

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

Pacific Gas and Electric Company

Project No. 77-120

ORDER ON REHEARING

(Issued June 2, 2004)

1. In this order the Commission acts on several requests for rehearing of the order issued on January 28, 2004, amending the license for Pacific Gas and Electric Company's (PG&E) Potter Valley Project No. 77, located in Northern California.<sup>1</sup> The January 28 Order required operational and physical modifications to the project for the benefit of federally-threatened salmonids. With minor exceptions, we deny the requests for rehearing.

**I. Background**

2. The history of this proceeding is explained in the January 28 Order. In brief, the 9.4-megawatt Potter Valley Project is located on the Eel and East Branch Russian Rivers. On the Eel River, the furthest-upstream project work is Scott Dam, which impounds Lake Pillsbury. There is no fish passage at Scott Dam. Twelve miles below Scott Dam, the Eel River flows into Van Arsdale Reservoir, impounded by Cape Horn Dam, which has upstream and downstream fishways.

3. At Van Arsdale Reservoir, water has since the early 1900s been diverted from the northward-flowing Eel River by tunnel and penstock to the Potter Valley powerhouse, after which the water is released into the southward-flowing East Branch Russian River. The East Branch flows into the mainstem Russian River.<sup>2</sup> The Eel River Basin is

---

<sup>1</sup>106 FERC ¶ 61,065 (2004).

<sup>2</sup>Both the Eel and Russian Rivers flow to the Pacific Ocean.

principally rural and forested. The Russian River Basin supports a significant agricultural industry and has a large and growing urban population.

4. Below the Potter Valley powerhouse on the Russian River are two U.S. Army Corps of Engineers (Corps) projects: Coyote Dam and its impoundment, Lake Mendocino; and Warm Springs Dam and its impoundment, Lake Sonoma.

5. A new license issued for the project in 1983 imposed certain flow requirements for the benefit of Eel River salmonids.<sup>3</sup> License Article 39 required a study of the project's new flow regime to determine its effects on salmon and steelhead, and a proposal for the development of any modifications to project structures or operations necessary to maintain and protect these fish.<sup>4</sup> Subsequently, certain species of Eel River and Russian River salmonids were listed as threatened under the Endangered Species Act (ESA).<sup>5</sup>

---

<sup>3</sup>Pacific Gas and Electric Co., 25 FERC ¶ 61,010 (1983).

<sup>4</sup>Article 39, 25 FERC ¶ 61,010 at 61,070, states:

Article 39. The Licensee shall, in consultation with the California Department of Fish and Game and the U.S. Fish and Wildlife[,] develop a satisfactory study plan to determine the effects of the flow release schedule provided for in Article 38 on the salmonid fishery resources of the upper Eel and the East Branch of the Russian River. The plan shall further provide for the monitoring of the temperature regime of the Eel River downstream of Scott Dam.

. . . After completion of the monitoring program the Licensee shall, in consultation with [the California Department of Fish and Game and the U.S. Fish and Wildlife Service], review the results and file a report on the results of the monitoring program and for Commission approval recommendations for modifications in the flow release schedule or project structures and operations necessary to protect and maintain the fishery resources. . . .

<sup>5</sup>16 U.S.C. § 1531 *et seq.* The threatened Eel River species are coho salmon (May 1997), Chinook salmon (May 1999), and steelhead (June 2000). 106 FERC ¶ 61,065 at 61,217 n. 95.

6. Following completion of the required study, PG&E filed, in March 1998, an application to amend the license to modify the flows and take other actions to benefit the threatened salmonids. The application was vigorously contested. Some parties supported what they believe would be more effective actions to protect the salmonids. Others took the position that the proposal would leave the Russian River Basin without adequate water for current or future needs.

7. On May 30, 2000, Commission staff issued a Final Environmental Impact Statement (EIS) that analyzed the “no action” alternative and five action alternatives. The Final EIS recommended adoption of what is called the Potter Valley Irrigation District (PVID) Alternative.<sup>6</sup>

8. On November 29, 2002, the National Marine Fisheries Service within the U.S. Department of Commerce (NOAA Fisheries) issued a final Biological Opinion which found that the PVID alternative would jeopardize the continued existence of the threatened salmonids. The Biological Opinion included a reasonable and prudent alternative and an incidental take statement with reasonable and prudent measures for project operation that NOAA Fisheries considers necessary to prevent jeopardy to the threatened salmonids.

9. The January 28 Order compared the PVID alternative to the Biological Opinion conditions, and noted where the Commission disagreed with the Biological Opinion, but concluded that in light of NOAA Fisheries’ status as the agency principally charged with administering the ESA with respect to anadromous fishes, and the essentially mandatory nature of an incidental take statement, the Commission had no real choice but to amend the license consistent with the Biological Opinion.

---

<sup>6</sup>Potter Valley Irrigation District (PVID) initially proposed this alternative. The other action alternatives, all submitted before issuance of the Biological Opinion, were offered by PG&E, Sonoma, the Tribes, and Interior/NOAA Fisheries. All the action alternatives were generally premised on mimicking the pattern of unregulated flows in the upper Eel River, in part by setting seasonably variable minimum-flow releases. The alternatives differed in terms of the timing and magnitude of such releases, with the greatest differences in dry and critically dry years. They all included a package of non-flow fishery enhancement measures, and all but the Tribe’s provided for an annual block of water to be released at the discretion of the resource agencies.

10. Timely rehearing requests supporting the Commission's adoption of the Biological Opinion, but finding fault with other aspects of the order, were filed by NOAA Fisheries; the U.S. Department of the Interior; Round Valley Indian Tribes (Tribes); California Trout (Cal Trout); and jointly by Friends of the Eel River, California Sportfishing Protection Alliance, and Pacific Coast Federation of Fishermen's Associations (Eel River Groups).<sup>7</sup>

11. Timely rehearing requests opposing adoption of the Biological Opinion, and supporting the PVID alternative or a version thereof, were filed by PG&E; California Department of Fish and Game (California DFG); jointly by the Mendocino County Inland Water and Power Commission, Potter Valley Irrigation District, City of Ukiah, Redwood Valley County Water District, and Mendocino Russian River Flood Control and Water Conservation Improvement District (Russian River Districts); jointly by the County of Mendocino and the Mendocino County Water Agency (Russian River/Mendocino); and the California Farm Bureau Federation (Farm Bureau).

## II. Discussion

### A. Adoption of NOAA Fisheries' Reasonable and Prudent Alternative and Related Measures

12. Section 7 of the ESA requires each federal agency, in consultation with the ESA agency with jurisdiction over the species involved, to ensure that its actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of their critical habitat.<sup>8</sup> Under the Joint NOAA Fisheries and U.S. Fish and Wildlife Service (FWS) regulations implementing the ESA (Joint Regulations),<sup>9</sup> a proposed action will jeopardize the continued existence of a listed species if it will reduce appreciably the likelihood of the listed species' survival in the wild.<sup>10</sup> NOAA

---

<sup>7</sup>The U.S. Forest Service filed an answer to the Eel River Groups, in which it disputes certain of the Groups' statements concerning the Forest Service's obligations under Federal Power Act section 4(e), 16 U.S.C. § 797(e), and various sections of the Wild and Scenic Rivers Act.

