

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Project No. 77-121

ORDER DENYING REHEARING

(Issued September 21, 2004)

1. In this order, the Commission denies a request for rehearing by Friends of the Eel River (Friends) of the order on rehearing issued on June 2, 2004, in this proceeding.¹ The June 2 Order considered various challenges to a January 28, 2004 order amending the license for Pacific Gas and Electric Company's (PG&E) Potter Valley Project No. 77 to require various operational and physical modifications to the project for the benefit of federally-listed, threatened salmonids.²

BACKGROUND

2. The history of this proceeding is explained in the January 28 and June 2 orders. The project is located on California's Eel River, which flows northward and drains into the Pacific Ocean. The project has two dams on the Eel River. The upper dam impounds Lake Pillsbury. Twelve miles downstream, at Cape Horn Dam, some of the river's flow is diverted from the Eel River by tunnel and penstock to the project powerhouse. The powerhouse releases water into the southward-flowing East Branch Russian River, which flows into the mainstem Russian River. Below the powerhouse on the mainstem Russian River is a U.S. Army Corps of Engineers (Corps) project, Coyote Dam, and its impoundment, Lake Mendocino. Further below, on a tributary to the mainstem Russian River, is the Corps' Warm Springs Dam and its impoundment, Lake Sonoma. The upper Russian River basin has a substantial agricultural economic base, and the lower basin is rapidly urbanizing. The mainstem Russian River drains into

¹ 107 FERC ¶ 61,232.

² 106 FERC ¶ 61,065.

the Pacific Ocean about 150 miles south of the Eel River estuary. Both rivers are inhabited by federally-listed, threatened salmonids.

DISCUSSION

A. Procedural Considerations

3. Friends' timely-filed pleading raises three issues. First, the group opposes the decision in the June 2 Order on rehearing to delete the requirement for PG&E to upgrade an existing flow gauge at Tomki Creek, a tributary to the Eel River below Cape Horn Dam. Rehearing of an order on rehearing lies when the order on rehearing reverses a prior order on the issue in question. Rehearing therefore lies of the decision not to require PG&E to upgrade the Tomki Creek flow gage.

4. Second, the June 2 Order rejected certain arguments made by Friends pertaining to project impacts on Russian River salmonids, because, among other things, Friends failed to specifically identify or submit for the record the studies upon which its rehearing arguments purported to rely. Friends has now submitted excerpts from a draft Biological Assessment (BA) prepared in another proceeding by other agencies,³ which it states references the studies and supports its assertion of a connection between diversions from the Eel River and impacts to Russian River salmonids.

5. Rehearing of an order on rehearing does not lie where a party seeks merely to supplement the record with additional evidence. We therefore construe this element of Friends' pleading as a request for reconsideration. The Commission's policy is to entertain a party's motion for reconsideration of a rehearing order where the party believes the Commission may have overlooked or misunderstood facts or arguments set forth in the party's rehearing request. The function of reconsideration is not to consider information submitted for the first time on reconsideration.⁴ However, although the draft BA pre-dates and could have been included with Friends' rehearing request, we

³ Friends' rehearing request, Exhibit 1. This exhibit consists of excerpts from the Executive Summary and Chapter 4 of the draft BA prepared by the Corps, Sonoma County Water Agency, and Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino) in the context of Endangered Species Act consultation regarding potential impacts to listed fish species from these entities' proposed structural and operational modifications to the Coyote Valley and Warm Springs Dams and two diversion facilities, as well as proposals regarding water supply withdrawals, channel maintenance, fish production facilities, and other matters.

⁴ Great Northern Paper, Inc., 86 FERC ¶ 61,184 at 61,635 (1999).

think the record would benefit from a response to Friends' characterization of the information in the excerpted portions of the draft BA.

6. Finally, Friends requests clarification of one passage in the June 2 order on rehearing. We consider that below.

7. On July 30, 2004, a pleading was filed by intervenors California Sportfishing Protection Alliance, Friends of the Russian River, and certain non-parties (together, CSPA)⁵ The County of Sonoma, California and the Sonoma County Water Agency subsequently filed an answer disputing the arguments in that pleading.

8. Although CSPA's pleading is styled as a motion for leave to file a brief in support of Friends' pleading pursuant to Rule 713(d)(2) of our Rules of Practice and Procedure,⁶ it is actually a separate request for rehearing which was filed almost one month after the statutory deadline for rehearing requests. We will therefore dismiss this pleading. In any event, the arguments made by CSPA are essentially the same as the argument made by Friends regarding the relationship between Eel River diversions and Russian River flows, which we discuss below.

