

149 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Pacific Gas and Electric Company

Project No. 2687-167

ORDER DENYING REQUEST FOR REHEARING

(Issued October 16, 2014)

1. On June 19, 2014, the Commission staff issued an order¹ granting Pacific Gas and Electric Company (licensee or PG&E) a temporary flow variance for the Pit 1 Hydroelectric Project No. 2687. The order approved the licensee's request to temporarily amend certain flows required by the water quality certification for the project. On July 21, 2014, American Whitewater filed a request for rehearing of the Commission's June 2014 Order. As discussed below, we deny rehearing.

Background

2. In 2003, the Commission issued a new license for the Pit 1 Project.² The 69.3-megawatt project is located on the Fall and Pit Rivers, near the towns of Fall River Mills and McArthur in Shasta County, California. The license includes mandatory conditions incorporated from the California State Water Resources Control Board's (State Water Board) water quality certification issued for the project pursuant to the Clean Water Act.³ Condition No. 13 requires PG&E to control growth of aquatic vegetation and mosquito production in Fall River Pond by releasing three flushing flows each year. The flows are required to occur in May or June, July, and August for two consecutive weekend days. A consequence of – but not a stated reason for – the flushing flows is the creation of whitewater recreation in the Pit 1 Bypass reach.

¹ *Pacific Gas and Elec. Co.*, 147 FERC ¶ 62,218 (2014) (June 2014 order).

² *Pacific Gas and Elec. Co.*, 102 FERC ¶ 61,309 (2003).

³ *See id.* at Ordering Paragraph (D) (appending to license California State Water Resource Control Board, Water Quality Certification for the Pit 1 Hydroelectric Project).

3. Subsequently, U.S. Fish and Wildlife Service (FWS) determined that the flushing flows from Pit 1 Project adversely affected the population of the Shasta crayfish, a species listed as endangered under the Endangered Species Act of 1973.⁴ By letter filed May 26, 2009, FWS requested that the Commission and the State Water Board suspend the flushing flows to prevent further adverse effects on and take of Shasta crayfish.⁵

4. The State Water Board temporarily suspended the flushing flow requirement in the water quality certification by order on July 6, 2010 for two years, 2010 and 2011, to allow for completion of the required California Environmental Quality Act (CEQA) analysis before ruling on a permanent amendment to the water quality certification to suspend the flushing flows.⁶ On July 16, 2010, PG&E filed a request with the Commission to temporarily halt the flushing flows.⁷

5. By order dated August 10, 2010, the Commission issued a temporary amendment to the project license, incorporating the State Water Board's temporary suspension of Condition No. 13 and suspending the flushing flow requirement for 2010 and 2011.⁸

6. The State Water Board ordered the temporary suspension of the flushing flow requirement for 2012,⁹ 2013,¹⁰ and 2014¹¹ to allow for the CEQA process. The

⁴ 16 U.S.C. § 1531, *et seq.* (2012).

⁵ Letter from Chris Nagano (FWS) to Kimberly D. Bose (Commission Secretary) and Victoria A. Whitney (State Water Board) (filed May 26, 2009).

⁶ *See* PG&E, Request for Temporary Modification to Halt Flushing Flows (filed July 16, 2010) at attachment.

⁷ *Id.* at 1.

⁸ Order Temporarily Amending License and Incorporating Temporary Amendment to Water Quality Certification, *Pacific Gas and Elec. Co.*, 132 FERC ¶ 62,101 (2010).

⁹ PG&E, Request for Temporary Amendment to Allow Cessation of Flushing Flows for 2012 (filed June 21, 2012) at attachment A.

¹⁰ PG&E, Request for Temporary Amendment to Allow Cessation of Flushing Flows for 2013 (filed June 25, 2013) at attachment A.

¹¹ PG&E, Request for Temporary Amendment to Allow Cessation of Flushing Flows for 2014 (filed June 13, 2014) at attachment B.