<sup>8</sup>Section 7(a)(2), 16 U.S.C. § 1536(a)(2).

<sup>9</sup>50 C.F.R. Part 402.

<sup>10</sup>50 C.F.R. § 402.2.

Fisheries' Biological Opinion in this proceeding states that the PVID alternative would have this effect, because, although it would improve conditions for the threatened salmonids, it would not mimic pre-project flows sufficiently to arrest and reverse the existing threatened status of the stocks.<sup>11</sup>

13. If the ESA agency finds that a proposed action will result in jeopardy, it shall suggest in its Biological Opinion any reasonable and prudent alternatives to avoid jeopardy<sup>12</sup> and provide the action agency with an incidental take statement specifying the reasonable and prudent measures (RPMs) that are necessary to minimize incidental take, and the terms and conditions necessary to implement the RPMs.<sup>13</sup>

14. The January 28 Order stated the following with respect to the import of a jeopardy opinion:<sup>14</sup>

[W]e have concluded that the PVID alternative provides sufficient assurance of benefits to the threatened salmonids and less risk to other water uses than the regime provided by the Biological Opinion, and would not jeopardize any of the listed salmonids or adversely affect their critical habitat. However, because NOAA Fisheries is the agency with principal responsibility for administering the ESA with respect to anadromous fish, and in light of the nature of an incidental take statement, 147/ we are amending the license consistent with the Biological Opinion.

---

147/ As we noted in Public Utility District No. 1 of Okanogan County, Washington, 90 FERC ¶ 61,169 at p. 61,549 (2000), the Supreme Court stated in *Bennett v. Spear*, 520 U.S. 154 (1997) [*Bennett*], that an action agency that disregards an incidental take statement does so at its own peril (and that of its employees), because “any person” who knowingly “takes”

---

<sup>11</sup>Biological Opinion at pp. 79-81.

<sup>12</sup>Section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A).

<sup>13</sup>Section 7(b)(4), 16 U.S.C. § 1536(b)(4).

<sup>14</sup>106 FERC ¶ 61,065 at 61,221-22.

an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.

15. PG&E, Russian River Districts, Russian River/Mendocino, Farm Bureau, and California DFG contend that the Commission is not legally bound to adopt reasonable and prudent alternatives and RPMs, and that failure to do so is not a violation of the ESA.<sup>15</sup> PG&E and Russian River Districts state first that the Joint Regulations provide that the action agency has discretion on how to proceed following the issuance of a Biological Opinion;<sup>16</sup> that the final rule promulgating those regulations makes clear that a Biological Opinion is advisory only; and that the ultimate decision whether its proposed action will satisfy the substantive requirements of section 7 rests with the action agency.<sup>17</sup> PG&E and Russian River Districts note that, consistent with these regulations, the courts have held that federal agencies are not bound to follow the recommendations of a Biological Opinion.<sup>18</sup> PG&E adds that legislative history subsequent to the original enactment of the ESA in 1973 shows that Congress had the same understanding of an

---

<sup>15</sup> PG&E at 12-16; Russian River Districts at 7-10. Russian River/Mendocino and California DFG adopt Russian River Districts' arguments by reference. For convenience, we refer hereafter only to Russian River Districts.

<sup>16</sup>Citing 50 C.F.R. § 402.15(a), which states:

Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

<sup>17</sup>See Interagency Cooperation--Endangered Species Act of 1973, as Amended, Final Rule, 51 Fed. Reg. 19,926 at 19,928 (June 3, 1986).

<sup>18</sup>Citing *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (8<sup>th</sup> Cir. 1976); *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5<sup>th</sup> Cir. 1976), cert. denied, 429 U.S. 979 (1976) (Coleman); *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1037 (8<sup>th</sup> Cir. 1988) (quoting Coleman); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9<sup>th</sup> Cir. 1989); *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300 (8<sup>th</sup> Cir. 1989); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1160 (D. Alaska 1983), aff'd, 733 F.2d 605 (9<sup>th</sup> Cir. 1984); *ALCOA v. Administrator, Bonneville Power Administration*, 175 F.3d 1156 at 1161 (9<sup>th</sup> Cir. 1999) (ALCOA); and *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1415 (9<sup>th</sup> Cir. 1990).

action agency's authority and responsibility,<sup>19</sup> and that the Commission itself has indicated that it is not bound to follow a reasonable and prudent alternative or incidental take statement.<sup>20</sup>

16. PG&E is correct that the law does not require the Commission to adopt a reasonable and prudent alternative or the RPMs which implement the incidental take statement. It is clear, however, that an agency that deviates from a Biological Opinion bears a heavy burden in establishing that its actions will not result in jeopardy and will adequately protect listed species. It is also apparent that, in creating the potential for substantial civil and criminal penalties,<sup>21</sup> Congress meant to set the bar very high, indeed, for an agency to consider deviating from a Biological Opinion.

---

<sup>19</sup>Citing H. Rept. No. 1625, 95<sup>th</sup> Cong. 2<sup>d</sup> Sess. 12 (1978) (prepared in connection with the 1978 amendments to the ESA (P.L. 95-632)).

<sup>20</sup>Citing Allegheny. In Allegheny, unlike this case, FWS' Biological Opinion concluded that the Commission's preferred alternative was not likely to jeopardize the continued existence of the listed species in question (pink mucket pearly mussel). See 48 FERC ¶ 61,363 at 62,360.

<sup>21</sup>The civil penalty provisions apply to "any person" who knowingly violates any provision of the ESA or any regulation or permit issued thereunder. See ESA section 11(a)(1), 16 U.S.C. § 1539(a)(1). The criminal penalty provisions are essentially the same in this regard. See ESA section 11(b)(1), 16 U.S.C. § 1539(b)(1). These sections plainly include a violation of an Incidental Take Statement. NOAA Fisheries has issued regulations which extend to threatened species the same protections that ESA section 9 applies to endangered species. See 50 C.F.R. §§ 223.203(a) and 223.102(a)(4), (21), and (22). None of the cases these parties cite holds that the action agency's views regarding the efficacy of the Biological Opinion serve as a shield in this regard.

In addition, the ESA, unlike most federal statutes concerned with the protection of environmental resources, establishes a right for "any person" to "initiate a civil suit . . . to enjoin any person, including the United States, . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . .", and that jurisdiction of such citizen suits lies with United States District Courts. ESA section 12, 16 U.S.C. § 1540(g)(1). The Commission and its individual staff members are therefore potential defendants with respect to such private enforcement actions.

