study issues found not to be important.
- (b) Scoping has been found to be an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, the proponent of the action, and other interested persons including those who might not be in accord with the action on environmental grounds.

(c) Where scoping is used, it should be combined to the extent possible with consultation under Section 15082.

Step 4.3. Issue Notice of Completion and Availability of draft EIR (*id.* §§ 15085, 15087). Notice should specify deadline for comments (30 to 60 days (*see id.*; *see also id.* at § 15105; Public Resources Code § 21104).

Step 4.4. Consult with agencies, local governments, and public during review period for draft EIR (14 CCR § 15086).

Step 4.5. Conduct public hearing if significant disputes regarding draft EIR (*see id.* at § 15087(i)).

Step 4.6. Prepare and issue final EIR, which shall include responses to comments received on the draft EIR (*id.* at §§ 15088, 15089; *see also* Public Resources Code § 21161).

Step 4.7. Certify the final EIR.

Step 5. In the alternative to Step 4, comply with CEQA guidelines for Negative Declaration⁴ (14 CCR § 15070 *et seq.*).

Step 5.1. Issue Notice of Intent to Adopt a Negative Declaration or Mitigated Negative Declaration to the public, responsible agencies, trustee agencies, any federal agencies involved in approving or funding the project, local governments (*id.* at § 15072; Public Resources Code § 21092)

Step 5.2. Provide public review period of not less than 20 days for proposed negative declaration or mitigated negative declaration (*id.* at § 15073)

Step 5.3. Prepare and adopt final Negative Declaration or Mitigated Negative Declaration after considering comments received during the public review process (*id.* at § 15074).

⁴ A negative declaration is only appropriate if:

- (a) The initial study shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment, or
- (b) The initial study identifies potentially significant effects, but:
 - (1) Revisions in the project plans or proposals made by or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and
 - (2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment.

Step 6. Issue draft decision with not less than 21 days for public comment, including requests for hearing (23 CCR § 3858(b)). Any requests for hearing shall be made during comment period and should be accompanied by description of why a hearing is warranted.

Step 7. Hold hearing separate from CEQA hearing to address additional relevant issues, if necessary.

Step 8. Issue Certification and Notice of Decision/Determination (14 CCR §§ 15075, 15094; 23 CCR § 3859)

American Whitewater has been engaged in the issues surrounding the potential 401 amendment on the Pit 1 Project since 2009, and we have a strong interest in remaining involved in the public process. We hope that the SWRCB will be amenable to discussing these steps, and look forward to meeting with you in the near future. If you have any questions, please contact me via e-mail or phone listed in the letterhead above, or Julie Gantenbein, Water and Power Law Group PC, at (510) 296-5590.

Sincerely,



Dave Steindorf
California Stewardship Director
American Whitewater

cc: Peter Barnes, Water Quality Certification Unit
Barbara Evoy, Deputy Director, Division of Water Rights