

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Licensed)
Applications 1341, 1342, 1343, 1344,)
1345, 11115, 13928 and 16102 and)
Permitted Application 26533,)
SOUTHERN CALIFORNIA EDISON COMPANY,)
Petitioner.)

ORDER: WR 84-11
SOURCES: San Joaquin River,
South Fork San Joaquin
River and Tributary
Streams
COUNTY: Fresno

ORDER AMENDING AND AFFIRMING PERMIT AND
ORDERS GRANTING PETITIONS FOR CHANGE,
AND DENYING PETITION FOR RECONSIDERATION



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1.0 BY THE BOARD

The Board having issued orders dated June 11, 1984 approving changes petitioned by Southern California Edison Company (Company) and having issued the permit on Application 26533 on June 12, 1984; the Company having filed a petition for reconsideration on July 11, 1984 and the Board having duly considered the petition for reconsideration finds as follows:

2.0 THE PROJECT

The petitioned changes and the permitted application are for the Balsam Meadow Hydroelectric Project. Balsam Meadow Project is located about 40 miles north-northeast of the City of Fresno on the western slope of the Sierra Nevada about 5,300 to 6,720 feet above sea level within the Sierra National Forest. Having significant environmental

impacts, the project will entail construction and operation of large scale physical works and diversion of water from San Joaquin River, South Fork San Joaquin River and tributary streams. The proposed project will be a part of extensive existing works used for the diversion and storage of water and the production of electric power.

3.0 PROTESTS

The protest filed to the petitions for change and the application by the Department of Fish and Game (DFG) was resolved by the Company stipulating to certain conditions. The protest by Pacific Gas and Electric Company was withdrawn. All protests having been resolved, the permit and orders approving the petitioned changes were issued by the Chief, Division of Water Rights, in accordance with our order of delegation.

4.0 CALIFORNIA ENVIRONMENTAL QUALITY ACT

On October 5, 1983, the Public Utilities Commission (PUC), as lead agency, approved the Final Environmental Impact Report (FEIR) for the proposed project. The FEIR was considered and conditions adopted to mitigate or avoid significant project effects pursuant to Public Resources Code Section 21002.1. These conditions and other conditions adopted to implement the DFG agreement are, in part, the subject of the Company's petition for reconsideration.

5.0 PETITION

Filed in accordance with Water Code Section 1357, the petition for reconsideration grouped objections and requested changes under headings "A" through "L". Water Code Section 1359, however, provides that the Board may amend or modify a decision or order to correct obvious errors or oversight without the necessity of notice or a hearing. Requests for changes within headings A, B, I, K and L were appropriate for correction in accordance with Section 1359, and on August 21, 1984 the Company was advised that requested changes would be made. The request for the copy of a page from Licensed Application 1343 under heading H was also answered in the aforementioned letter. Accordingly, only matters under headings C, D, E, F, G and J will be considered in this order.

5.1 Changes Requested Because Construction Began Before Water Right Approvals Obtained

The Company states that construction commenced in 1983 following authorization from the Federal Energy Regulatory Commission (FERC). If this statement is offered for the proposition that construction may commence following FERC approval in the absence of necessary water right approvals, we do not concur. Except in compliance with the Water Code, there is no right to appropriate or use water subject to appropriation (Section 1225). No water appropriated under the code for one specific purpose may be used for a different purpose except as authorized by the code (Section 1700). When approving a project as a responsible agency, the Board is required to mitigate significant environmental effects, within its authority, identified in an environmental impact report (Public Resources Code Section 21002.1).

Commencing construction of a project before necessary approvals are obtained may frustrate conditions adopted to mitigate or avoid project impacts.

The Company commenced construction of the proposed project before obtaining necessary approvals from the Board. Several permit conditions require Company performance prior to construction and the Company requests these conditions be modified or eliminated.

5.1.1 Condition "4.(9)" of Permitted Application 26533 and Order on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102

Condition "4.(9)" of Permitted Application 26533 and Order on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 provides as follows:

- "(9) To mitigate impacts to disturbed site, licensee shall develop and implement rehabilitation plans for laydown and construction areas and the Balsam Meadow spillway. Such plans shall be submitted to the State Water Resources Control Board for review and approval prior to construction. The Board shall maintain continuing authority to change or add terms in the public interest to resolve issues arising from any impasse among the parties encountered in achieving the goals of the plans." (Emphasis added.)