17. PG&E contends that any concern the Commission may have in this regard is unfounded, because the EIS found, and NOAA Fisheries had acknowledged (in March 1998), that the PVID alternative would provide a substantial benefit to the listed species relative to current project operations.<sup>22</sup> However, NOAA Fisheries subsequently issued the Biological Opinion finding that the PVID alternative would jeopardize the continued existence of these species. The ESA agency may revise its findings for a variety of reasons, including new facts, new interpretations of the facts, and new policies. The action agency may have the legal discretion to differ with facts, interpretations, and policies embodied in a Biological Opinion, but if it departs from the Opinion's requirements it takes at least two risks: first, that it can convincingly demonstrate that the Opinion is not based on substantial evidence (i.e., is arbitrary and capricious); and second, as noted above, that it can also convincingly demonstrate that its own requirements on behalf of the listed species are not likely to jeopardize their continued existence. Consequently, an action agency would likely be moved to disregard a Biological Opinion and rely on its own "no jeopardy" showing only when faced with an Opinion that is patently unsupported and arbitrary. That surely is not the case in the instant proceeding.

18. On the other hand, we disagree with the parties who assert that it was inappropriate for the January 28 Order to address and critique the differences between the Commission's preferred PVID alternative and the Biological Opinion. The comparison, which was concise and technical,<sup>23</sup> served to show that the two alternatives have core similarities, and that most of the differences are matters not of goals but of methods.

19. PG&E and Russian River Districts assert that the Commission's adoption of NOAA Fisheries' recommendations was arbitrary and capricious, because the Biological Opinion was based on an "impermissible" pre-project environmental baseline.<sup>24</sup> They

---

<sup>22</sup>PG&E's rehearing request (at 18) quotes from NOAA Fisheries' March 30, 1998 letter to PG&E that the PVID alternative proposal "is a vast improvement over the existing Article 38 flow schedule, and if implemented should assist in the recovery of Eel River salmon and steelhead fisheries."

<sup>23</sup>See 106 FERC ¶ 61,065 at 61,222.

<sup>24</sup>PG&E at 18-20; Russian River Districts at 11-15.

point to section 402.2 of the Joint Regulations,<sup>25</sup> which defines the “effects of the action” as:

the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area. . . .

20. PG&E notes that the final rule promulgating this section states that in determining the “effects of the action,” the ESA agency will evaluate the status of the species or critical habitat at issue, and that this “will involve consideration of the present environment in which the species or critical habitat exists.”<sup>26</sup>

21. It is clear from the regulations that the environmental baseline for ESA purposes includes past as well as present impacts of human activities in the action area. Furthermore, it is appropriate for the Commission to show reasoned deference to the ESA agencies with regard to the interpretation of their Joint Regulations and documents associated therewith. In any event, the sources cited by PG&E and Russian River Districts do not require ESA agencies to select any particular baseline condition from which to measure the effects of the proposed action; rather, they appear merely to require the ESA agency to ensure that its environmental analysis identifies past and present activities that have contributed to current environmental conditions. That the Commission’s current-conditions baseline for hydroelectric licensing has been affirmed on judicial review does not mean that other agencies cannot validly use a different baseline.<sup>27</sup>

---

<sup>25</sup>50 C.F.R. § 402.2.

<sup>26</sup>PG&E at 21, citing 51 Fed. Reg. at 19,932. PG&E also cites Solicitor’s Opinion M-36938, 88 Interior Decisions 903, 907 (1981), which states that “[i]n determining the environmental baseline, the consultation team should consider the *past* and *present* impacts of *all* projects and human activities in the area . . .” (Emphasis in the original.) Finally, PG&E takes note of judicial approval of the Commission’s policy to use current environmental conditions as the baseline for environmental analysis.

<sup>27</sup>See *American Rivers v. FERC*, 201 F.3d 1186, 1195-99 (9th Cir. 2000) (affirming Commission’s baseline). As the court noted (at 1195 n. 15), “A baseline is not an independent legal requirement, but rather, a practical requirement in environmental

22. Finally, Russian River Districts argue that the Commission failed to analyze the environmental consequences of the reasonable and prudent alternative, in violation of the National Environmental Policy Act of 1969 (NEPA).<sup>28</sup> However, as explained in the January 28 Order, the reasonable and prudent alternative is a somewhat revised version of the earlier-filed DOI/NMFS alternative. The principal substantive differences between the reasonable and prudent alternative and the DOI/NMFS alternative, respectively, are: (1) minimum summer flows in very dry years of 3 cubic feet per second (cfs) under the RPA, versus 2 cfs under DOI/NMFS; (2) the RPA changes the “Exceptionally Low Inflow” criterion to better conserve storage in Lake Pillsbury; and (3) the RPA curtails water deliveries to PVID when cumulative inflows to Lake Pillsbury are 25,000 acre-feet, versus 15,000 acre-feet under DOI/NMFS. 106 FERC ¶ 61,065 at 61,222 n.148. These modest differences are not likely to result in any material difference in the environmental effects. For this reason, the January 28 Order used DOI/NMFS alternative as a surrogate for the reasonable and prudent alternative.

23. In conclusion, we find that the deference accorded to the Biological Opinion was appropriate in the circumstances of this case.

---

analysis often employed to identify the environmental consequences of a proposed agency action.”

Russian River Districts also charge (at 14-15) that NOAA Fisheries improperly relied on the ESA agencies’ section 7 Consultation Handbook for the proposition that this license amendment proceeding is akin to ongoing federal discretionary operation of water projects, for which the Handbook states that the analysis should address effects of the entire project rather than a discrete action (here, modifying Eel River flows). According to Russian River Districts, the Handbook states (at 4-26 to 4-29) that an analysis should not include aspects of the project not dependent on the existence of the proposed action, and that the broader scope of analysis is required only at relicensing. As far as we can determine, this is simply another variation of the baseline argument that we have already addressed. In any event, in light of the inclusion of past actions in the ESA baseline, it is not apparent to us that NOAA Fisheries would have reached a different result by using a narrower scope of analysis.

<sup>28</sup>42 U.S. § 4321, *et seq.*

## **B. Public Interest Standard**

24. Federal Power Act section 10(a)(1)<sup>29</sup> requires the Commission to consider all matters relevant to the public interest when it issues a hydroelectric license.<sup>30</sup> The Tribes support the decision in the January 28 Order to adopt the reasonable and prudent alternative, but argue that the section 10(a)(1) public interest standard does not apply to this proceeding, because the only purpose of Article 39 is to protect the Eel River fishery. They assert that all other aspects of the public interest were accounted for when the license was issued, and that therefore it was improper for the EIS to consider any interests other than those of the fishery. The Eel River Groups similarly contend that Article 39 bars the Commission from considering anything except protection of the Eel River fishery.<sup>31</sup>

25. Clearly, the purpose of this proceeding is to modify project structures or operations in order to maintain and protect the fisheries of concern. However, the public interest standard of FPA section 10(a)(1)<sup>32</sup> applies throughout the term of the license.<sup>33</sup> Both NEPA and section 10(a)(1) require consideration of the effects of proposed actions

---

<sup>29</sup>6 U.S.C. § 803(a)(1).