Commission issued temporary amendments to the project license and incorporated the State Water Board's temporary water quality certification amendment and suspended the flows for 2012,¹² 2013,¹³ and 2014.¹⁴

7. American Whitewater, a non-profit organization focused on conserving and restoring whitewater resources, has participated in proceedings regarding the Pit 1 Project since the relicensing proceeding. Following the temporary suspension orders, American Whitewater has provided comments to the Commission and requested technical conferences on the impact of the flushing flows on the Shasta crayfish and whitewater recreational opportunities.¹⁵

8. Specifically, American Whitewater provided comments disputing the accuracy of the reports relied on by FWS throughout the temporary suspensions of the flushing flows. American Whitewater questioned whether the water temperature readings indicating increases in temperature from the flushing flows were measured in areas where Shasta crayfish are known to inhabit.¹⁶ Also, American Whitewater, jointly with Friends of the River, asserted that FWS relied on a report in the Biological Assessment that was not designed to determine how Shasta crayfish respond to temperature variation. Instead, the organizations claimed that the report made overbroad conclusions about the impact of temperature and flushing flows on Shasta crayfish.¹⁷ American Whitewater and Friends

¹² Order Temporarily Amending License and Incorporating Temporary Amendment to Water Quality Certification, *Pacific Gas and Elec. Co.*, 140 FERC ¶ 62,080 (2012).

¹³ Order Temporarily Amending License and Incorporating Temporary Amendment to Water Quality Certification, *Pacific Gas and Elec. Co.*, 143 FERC ¶ 62,220 (2013).

¹⁴ Order Modifying and Approving Temporary Flow Variance, *Pacific Gas and Elec. Co.*, 147 FERC ¶ 62,218 (2014) (June 2014 Order).

¹⁵ *E.g.*, American Whitewater comments, filed June 8, 2009 (commenting on the decision to temporarily suspend the flushing flows and the impacts on the whitewater recreational opportunities); American Whitewater and Friends of the River comments, filed June 16, 2011 (commenting on FWS' Biological Assessment); American Whitewater comments, filed December 19, 2013 (commenting on the data used by the resource agencies to make their determinations and requesting a technical conference).

¹⁶ *See* American Whitewater comments, filed June 8, 2009.

¹⁷ *See* American Whitewater and Friends of the River comments, filed June 16, 2011.

of the River raised concerns about the lack of a comprehensive analysis of the Shasta crayfish population to help track the benefits of recovery plans and the temporary suspension of the flushing flows.¹⁸ Finally, American Whitewater raised the issue of whether non-native crayfish were impacting the Shasta crayfish.¹⁹

9. American Whitewater also asserted in its comments that the flushing flows provided an opportunity for whitewater recreation.²⁰ It asserted that the original intent behind the flushing flows is more expansive than the text of Condition No. 13 indicates.²¹ American Whitewater claimed that the Commission failed to ensure a balance between hydropower and non-hydropower values – fish and wildlife and whitewater recreational opportunities – when considering the temporary suspension of the flushing flows.²²

10. On July 21, 2014, American Whitewater filed a timely request for rehearing of the June 2014 order.²³

Discussion

11. American Whitewater makes three distinct arguments about the June 2014 Order: (1) that the record before the Commission did not support the decision to temporarily suspend the flushing flows, (2) that the Commission acted arbitrarily and capriciously in issuing the order, and (3) that the Commission disrupted the balance between hydropower, fish and wildlife, and recreation contemplated in the 2003 license.

12. We were required, as a matter of law, to include the State Water Board's conditions in the license for the Pit 1 Project,²⁴ and accordingly did so. As discussed above, Condition No. 13 requires the licensee to release flushing flows annually, for the

¹⁸ See American Whitewater and Friends of the River comments, filed December 20, 2012.

¹⁹ *Id.*

²⁰ See American Whitewater comments, filed June 8, 2009.

²¹ See American Whitewater comments, filed December 19, 2013.

²² *Id.*

²³ American Whitewater included with its rehearing request a timely motion to intervene, which was granted by operation of Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2014).

²⁴ See, e.g., *American River v. FERC*, 129 F.3d 99 (2nd Cir. 1997).

purpose of controlling aquatic vegetation and mosquitos, pursuant to a plan approved by the State Water Board. Condition No. 14 provides that the licensee must establish a program to monitor the effectiveness of the flushing flows, which the State Water Board may modify.²⁵ In addition, Condition No. 2 reserves to the State Water Board authority to amend the certification.²⁶ We construe these provisions as giving the State Water Board the authority to revise the flushing flow requirements, and, accordingly, we are required to approve the variance.

13. Given this conclusion, American Whitewater's arguments, which assume that we have discretion in this matter, are moot. We nonetheless will address them briefly, for clarity.