This condition is derived from the 17-page mitigation agreement between the Company and DFG. The appendix to the agreement provides a schedule for implementing measures to mitigate project impacts to wildlife. Most measures are to be implemented prior to construction. Upon closer inspection, we note that the rehabilitation plan to

mitigate impacts to disturbed areas (A-6) is supposed to be completed six months prior to project operation. We will, accordingly, amend the second sentence in condition (9) as follows:

"Such plans shall be submitted to the State Water Resources Control Board for review and approval six months prior to project operation ~~CONSTRUCTION~~."

The Company also expresses concern that the authority retained by the Board could place the Company in the untenable position of having to serve two agencies (this Board and DFG) with different requirements on the same subject. This issue will be discussed under Section 5.2, infra.

5.1.2 Condition "7." of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 and Paragraph 19 of Permitted Application 26533

Condition 7 of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 provides as follows:

"7. Licensee shall undertake a monitoring program to evaluate the effectiveness of that portion of the Habitat Management Plan (see other terms herein) which deals with meadow rehabilitation. Said monitoring program shall include, at a minimum, the following two-phase approach:

"Phase I: Before initial habitat work commences on the meadows, licensee in cooperation with the Department of Fish and Game, shall monitor deer usage and determine achievable objectives for increasing deer usage in those areas. These objectives shall be compatible with other goals of the management plan.

"Phase II: Following completion of the initial meadow habitat enhancement work, in cooperation with the Department of Fish and

Game, licensee shall periodically monitor deer usage of these meadows and evaluate the trend in actual usage against objectives established during Phase I.

"If the Phase II monitoring shows that deer usage is below the objective and the habitat manipulation objective has not been met, licensee shall undertake a study to determine whether lower than expected deer usage is attributable to external factors or to deficiencies in the habitat management plan. If the latter is found to be the case, licensee, in cooperation with the Department of Fish and Game, shall further modify the wildlife habitat management plan to achieve the desired objectives for deer usage. If desired objectives for deer usage cannot be obtained, licensee, in cooperation with the Department of Fish and Game, shall institute the alternative meadow compensation plan (Condition 6)." (Emphasis added.)

Condition 19 is the same as condition 7 except for differences due to the numbering of conditions and to the fact that condition 19 is in a permit.

Construction having commenced, literal compliance with this condition is not possible. The company requests modification or elimination of the condition and suggests that having satisfied DFG with regard to meadow habitat mitigation no further mitigation is really necessary.

That the Company has satisfied DFG with regard to habitat mitigation does not mean, necessarily, that the Board should not adopt conditions regarding the same subject. The Water Code provides broad authority to adopt conditions in the public interest (Section 1253) and, more significantly, the Public Resources Code requires the Board to mitigate or avoid, where feasible, significant project impacts within the scope of its authority (Section 21002; 14 Cal. Adm. Code 15091.)

One direct consequence of Board approvals allowing the Company to divert, store, and divert the water for the Balsam Meadow Project is habitat reduction. Conditions 7 and 19 were developed to address such impacts and a perceived weakness in the Company-DFG mitigation agreement. The following excerpts from the Staff Analysis of the FEIR will make these points more meaningful:

"Impacts

"Construction of the forebay, dam, spillway, switchyard and various tunnel facilities would result in a wide range of permanent impacts on vegetation and wildlife resources. Primary among these would be the elimination of 97 acres of vegetation and wildlife habitat. This loss will include about 33 acres of meadow habitat. Meadow habitats are becoming increasingly limited and degraded due to livestock grazing, recreational activities and loss due to inundation from reservoir construction. Meadow species and other species which require meadow habitat to fulfill their life-cycle needs are significantly impacted when available habitat is degraded or lost. As an example, mule deer have been particularly affected because meadows, in part, are critical fawning areas. In addition to the 33 acres of meadow habitat, 44 acres of montane chaparral and coniferous forest, and approximately 3 acres of granite outcrop vegetation will be lost.

"Staff Recommendation (Pursuant to Sections 15051 and 15093)

"8. Vegetation and Wildlife. The EIR indicates that construction of the project will result in the permanent removal of 93 acres of habitat lands, the most important of which is Balsam Meadow. This will affect deer and quail populations. The Fish and Wildlife Agreement between SCE and Fish and Game provides mitigation for adverse impacts to fisheries and wildlife in the project area. Compensation and/or direct mitigation is provided for most project related impacts. Mitigation is partially contingent upon the success of the meadow rehabilitation plan.