B. Substantive Issues

1. Tomki Creek Stream Gauge

9. The January 28 Order required PG&E to upgrade a streamflow gauge at Tomki Creek⁷ for the purpose of indexing Eel River Basin flows to implement the instream flow requirements added to the license by the January 28 Order. On rehearing, PG&E asserted that if the license included the flows set forth in the Reasonable and Prudent Alternative (RPA) to the Commission's proposed action proffered by the National Marine Fisheries Service (NOAA Fisheries), the Commission should delete the upgrade/indexing requirement, because the Tomki Creek gauge is not needed to monitor those flows.⁸

⁵ The non-parties are Pacific Coast Federal of Fishermen's Associations, Mayor Frank Egger of Fairfax, California, and L. Martin Griffin, Jr.

⁶ 18 C.F.R. §385.713(d)(2).

⁷ See ordering paragraph (D) and Article 51, 106 FERC ¶ 61,065 at 61,228.

⁸ PG&E's rehearing request at 34-35.

10. Our June 2 Order agreed with PG&E. Use of the Tomki Creek gauge for flow indexing was proposed as part of the Potter Valley Irrigation District Alternative, which the Environmental Impact Statement (EIS) considered, but which we did not adopt. The June 2 Order stated that the flow regime of the RPA, which NOAA Fisheries issued after the EIS was issued, uses a different method to index daily flows below Cape Horn Dam, and accordingly removed the upgrade/indexing requirement.⁹

11. Friends objects to the removal of this requirement. It points out that in assessing the environmental effects of the RPA, the January 28 Order used, as a surrogate, the “DOI/NMFS” Alternative,¹⁰ to which the RPA is quite similar and on which it is based. Under the DOI/NMFS Alternative, Friends states, flow indexing would be based on a weighted average of readings from three gauges, including the Tomki Creek gauge. If the Tomki Creek gauge is not used to index flows under the RPA, Friends contends, a Supplemental EIS is needed to examine the effect of the indices resulting from the gauges the RPA actually will use.

12. The DOI/NMFS Alternative provides for the Tomki Creek gauge to be used for two years until two new gauges are built upstream of Lake Pillsbury. However, the DOI/NMFS Alternative also states that if the Tomki Creek gauge is not operative during this two-year period, the flow indices should be based on a surrogate index calculated from a combination of Lake Pillsbury elevation levels, generation flows, and flows at Cape Horn Dam.¹¹ This surrogate index method was moreover specified by NOAA Fisheries in its Biological Opinion, which contained the RPA.¹² The Biological Opinion states that the RPA is a “slight modification” to the DOI/NMFS Alternative, and that “the simulated performance over the historical record [using the surrogate index method] is nearly identical to that of the DOI/NMFS proposal.”¹³ Therefore, “the installation of additional flow gages will not be required,” and the “surrogate index will be adopted permanently.”¹⁴ In light of the above, we deny rehearing on this issue.

⁹ 107 FERC ¶ 61,232 at 62,002.

¹⁰ This is an abbreviation for “Department of the Interior/National Marine Fisheries Service.”

¹¹ EIS at 2-34 to 2-35.

¹² Biological Opinion at 87-88, 100.

¹³ *Id.* at 101.

¹⁴ *Id.* at 102.

2. Russian River Studies

13. In their requests for rehearing of the January 28 amendment order, Friends and others contended that the EIS was deficient because it failed to address unidentified post-EIS studies which they alleged show that continued diversion of Eel River water to the Russian River creates unnaturally high summer flows, to the detriment of Russian River salmon and steelhead.¹⁵

14. On our June 2 Order on rehearing, we responded that: (1) these parties did not include copies of or citations to any of the alleged study results; (2) neither NOAA Fisheries nor the California Department of Fish and Game (Cal Fish & Game) submitted any such studies for the record; and (3) the negative impacts of high summer flows on Russian River salmonids are discussed in the EIS¹⁶ and are related to the Potter Valley Project's Russian River discharges only indirectly, if at all, because the flows that affect salmonids are the result of downstream releases made by the Sonoma County Water Agency (Sonoma) from Coyote Dam.¹⁷ Finally, we noted that these parties established no connection between the project's diversions to the upper Russian River and Sonoma's decisions regarding releases to the lower Russian River below Coyote Dam.¹⁸

15. In its current rehearing request, Friends states that the study results are set forth in the above-mentioned draft BA issued on January 16, 2004, by the Corps, Sonoma, and Mendocino (*see* n. 3, above). Friends adds that Sonoma is conducting a pilot study that would reduce summer flows in the Russian River to assist in the recovery of listed salmonids.¹⁹ The pilot program is one of the measures under consideration in the draft BA. Finally, Friends states that a California court has found that the diversions from the

¹⁵ Friends' February 27, 2004, rehearing request at 13.