14. American Whitewater argues that the record before the Commission lacks substantial evidence to support staff's decision to temporarily amend the license and grant the flow variance, asserting that the suspension of the flushing flows is "contributing to the decline in populations" of the Shasta crayfish. It provides a table containing data extracted from the Shasta Crayfish Technical Review Committee's 2010 Annual Report to support this argument.²⁷ American Whitewater also hypothesizes that the decline of the Shasta crayfish population results from the project-induced, steadily-increasing water temperatures downstream, regardless of the temperature increases related to the flushing flows.²⁸

15. In fact, the record supports staff's decision to grant the temporary flow variance in the June 2014 Order. FWS found the suspension of the flushing flow for 2014 to be not likely to adversely affect the Shasta crayfish, reaching this conclusion because "the best available science . . . has shown the flushing flows create detrimental effects to [the Shasta crayfish] and potentially create a favorable environment for non-native crayfish."²⁹ Similarly, the State Water Board ordered the temporary suspension of the flushing flows "with continued monitoring of effects until a full CEQA analysis can be

²⁵ See *Pacific Gas and Elec. Co.*, 102 FERC ¶ 61,309 at Appendix.

²⁶ *Id.*

²⁷ American Whitewater Request for Rehearing at 9-10.

²⁸ American Whitewater Request for Rehearing at 11.

²⁹ See PG&E, Request for Temporary Amendment to Allow Cessation of Flushing Flows for 2014 (filed June 13, 2014) at attachment A (Letter from Eric Tattersall (FWS, Deputy Assistant Field Supervisor) to Jessica Albeitz (PG&E License Coordinator, Hydro Licensing) regarding informal Section 7 consultation).

completed [because] significant impacts can be avoided.”³⁰ While we reach independent judgments on matters before us, and do not defer to other agencies, we can rely on experts whose judgment we find credible. We conclude that the evidence supplied by FWS and the State Water Board is sufficient to justify a temporary cessation of the flushing flows.

16. Next, American Whitewater argues that the Commission’s June 2014 Order constituted an arbitrary and capricious action to the extent that Commission staff has repeatedly approved variances of the flushing flow condition, thereby altering the balance achieved by the license. The organization argues that the June 2014 Order violated section 10(a)(1) of the Federal Power Act³¹ because the temporary license amendment does not address the comprehensive plan of development established in the 2003 license, claiming that the total number of days available for whitewater recreational opportunities has been reduced because of the cancellation of the flushing flows, thereby upsetting the balance of the comprehensive plan of development. American Whitewater contends that the flushing flows served a dual purpose, vegetation and mosquito control and whitewater recreation. It relies on personal communications with a former State Water Board employee and discussions during negotiation of the water quality certification that all parties agreed the flushing flows served a dual purpose.³²

17. We disagree. The license balanced, among other things, environmental protection and recreation, under the then-existing conditions. Since that time, the question has arisen whether the flushing flows are having an unanticipated, negative impact on an endangered species. Halting the flushing flows until scientific studies determine how best to resolve this issue is both reasonable and consistent with the Federal Power Act’s mandate that we balance competing uses of water resources.

18. The anecdotal evidence provided by American Whitewater is not only unclear, but is not supported by anything in the record of the relicensing proceeding, the certification, or the license order. Hence, it has minimal, if any, probative value. Condition No. 13

³⁰ See PG&E, Request for Temporary Amendment to Allow Cessation of Flushing Flows for 2014 (filed June 13, 2014) at attachment B (State Water Resource Control Board, Order Approving the Extension of the Temporary Suspension of Flushing Flow Requirement, Pit 1 Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2687).

³¹ 16 U.S.C. § 803(a)(1) (2012).

³² Request for Rehearing at Footnote 5 (asserting that the dual purpose language was left out of the certification at the behest of PG&E, but that the parties agreed the “flushing flows had a co-purpose to provide a whitewater recreation opportunity”).

states “Licensee shall control growth of aquatic vegetation and mosquito production in the Fall River Pond by releasing a continuous minimum fish/aquatic habitat release as described in Condition [No.] 8 and by releasing flushing flows through Fall River Pond for two consecutive days (Saturday and Sunday) three times per year.”³³ The plain language of the condition does not support American Whitewater’s contentions. We also note that Article 424 of the Pit 1 Project license requires implementation of a recreational boating plan.³⁴ American Whitewater does not argue that the plan fails to provide sufficient recreational flows, and hence fails to show that the variance in any way undercuts the recreational regime established pursuant the project license.

The Commission orders:

The request for rehearing filed on July 21, 2014 by American Whitewater is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³³ *Pacific Gas and Elec. Co.*, 102 FERC ¶ 61,309 (2003).

³⁴ *Pacific Gas and Elec. Co.*, (Order Approving Final Whitewater Boating Flow Schedule), 135 FERC ¶ 62,215 (2011).