"The Fish and Wildlife agreement contains mitigation measures to reduce most of the potentially significant impacts to acceptable levels; however, the mitigation measures for the rehabilitation of Stevenson Meadow are tenuous at best. This is an important point since this program is the major cornerstone of wildlife mitigation. Due to the experimental nature of the proposed program and what appears to be a significant possibility of failure, specific backup measures should be devised and evaluated prior to the diversion and use of water. Staff recommends that the Board require such a program, pursuant to any permit or change orders issued on the subject applications and licenses. Such additional requirements may not reduce this impact to an acceptable level and additional findings will be suggested after consideration of alternatives." (Emphasis added).

In view of the foregoing discussion we conclude that elimination of the condition is inappropriate. However, because technical difficulties would be encountered by the Company in attempting to comply with conditions 7 and 19, we conclude that the following condition should be substituted for conditions 7 and 19:

"Within 180 days the Licensee (Permittee) shall, in consultation with the California Department of Fish and Game, prepare a report (1) specifying meadow habitat mitigation objectives, (2) providing a monitoring program for measuring compliance with the objectives and submit the report to the State Water Resources Control Board for approval.

- o Mitigation objectives shall be stated as general terms and terms capable of measurement.
- o Monitoring shall result in data permitting comparison of mitigation objectives with mitigation accomplishments.

"Commencing January 1, 1989 and continuing through January 1, 1993, the Licensee (Permittee) shall submit annual reports to the Board summarizing mitigation work completed, work in progress or to be

initiated and mitigation measures accomplished. If mitigation objectives are not accomplished by December 1, 1993, the Licensee (Permittee) shall, within 6 months and in consultation with the Department, prepare a report which either recommends additional actions to ensure successful meadow rehabilitation or alternative mitigation measures and submit the report to the Board for approval. The Board retains jurisdiction to require the Company to implement additional actions to ensure successful meadow rehabilitation or alternative mitigation measures."

The new condition also obviates the need for Condition 6 of Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928 and 16102 and for condition 19 of Permitted Application 26533. (See item 5.3, infra.) Accordingly, the new condition should be renumbered as condition 6.

5.2 Changes Requested Due to Potential for Conflicting Requirements from Agencies: Conditions "4(9)" and "4(10)" of Permitted Application 26533 and of Licensed Orders 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102

Relief is sought from several conditions included in the orders and the permit that could place the Company in the position of having to satisfy conflicting mandates from multiple agencies, e.g., this Board, DFG and the United States Forest Service (USFS).

Condition 4(9) and 4(10) of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 and Permitted Application 26533 are the conditions. Condition 4(9) is set forth on page 4, supra, Condition 4(10) follows:

"(10) To mitigate/compensate for effects on wildlife in the transmission line right-of-way, licensee shall develop and implement a vegetative clearing and maintenance plan which is satisfactory to the Department of Fish and Game and the United States Forest Service. Such plan shall be submitted to the State Water Resources Control Board for review and approval prior to implementation. The Board should maintain continuing authority to change or add terms in the public interest to resolve issues arising from any impasse among the parties encountered in achieving the goals of the plan." (Emphasis added).

The operative effect of the underlined portion of condition 4(10) is the same as condition 4(9) and raises the same genre of problem for the Company.

Staff analysis of the Environmental Impact Report indicates that the proposed measures to mitigate are adequate for:

- o impacts due to transmission lines (4. (10)); and
- o impacts due to laydown and construction areas (4(9)).

Proposed measures include joint evaluation processes and requirements for preparation of specific mitigation plans and measures. In both instances, Conditions 4(9) and (10) were recommended to deal with the contingency that the Company and DFG could disagree during the ongoing evaluation and planning processes and for the possibility that circumstances could arise that would make performance of specified mitigation measures impossible. The Company's request for a change of condition under heading "G" demonstrates the prudence of such conditions (see item 5.4, infra) because a circumstance has already

arisen requiring a change in mitigation. Further, when an FEIR defers specific formulation of mitigation measures until after project approvals are given, responsible agencies should retain jurisdiction to review and require implementation of such measures in order to insure that project impacts are in fact mitigated or avoided.

Finally, Company fears are specious; relations between this Board and DFG and the USFS are more cooperative than competitive. Moreover, until a particular problem arises it is impossible to evaluate which agency should have the last word respecting appropriate mitigation measures. Until such time we can only indicate that the Board will be sensitive to any dilemma in which the Company may find itself as a result of these conditions. We conclude that no amendments should be made to these conditions in response to the Company petition (headings C and D); however, in Condition 4(10), the word "shall" will replace the word "should" in the last sentence.