¹⁶ EIS at 4-71, 4-83, and App. D at 9-10.

¹⁷ EIS at 2-9.

¹⁸ 107 FERC ¶ 61,2332 at 61,999-62,000.

¹⁹ A letter from Sonoma to the California State Water Resources Control Board's Division of Water Rights describing the pilot study is attached to Friends' rehearing request at Exhibit 2.

Eel River constitute the majority of the summer flows in the Russian River.²⁰ All of these things, Friends asserts, require the preparation of a supplemental EIS.

16. The essence of Friends' position is that reducing summer flows in the lower Russian River to benefit salmonids translates into additional water that could be retained in the Eel River. It is undisputed that diversions from the Eel River are an important component of Russian River summer flows. However, the submitted excerpts from the draft BA do not show that reduced summer flows in the Russian River translate into more water available for the Eel River. The draft BA analyzes proposed changes to various Russian River facilities and operations, a major objective of which is to improve salmonid habitat and reduce opportunities for injury and harm to them. A principal component of the proposed changes is reduced summer-flow releases at Coyote and Warm Springs Dams.²¹ Friends fails to mention however that the draft BA also states that Sonoma is planning ways to meet increased future water demands,²² and that *Friends v. Sonoma* concerns a related request by Sonoma to the State Water Resources Control Board to increase its annual diversion of water from the Russian River for consumptive uses by about 33 percent, from 75,000 acre-feet-per-year (AFY) to 101,000 AFY.²³ Therefore, the proposed Russian River flow reductions cannot be interpreted as a reduction in the need for water in the Russian River basin. Accordingly, we decline Friends' request to revisit this matter.

²⁰ Friends cites *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal. App. 4th 859 (2003) (*Friends v. Sonoma*). This case holds that Sonoma, in preparing an environmental report under California law for a proposal to increase its diversions of water from the Russian River to serve increasing consumptive demands, improperly failed to disclose and address the potential impacts of reduced diversions from the Eel River to the Russian River as a result of this license amendment proceeding.

²¹ Exhibit 1 at xxxvii. Other elements of the proposal are, in summary: (1) a minimum flow and reduced ramping rates during maintenance at Coyote Dam; (2) modified facilities and operations at Warm Springs Dam to provide better temperature control for release, reduce ramping rates, and improve water supplies to the fish hatchery at that location; (3) modifications to diversion facilities to improve fish screening and fish passage; and (4) improved bank stabilization and vegetation and sediment management. Exhibit 1 at xxxviii-xxxix.

²² Some measures under consideration include an aquifer storage and recovery program, additional diversion facilities, and new rate water pipeline. Exhibit 1 at xxxix, 4-23 to 4-25.

²³ *Friends v. Sonoma*, 106 Cal. App. at 865.

3. Limitations on Expenditures

17. On rehearing of the January 28 amendment order, PG&E asked the Commission to clarify that its obligations to support the suppression of pikeminnow, a salmonid predator, and for various monitoring and reporting programs are limited to \$60,000 annually, and that any additional expenses for such program must be funded from other sources. PG&E's request was based on its understanding of discussions it had with NOAA Fisheries and certain provisions of the RPA and NOAA Fisheries' implementing measures.²⁴ In our June 2 Order, we declined make the requested clarification, because cost-limitation understandings between a licensee and another entity cannot limit the Commission's exercise of its reserved authority to require additional measures, should future circumstances warrant.²⁵ We added that the issue of costs would be addressed at such future time.²⁶

18. In its July 2 rehearing request, Friends asks us to again affirm that the expenditures in question cannot be capped.²⁷ The June 2 Order adequately clarifies our conclusion regarding this matter.

The Commission orders:

(A) The Friends of the Eel River's July 2, 2004, request for rehearing in this proceeding is denied.

²⁴ Specifically, Friends cites Reasonable and Prudent Measure 4, which states that the licensee shall annually credit \$60,000 to the fund established for these purposes, and makes no mention of any adjustments thereto. *See* 106 FERC ¶ 61,065 at 61,237.

²⁵ *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 that the purpose of reopener provisions is to ensure that the public interest standard is met throughout the license term).

²⁶ For this purpose, we would use the standard 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 by reference Standard Article 15 of Form L-5, 54 FPC 1793 at 1837 (1975).

²⁷ Friends' rehearing request at 4.

(B) The late-filed request for rehearing of California Sportfishing Protection Alliance, Friends of the Russian River, Pacific Coast Federal of Fishermen's Associations, Mayor Frank Egger of Fairfax, California, and L. Martin Griffin, Jr. is dismissed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.