<sup>30</sup>Udall v. FPC, 387 U.S. 428, 450 (1967).

<sup>31</sup>Eel River Groups at 13-15. Article 39 is quoted in n. 4, above.

<sup>32</sup>FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), states:

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public purposes, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e); and if necessary in order to secure such plan the Commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.

<sup>33</sup>See, e.g., City of Tacoma, WA, 86 FERC ¶ 61,313 at 62,087 n. 104 (1999).

on, respectively, the environment and other public interest uses of the waterways. In the Commission's judgment, its preferred alternative would achieve the necessary protection of the fisheries with the least possible adverse effect on other public interest uses of the waterways. In any event, the Commission ultimately deferred to the reasonable and prudent alternative, which was developed under a different statute and was not required to entail consideration of other public interest uses.

### C. Comprehensive Plan

26. While the Eel River Groups assert that the Commission should not have applied the section 10(a)(1) standard, they at the same time claim that the Commission violated section 10(a)(1) by failing to prepare a comprehensive plan for the Eel River Basin against which to measure the amendment application.<sup>34</sup> In support, they cite National Wildlife Federation v. FERC, 801 F.2d 1505 (9<sup>th</sup> Cir. 1986), and LaFlamme v. FERC, 852 F.2d 389 (9<sup>th</sup> Cir. 1988) (LaFlamme I).

27. Neither judicial opinion requires a comprehensive river basin plan in the sense meant by Eel River Groups. In National Wildlife Federation, the court found that the Commission did not adequately explain its reasons for not preparing a comprehensive plan before issuing multiple preliminary permits to study potential projects in a single river basin. The court specifically stated that it was not holding that a comprehensive plan must be developed prior to the issuance of the permits.<sup>35</sup> In LaFlamme I, the court found only that the Commission's environmental review gave insufficient consideration to potential cumulative impacts of other existing and proposed hydroelectric projects on the same waterway.<sup>36</sup> In LaFlamme v. FERC, 945 F.2d 1124 (9<sup>th</sup> Cir. 1991) (LaFlamme II), which the Eel River Groups do not reference, the court held that section 10(a)(1) requires only that the Commission comprehensively consider all aspects of the public interest relative to the project proposal in the context of the entire waterway and the cumulative impacts with other existing and proposed projects on the waterway.

---

<sup>34</sup>Eel River Groups at 26-29.

<sup>35</sup>801 F. 2d at 1512. The Commission subsequently explained its reasoning in City of Fort Smith, Arkansas, 44 FERC ¶ 61,160 (1988), and Skykomish River Hydro, 42 FERC ¶ 61,283 (1988).

<sup>36</sup>852 F.2d at 402-03.

28. The EIS discusses project impacts throughout the entire Eel River system. There is no discussion of other hydroelectric or other major water resource development projects affecting the Eel River, because there are no other existing or proposed hydropower projects in the basin and, to our knowledge, no significant diversions for irrigation, municipal water supply, or other consumptive uses. Other activities within the Eel River Basin that have potential cumulative impacts with the Potter Valley Project are appropriately considered.<sup>37</sup> The EIS also discusses the impact of each of the alternatives on potentially affected interests in the Russian River Basin.

#### **D. Environmental Impact Statement**

##### **1. Action Alternatives**

##### **(a) Project Decommissioning**

29. NEPA requires federal action agencies to examine reasonable alternatives to proposed actions. The EIS found that decommissioning is not a reasonable alternative to consider, because PG&E's license is administratively final and cannot be revoked in the absence of circumstances not present here.<sup>38</sup> The January 28 Order affirmed that determination.<sup>39</sup> On rehearing, the Tribes argue that the finality of the license is irrelevant to the possibility of revocation, because the fishery issues were not fully resolved when the license was issued.<sup>40</sup> However, the case they cite, Confederated Tribes and Bands of the Yakima Indian Nation v. FERC (Yakima),<sup>41</sup> is inapposite; there, the court reversed the Commission's decision, in a non-final order issuing a new license, to refer the entire subject of how to address project impacts on fisheries of concern to a separate proceeding. Here, by contrast, the 1983 relicense considered project impacts on fisheries; required certain minimum flows and other measures on their behalf; and

---

<sup>37</sup>See EIS, Section 4.6.

<sup>38</sup>EIS at 2-40.

<sup>39</sup>106 FERC ¶ 61,065 at 61,214.

<sup>40</sup>Tribes at 5-6.

<sup>41</sup>746 F.2d 466 (9<sup>th</sup> Cir. 1984).

reserved the Commission's authority, not to terminate the license, but to alter project facilities and operations as needed to protect the fisheries.<sup>42</sup> The time for parties to raise issues regarding the adequacy of the fisheries analysis and measures in the new license order was on rehearing of that order. Once a license is final and non-reviewable, the Commission lacks the authority (absent revocation for a knowing violation of a final Commission order—see FPA section 31<sup>43</sup>) to unilaterally terminate the license and require project shut-down or removal. Congress would have to enact project-specific legislation to take over and decommission the project. Either prospect – termination or takeover – is highly improbable, and therefore not a reasonable option for NEPA analysis.<sup>44</sup>

(b) **Russian River Basin Water Resource Initiatives**

30. The EIS also did not consider as a reasonable alternative future water-resource development initiatives under consideration by Sonoma County and others to increase the storage and conveyance capacity of water systems in the Russian River basin. Such initiatives might, if implemented, reduce the need for Eel River water in the Russian River basin. We rejected for consideration as speculative the only specifically identified project in this regard, raising an existing Russian River federal dam by 20 to 40 feet, because it would require numerous prerequisites that are not in place.<sup>45</sup> On rehearing, the

---

<sup>42</sup>Yakima does not require any heightened degree of certainty for environmental facts, nor does it imply that all environmental concerns must be definitively resolved before a license is issued. See U.S. Dept. of the Interior v. FERC, 952 F.2d 538, 546 (D.C. Cir. 1992).

<sup>43</sup>16 U.S.C. § 823b.

<sup>44</sup>The Eel River Groups (at 11) claim that inability to implement an alternative is irrelevant to whether it is reasonable, citing Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 (9<sup>th</sup> Cir. 1999); Sierra Club v. Lynn, 502 F.2d 43, 62 (D.C. Cir. 1974); and N.R.D.C. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972). However, these cases stand for the proposition that an agency may not reject an alternative merely because it requires action by others. Here, the potential action by others – the licensee or Congress – is, as noted, so unlikely as to be an unreasonable option.

<sup>45</sup>See 106 FERC ¶ 61,065 at 61,214.

Tribes reiterate the contention, rejected in the January 28 Order,<sup>46</sup> that by not fully considering such alternatives the Commission rewards Russian River water users for failing to develop alternatives to water from the Eel River.<sup>47</sup>

31. As discussed above, an alternative is not reasonable if it is nothing more than speculation about what various entities might do or arguably ought to be doing. The Russian River water storage and delivery system is very complex, with hundreds of dams, diversions, and wells (both to remove and inject groundwater), and clear hydraulic connections between the surface water and groundwater.<sup>48</sup> In order for us to consider an alternative that that involves modification to that system, the proponent must provide for the record a specific statement of the actions to taken and the entities that would have to undertake them, which entities might be affected and in what manner, and should identify any related regulatory requirements. The Tribes have provided no such information; accordingly, we deny rehearing on this issue.

(c) **Scott Dam Fishway**

32. The Eel River Groups argue that the Commission should have considered what they describe as a “fishway alternative,” which would entail construction of a fishway at the project’s Scott Dam (the uppermost project dam on the Eel River mainstem) in order to provide the threatened salmonids with access to additional spawning grounds upstream.<sup>49</sup> This, they state, would achieve the Commission’s objectives of complying with the ESA and reducing the environmental effects of the project.<sup>50</sup>

---

<sup>46</sup>106 FERC ¶ 61,065 at 61,224.

<sup>47</sup>Tribes at 7-8.

<sup>48</sup>EIS sections 3.1.3 and 3.2.

<sup>49</sup>The Eel River Groups also argue that NOAA Fisheries’ failure in its Biological Opinion to consider the alternative of providing fish passage at Scott Dam violates that agency’s obligations under the ESA and the Joint Regulations. Eel Rivers Groups at 16-17. The Commission, however, has no authority to determine if that is the case.

<sup>50</sup>Eel River Groups at 7-8.

33. A fishway at Scott Dam was not included in the inter-agency recommendations that accompanied the Article 39 study, and none of the federal or state agencies is advocating one. Moreover, all of the action alternatives would significantly improve conditions for the threatened salmonids, and NOAA Fisheries did not find that a fishway at Scott Dam is needed to avoid jeopardy to those species. Under these circumstances, we do not consider the alternative to be a reasonable one.

## 2. Economic Analysis

34. The Tribes and the Eel River Groups object to the fact that the EIS includes a detailed analysis of the potential economic impacts of the various alternatives on Russian River interests, but does not include a comparable analysis of economic impacts on Eel River Basin interests.<sup>51</sup> As the January 28 Order explained, this is because the alternatives have direct and substantial effects on the Russian River Basin economy, which has strong agricultural and consumptive urban components. In contrast, the Eel River Basin economy has very little agriculture or other consumptive uses of water and is dominated by forestry and forest products.<sup>52</sup>

35. The Eel River Groups also state that the project has compromised the “scenic, recreational, fishery, and wildlife resources” of the Eel River, with “severe adverse impacts on the economy of Humboldt County,”<sup>53</sup> but offer no facts or other evidence in this regard not already considered in the EIS.<sup>54</sup>

## 3. Pikeminnow

36. Interior continues to dispute the EIS’ conclusion that increasing habitat for Sacramento pikeminnow in the Eel River by maintaining high summer flows is likely to

---

<sup>51</sup>See Tribes’ motion to intervene and for interim relief, at 2; Eel River Groups at 12.

<sup>52</sup>106 FERC ¶ 61,065 at 61,207 and 61,224-25.

<sup>53</sup>Eel River Groups at 12.

<sup>54</sup>See also 106 FERC ¶ 61,065 at 61,225, where we found that any effort to evaluate the economic benefits to the Tribes of a restored commercial or subsistence fishery would be wholly speculative at this time.

increase the pikeminnow population and, therefore, the risk of predation by these fish on the threatened salmonids.<sup>55</sup> Interior acknowledges that pikeminnow are a destructive predator, but asserts there is no proof of a relationship between the size of the pikeminnow population and the extent of their predation on salmonids.<sup>56</sup> We continue to see a positive correlation in this regard, and are puzzled by Interior's insistence on proof in light of its vigorous support of the reasonable and prudent alternative, which requires substantial annual expenditures by PG&E for the purpose of reducing pikeminnow predation on the threatened fish.

#### **4. Supplemental EIS**

##### **(a) Computer Modeling**

37. Interior contends that its comments on the Draft EIS identified important errors in the Commission's hydrologic computer modeling, and that the alleged errors were not fully rectified in the Final EIS. Interior states that these errors result in a misrepresentation of the DOI/NMFS alternative so significant as to require a supplemental EIS. It states that a new EIS with the computer models revised in response to Interior's critique will make clear that DOI/NMFS, which closely resembles the reasonable and prudent alternative, is the alternative to be preferred.

38. The only specific disagreement referenced in Interior's rehearing request is whether the 67-year data set used by it and NOAA Fisheries is preferable to the 21-year data set used in the EIS.<sup>57</sup> This was discussed in the January 28 Order,<sup>58</sup> and Interior

---

<sup>55</sup>See EIS at 3-39.

<sup>56</sup>Interior at 6-7.

<sup>57</sup>The Tribes also criticize the EIS' use of the 21-year period, on the ground that it is inappropriate to use a conservative estimate of the amount of water available to the threatened salmonids. Tribes at 9-10. We continue to think that in the case of listed fish it is important for the analysis to conservatively estimate the available water supply.

<sup>58</sup>106 FERC ¶ 61,065 at 61,215.

makes no arguments that persuade us the Interior/NOAA Fisheries data set is preferable.<sup>59</sup>

(b) **New Evidence**

39. The Eel River Groups claim that following the issuance of the Final EIS, but long before the January 28 Order, California DFG and NOAA Fisheries completed studies which show that diversion of Eel River water to the Russian River Basin is harming federally-listed threatened salmonids in the Russian River Basin<sup>60</sup> by creating unnaturally high summer flows which create favorable conditions for warm water fish that prey on juvenile salmonids.<sup>61</sup>

40. The Eel River Groups' filing does not include copies of or citations to any of the alleged study results, but merely asserts that they are "well known."<sup>62</sup> Neither NOAA Fisheries nor California DFG (which supports the Commission's preferred alternative) submitted any such studies for the record following issuance of the EIS. In any event, the negative impacts of high summer flows on Russian River salmonids is discussed in the

---

<sup>59</sup>Interior at 2-5. In a related vein, Interior argues that the identification of principal differences between the PVID alternative and the reasonable and prudent alternative in the January 28 Order (106 FERC at 61,222) is faulty. However, this criticism rests entirely on Interior's assertion that the EIS' computer modeling is deficient.

<sup>60</sup>These are Central California Coast coho salmon; California Coastal Chinook salmon, and Central California Coast steelhead. See 106 FERC ¶ 61,065 at 61,221.

<sup>61</sup>Eel River Groups at 13. Although the Eel River Groups are aligned with Interior, their assertions regarding the relationship between pikeminnow populations and predation contradict those of Interior.

<sup>62</sup>Id. The Eel River Groups attach to their pleading a declaration by Robert H. Curry, identified as the Research Director of the Watershed Institute of California State University at Monterey. Mr. Curry states that he is an expert in the field of hydrology (the study of water in the atmosphere, on the surface, and in the ground), that he is familiar with the unidentified studies, and that they show that Eel River diversions have the deleterious effects mentioned above. He does not however identify or provide copies of the studies.

EIS.<sup>63</sup> They are related to the Potter Valley Project Russian River discharges only indirectly, if at all. The Russian River summer flows that affect salmonids are the result of releases made by the Sonoma County Water Agency (Sonoma Water) from Coyote Dam, which impounds Lake Mendocino.<sup>64</sup> The Eel River Groups provide no reason to think that reduced diversions to the Russian River Basin would cause Sonoma Water to correspondingly change its releases from Lake Mendocino, which are governed by the California State Water Resources Control Board (State Water Board).

## 5. Tribal Water Rights

41. In the January 28 Order, we responded to the complaint of the Tribes that the EIS does not specifically assess the effects of the action alternatives on their water and fishing rights by stating that they did not explain those rights with any specificity or show how the alternatives might affect their enjoyment of those rights.<sup>65</sup> The Tribes reiterate their complaint on rehearing,<sup>66</sup> but again fail to provide more than a general assertion of rights. Without more, we cannot provide the type of analysis they appear to seek.

### E. State Water Law

42. Russian River Districts and the Farm Bureau, citing First Iowa Hydro-Electric Cooperative v. FPC<sup>67</sup> and California v. FERC,<sup>68</sup> contend that FPA sections 27<sup>69</sup> and 9, when taken together, require the Commission to determine how state water law applies to the proposed license or license amendment and to ensure that those changes do not

---

<sup>63</sup>EIS at 4-71, 4-83, and App. D at 9-10.

<sup>64</sup>EIS at 2-9.

<sup>65</sup>106 FERC ¶ 61,065 at 61,224.

<sup>66</sup>Tribes at 8-9.

<sup>67</sup>328 U.S. 152 (1946), reh'g denied, 328 U.S. 879 (1946) (First Iowa).

<sup>68</sup>495 U.S. 490, 501-02 (1990)

<sup>69</sup>16 U.S.C. § 21.

violate state law.<sup>70</sup> The Eel River Groups make essentially the same allegation, but add that PG&E has not shown it has the right under state law to divert water from the Eel River.<sup>71</sup> The Farm Bureau adds that the State Water Board and the California Supreme Court have held that water users in the Russian River watershed have proprietary rights to a continued flow of water from the project,<sup>72</sup> and that the loss of a contractually-conferred right to use water as a result of water restrictions imposed pursuant to the ESA is a physical “taking” under the Fifth Amendment to the U.S. Constitution, which requires compensation.

43. Although it is undisputed that states adjudicate and allocate water rights, First Iowa holds that section 9(a)(2)<sup>73</sup> does not incorporate the requirements of state law into the FPA as a condition precedent, and that limitations of state law regarding the project may not circumscribe the Commission's exercise of its licensing authority under the FPA.<sup>74</sup> California v. FERC affirms First Iowa, holding that the FPA preempts such regulation under state laws because the federal government occupies the field of hydroelectric licensing.<sup>75</sup>

---

<sup>70</sup>Russian River Districts at 21-23; Farm Bureau at 5-12. Section 27 states, in relevant part:

nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right therein. Section 9, 16 U.S.C. § 802, requires license applicants to submit evidence of compliance with State laws “with respect to bed and banks and to the appropriation, diversion, and use of water.”

<sup>71</sup>Eel River Groups at 24-26.

<sup>72</sup>Citing Stevens v. Oakdale Irrigation District, 13 Cal.2d 343, 352 (1939), and State Water Board Decision D1030 at 33-35 (1961).

<sup>73</sup>Section 9(a)(2) was at that time codified as section 9(b).

<sup>74</sup>328 U.S. at 177-78.

<sup>75</sup>495 U.S. at 497-500.

44. No party in this proceeding has advised us of water rights that will be adversely affected by the January 28 Order.<sup>76</sup> However, to the extent the new conditions in the project license require the licensee to destroy, *i.e.*, take the water rights of others, it is clear that the current owners of those rights must be compensated, and such compensation is provided for in Part I of the FPA. See Public Utility District No. 1 of Pend Oreille County v. City of Seattle, 382 F.2d 666, 670-72 (9th Cir. 1967); Portland General Electric Co. v. FPC, 328 F.2d 165, 176 (9th Cir. 1964).

**F. FPA Section 4(e)**

45. Portions of the project are located within the Mendocino National Forest. FPA section 4(e) requires the Commission to find, when issuing a license, that a project located within a federal reservation (which includes National Forests) “will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.” In the January 28 Order, we explained that section 4(e) does not apply to this license amendment proceeding, because it is not a “licensing” type of amendment, *i.e.*, one which authorizes new works or adds land to the project.<sup>77</sup> We responded to the assertion of some parties that the Forest Service did not comply with the interagency consultation and environmental review requirements of various statutes<sup>78</sup> before providing the Commission with recommendations on PG&E’s application by noting that whether the

---

<sup>76</sup>The Farm Bureau identifies Mendocino Inland Water and Power Commission, Redwood Valley County Water District, the City of Ukiah, and Mendocino Russian River Flood Control and Water Conservation and Improvement District as water users in the Russian River watershed that “will be affected” by the January 28 Order. The only evidence in this record concerning contractual water rights is portions of the contract that establish the amount of water PG&E is obligated to deliver to Potter Valley Irrigation District. See Interior’s comments on the Final EIS, filed July 20, 2002. at 17. Of the 160,000 acre-feet diverted annually from the Eel River the Russian River, only about 15,000 acre-feet is attributable to the contract between PG&E and Potter Valley.

<sup>77</sup>106 FERC ¶ 61,065 at 61,226.

<sup>78</sup>These include FPA section 4(e), 16 U.S.C. § 797(e); the National Forest Management Act, 16 U.S.C. § 1600, et seq.; the ESA; the Wild and Scenic Rivers Act, 16 U.S.C. § 1721, et seq.; and NEPA.

Forest Service is in compliance with any applicable statutory requirements other than those of the FPA is not a matter to be determined by this Commission.<sup>79</sup>

46. On rehearing, the Eel River Groups argue that the Forest Service's lack of compliance with these various statutes has deprived the Commission of the evidentiary record needed to make the consistency finding required by section 4(e).<sup>80</sup> First, as noted, section 4(e) does not apply to this proceeding, a holding the Eel River Groups do not try to rebut. Second, even if section 4(e) did apply, it is the Commission, not the Forest Service, that is required to make a consistency finding, and the purpose for which a reservation was created or acquired is limited to that stated in the legislative or administrative directive establishing the reservation.<sup>81</sup>

### **G. Fish and Wildlife Coordination Act**

47. The Eel River Groups claim that sections 2(a) and 10(b) of the Fish and Wildlife Coordination Act (FWCA)<sup>82</sup> require the Commission to conduct studies regarding the best means of restoring the Eel River salmonid fishery, and that FPA section 10(j)<sup>83</sup> requires the Commission to consult with FWS and California DFG based on such studies.<sup>84</sup>

48. Like FPA section 4(e), section 10(j) does not apply to this proceeding, because this amendment application is not a licensing action.<sup>85</sup> The FWCA moreover does not require the Commission to conduct studies. Rather, it requires the consulting federal and

---

<sup>79</sup>106 FERC ¶ 61,065 at 61,211.

<sup>80</sup>Eel River Groups at 29-32.

<sup>81</sup>See Rainsong Co. v. FERC, 106 F.3d at 269, 272-73 (9th Cir. 1997).

<sup>82</sup>16 U.S.C. §§ 662(a) and 670(b).

<sup>83</sup>16 U.S.C. § 803(j).

<sup>84</sup>Eel River Groups at 33.

<sup>85</sup>See 106 FERC ¶ 61,065 at 61,226.

state fish and wildlife agencies to make recommendations based on their own surveys and investigations.<sup>86</sup>

49. In any event, it is untenable to assert that there has been inadequate consultation with FWS and California DFG. The January 28 Order is the culmination of a process that began with a multi-year study of the Eel River fishery designed and implemented by PG&E with the participation of FWS, NOAA Fisheries, and California DFG. The study was followed by several years of interaction among the Commission staff and the fish and wildlife agencies and other parties, the record of which includes scores of pleadings, numerous technical analyses, technical conferences, public meetings, and draft and final EIS's on which comments were filed.<sup>87</sup>

#### **H. Wild and Scenic Rivers Act**

50. Parts of the Eel River are included in the National Wild and Scenic Rivers System: the mainstem from its mouth to a point 100 yards below Cape Horn Dam (the lowermost project feature), and portions of the Middle, South, and North Forks.<sup>88</sup> All of these features are outside of the project boundary.

51. The Eel River Groups assert that section 12 of the Wild and Scenic Rivers Act (Rivers Act)<sup>89</sup> requires the Commission, along with the Forest Service and Interior's Bureau of Land Management, to prepare a river corridor management plan for the Eel Wild and Scenic River, and to institute measures based on that plan to protect the scenic and environmental resources of the Eel River, specifically the threatened salmonids. They contend that section 12 has been violated because no such plan has been prepared, and that the amended license does not adequately protect the fishery.<sup>90</sup>

---

<sup>86</sup>FWCA section 10(b), 16 U.S.C. § 662(b).

<sup>87</sup>See 106 FERC ¶ 61,065 at 61,208-11.

<sup>88</sup>[www.npa.gov/rivers/wsr-eel.html](http://www.npa.gov/rivers/wsr-eel.html). All of these forks join with the mainstem below Cape Horn Dam.

<sup>89</sup>16 U.S.C. § 1283(c).

<sup>90</sup>Eel River Groups at 32-33.

52. Rivers Act section 12 requires, as pertinent here, the Secretaries of the Interior and Agriculture, and the head of any other federal agency “having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System” or under consideration for inclusion therein, to “take such action respecting management policies, regulations, contracts, plans, affecting such lands. . . as may be necessary to protect such rivers in accordance with the purposes of this chapter.” It also directs the designated agencies, where appropriate, to enter into agreements with state and local officials for the management of “federal lands” which are within the wild and scenic corridor.

53. This Commission is not a federal land management agency and has no jurisdiction over any of the lands included in, bordering on, or adjacent to the designated wild and scenic sections of the Eel River. Moreover, in this proceeding we have concluded that the reasonable and prudent alternative (and the preferred alternative in the EIS) will protect Eel River salmonids.<sup>91</sup>

#### **I. Limitations on Expenditures**

54. In addition to flow requirements, the reasonable and prudent alternative requires PG&E to modify a project dam to allow regulation of flows, implement a pikeminnow suppression program through the development and implementation of adaptive management plans and annual operating plans, and conduct a series of monitoring and reporting programs.<sup>92</sup>

55. PG&E states that the reasonable and prudent alternative includes provisions that appear to limit PG&E’s financial liability for pikeminnow suppression and the various

---

<sup>91</sup>For its part, the Forest Service states it is not required to prepare a management plan. It states that the federal Eel River wild and scenic corridor was designated pursuant to Rivers Act section 2(a)(ii) and, as such, is administered by the State of California, except for those portions located on federal lands. It adds that it manages approximately 35 of the 398 designated miles within the Eel River system, on the North and Middle Forks, and that there is no nexus between those portions of the wild and scenic corridor and the Potter Valley Project. Forest Service Answer at 4-5.

<sup>92</sup>January 28 Order, Appendix A, sections F and G, 106 FERC ¶ 61,065 at 61,235-36.

monitoring and reporting programs to an annual contribution of \$60,000,<sup>93</sup> which is consistent with PG&E's understanding of an agreement between itself and NOAA Fisheries. PG&E requests that we clarify that its annual obligation in this regard is limited to \$60,000 and that any additional expenses of the program must be funded from other sources. Without such a limitation, it states, the Project will not be economically feasible,<sup>94</sup> which would violate the requirement of the Joint Regulations that reasonable and prudent alternatives be "economically and technologically feasible."<sup>95</sup>

56. We are aware that it was PG&E's understanding that its costs for these purposes would not exceed \$60,000 annually, and the referenced provisions of the reasonable and prudent alternative and RPMs support that understanding. Nor has NOAA Fisheries made any filings that would lead us to think otherwise. We note however that agreements to limit a licensee's costs for agreed-upon measures do not, indeed cannot, limit the Commission's reserved authority to require additional measures, as future circumstances may warrant.<sup>96</sup> Should this become an issue in the future, we will address it based on the circumstances then obtaining.<sup>97</sup>

---

<sup>93</sup>See reasonable and prudent alternative Section F.2, 106 FERC ¶ 61,065 at 61,235; RPM Measure 4, *id.* at 61,237.

<sup>94</sup>In its comments on the Final Biological Opinion, PG&E states that the cost to fully implement the reasonable and prudent alternative's pikeminnow suppression activities and the various monitoring and reporting requirements alone could exceed \$600,000 annually. See PG&E, Attachment B, at 6-7.

<sup>95</sup>Citing 50 C.F.R. § 402.02.

<sup>96</sup>See, e.g., Power Authority of the State of New York, 105 FERC ¶ 61,102 at 61,572 (2004) (rejecting request that expenses of complying with license conditions be capped); Southern California Edison Co., 77 FERC ¶ 61,313 at 62,428 n. 46 (1996), and cases cited therein (explaining the purpose of reopener provisions; *i.e.*, to ensure that the public interest standard is met throughout the license term).

<sup>97</sup>For this purpose, we would use the standard form fish and wildlife license reopener article, which is incorporated into PG&E's license by Ordering Paragraph (D) of the license order. See 25 FERC ¶ 61,060 at 61,067, incorporating Standard Article 15 of Form L-5, 54 FPC 1793 at 1837.

**J. Tomki Creek Stream Gauge**

57. New license Article 51<sup>98</sup> requires PG&E to install a new streamflow gauge at Tomki Creek, which is an unregulated tributary to the Eel River Mainstem that joins the mainstem below Cape Horn Dam dam. PG&E states that if the Commission retains the reasonable and prudent alternative in the license, it should delete this requirement, because the Tomki Creek gauge plays no role in implementation of the reasonable and prudent alternative.<sup>99</sup>

58. We agree. The Tomki Creek gauge upgrade was part of the PVID alternative, under which the flow regime would have been based on flows in Tomki Creek. The reasonable and prudent alternative flow regime uses a different method to determine daily flows below Cape Horn Dam. We will therefore delete Article 51.

**K. Interim Flows and Extension of Time Request**

59. License Article 52 requires PG&E to submit a plan to implement and comply with the reasonable and prudent alternative and the RPMs by August 1, 2004.<sup>100</sup> However, RPM Measures 1 (pikeminnow control program) and 8 (plan to monitor and assess summer flows) are required to be implemented by April 15, 2004.<sup>101</sup> PG&E requests that we extend the dates by which it must comply with Measures 1 and 8 until August 1, 2004, stating that there is “simply not enough time” between issuance of the January 28 Order and April 15, 2004, to accomplish this task.<sup>102</sup> On March 30, 2004, PG&E filed a letter stating its intention to submit all of the plans required by Article 52 to applicable

---

<sup>98</sup>Ordering Paragraph (D), 106 FERC ¶ 61,065 at 61,228.

<sup>99</sup>PG&E at 34-35.

<sup>100</sup>106 FERC ¶ 61,065 at 61,229.

<sup>101</sup>RPM Measure 1, 106 FERC ¶ 61,065 at 61,236; Measure 8, *id.* at 61,237. The RPMS as filed by NOAA Fisheries provided for an implementation date of April 15, 2003, which was obsolete when the January 28 Order was issued. We therefore substituted April 15, 2004.

<sup>102</sup>PG&E at 35.

agencies by July 2, 2004, and to submit plans to the Commission for approval on August 1. No party filed a response to that letter.

60. In light of the extensive measures required by the reasonable and prudent alternative and RPMs, we think PG&E's request is reasonable, and no answers to it were filed. Accordingly, it will be granted.

61. Cal Trout requests that we modify Article 52 to establish a deadline for PG&E to comply with the substantive requirements of that article, in addition to the August 15, 2004 deadline for submitting the plan. Because of the extensive undertakings required by the reasonable and prudent alternative and RPMs, we are not prepared to impose a date for substantive compliance at this time, except as described in the following section. PG&E's plan should include proposed dates for achieving compliance.

#### **L. Interim Flow Requests**

62. During the course of this proceeding, some parties have requested that PG&E be required to implement DOI/NMFS or reasonable and prudent alternative flows on an interim basis.<sup>103</sup> Interior, NOAA Fisheries, and the Tribes renew their requests for interim flows.<sup>104</sup> Interior states that the August 15 date for filing an implementation and compliance plan will prevent the reasonable and prudent alternative flows from taking effect this year.<sup>105</sup> NOAA Fisheries requests that PG&E be required to implement the reasonable and prudent alternative flows by May 15, 2004, in light of its jeopardy opinion and incidental take statement.<sup>106</sup> The Tribes also cite the jeopardy opinion and request

---

<sup>103</sup>PG&E has been voluntarily implementing the PVID alternative flow regime since 1999. 106 FERC ¶ 61,065 at 61,211.

<sup>104</sup>On March 29, 2004, Humboldt County filed an untimely request for rehearing, in which it requested that the reasonable and prudent alternative flows be implemented by May 15, 2004. The date for filing rehearing requests is statutory and cannot be extended by the Commission. *Sierra Association for Environment v. FERC*, 791 F.2d 1403 (9th Cir. 1986). Humboldt County's request is therefore rejected. In any event, it generally makes the same arguments as NOAA Fisheries.

<sup>105</sup>Interior at 7-9.

<sup>106</sup>NOAA Fisheries at 6-7.

immediate flow implementation.<sup>107</sup> PG&E filed an answer to the Tribes which states that its interim flow regime is similar to that of the reasonable and prudent alternative flows except during the summer, and that NOAA Fisheries did not ask for immediate implementation.

63. In light of decision to affirm the January 28 Order's adoption of the reasonable and prudent alternative and RPMs, we think it is reasonable to require PG&E to implement the flows on an interim basis, beginning immediately. PG&E has never indicated that it could not implement the reasonable and prudent alternative flows at any time, and we see no reason PG&E should be less able to do so than it is able to implement the flow regime it has proposed. It is not necessary that the implementation and compliance plan be approved for PG&E to begin implementing these flows.

64. In conclusion, we affirm the January 28, 2004 Order for the reasons given above, except for the removal of license Article 51, pertaining to the installation of a new gauge at Tomki Creek, modification of the dates for certain Reasonable and Prudent Measures, and immediate implementation of the flow regime on an interim basis.

The Commission orders:

(A) Article 51 of the Potter Valley Project No. 77 license is deleted.

(B) The dates for implementation of RPM Measures 1 and 8 found in Appendix B to the January 28, 2004 order in this proceeding are extended to August 1, 2004.

(C) The licensee shall implement the reasonable and prudent alternative flow regime found in Appendix A to the January 28, 2004 Order in this proceeding, commencing no later than seven days following the issuance of this order.

---

<sup>107</sup>Tribes' Renewed Motion for an Order Establishing Interim Flows for the Eel River, filed March 5, 2004.

(D) All requests for relief not specifically granted in this order are denied.

By the Commission. Commissioner Brownell concurring in part with a  
separate statement attached.

( S E A L )

Linda Mitry,  
Acting Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Project No. 77-120

(Issued June 2, 2004)

Nora Mead BROWNELL, Commissioner *concurring*:

As I stated in my concurrence to the January 28 order, given the decision to defer to the recommendations in NOAA Fisheries' Biological Opinion, I think it is both unnecessary and counterproductive to take a position on the analyses and recommendations in the EIS. Therefore, I decline to join in the portions of this order that do so.

Nora Mead Brownell