5.3 Change Requested to Condition "6" of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 and to Condition 18 of Permitted Application 26533

The Company has requested that Condition 6 of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 and Condition 18 of Permitted Application 26533 be amended.

Condition 6 reads as follows:

"6. Prior to diversion and use of water, licensee shall consult with the California Department of Fish and Game and develop an Alternative Meadow Compensation Plan. Said plan shall be reviewed and approved by the State Water Resources Control Board."

Condition 18 differs from the above only in that "permittee" is used in lieu of "licensee." The Board is requested to modify the condition to indicate the Company will not be held accountable if DFG refuses to consult with the Company. Because new condition 6 (see page 8, supra) also requires the Company to consult with DFG, the Company's objection is still relevant.

On one level the Company's request is understandable, on another level the request is difficult to understand. The DFG's role is to preserve and protect fish and wildlife. In furtherance of its role, DFG entered into the 17 page agreement providing for numerous measures to mitigate project effects. The agreement provides that DFG will share ongoing responsibility with the Company to plan for and to evaluate mitigation measures. Further, Condition "C. 3" of the agreement provides:

"If desired wildlife condition cannot be achieved on the designated habitat improvement sites, alternative mitigation measures shall be developed by Edison. These mitigation measures could include such items as prescriptive clearing, meadow improvements, and structural or land use changes that improve wildlife values. Any alternative mitigation measures must be acceptable to the Department." (Emphasis added).

Mitigation for meadow habitat is the purpose of Condition 6. Given the language of the agreement, it is difficult to understand why the Company fears that DFG would not cooperate. Finally, if DFG should refuse to consult with the Company, the Board would not hold the Company accountable for such refusal. In view of our discussion, we

conclude that Condition 6 should not be amended in response to the Company's petition.

5.4 Change Requested to Condition 8(a-e) of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 and to Condition 20(a-e) of Permitted Application 26533

The Company has requested that Condition 8(a-e) of Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928, and 16102 and to Condition 20(a-e) of Permitted Application 26533 be amended. The Condition provides as follows:

"Licensee shall provide the following recreational facilities:

- a. A snow play area located just off State Highway Route 168 at the entrance road to the Balsam Meadow Forebay site, with a 20- to 30-car paved parking lot and vault toilets.
- b. A walk-in day use area with 5 picnic sites and vault toilets at the reservoir site.
- c. A snow play area, to be located at the existing turn-out/parking area on State Highway Route 168 near Pinchot Knob; portable toilets shall be provided in the winter.
- d. Cross-country ski trails, consisting of 8-10 miles of loop trails.
- e. Licensee shall be responsible for maintaining the above recreational facilities in a usable fashion."

Condition 20 differs from Condition 8 only in that "permittee" is used in lieu of "licensee."

According to the Final Environmental Impact Report the foregoing measures were developed by the Company in cooperation with the USFS and DFG and offered as project mitigation. The measures were included in the Board's orders to mitigate project effects.

The Company now indicates that, at the request of the USFS, mitigation measures are being renegotiated and requests that the Board amend Condition 8 to incorporate a future agreement between the Company and the USFS, however, no information is provided regarding the general nature of the proposed substitute measures. In essence, the Board is being asked to adopt unknown mitigation measures to satisfy the requirements of the California Environmental Quality Act (CEQA), a rather novel approach to the implementation of CEQA. We do recognize, however, that large projects requiring numerous approvals from different agencies necessitate accommodation among the various parties and interests. Nevertheless, under present circumstances we must require the Company to submit the proposed substitute measures to the Board for approval. We find, therefore, that Conditions 8 and 20 shall be amended as follows:

"8. ~~Licensee shall provide~~ The following recreational facilities shall be provided by the Licensee (or Permittee) unless substitute mitigation measures are agreed to by the Company and the United States Forest Service. Any substitute measure shall be submitted to the State Water Resources Control Board for review and approval.

- a. A snow play area located just off State Highway Route 168 at the entrance road to the Balsam Meadow Forebay site, with a 20- to 30-car paved parking lot and vault toilets.
- b. A walk-in day use area with 5 picnic sites and vault toilets at the reservoir site.
- c. A snow play area, to be located at the existing turn-out/parking area on State Highway Route 168 near Pinchot Knob; portable toilets shall be provided in the winter.

- d. Cross-country ski trails, consisting of 8-10 miles of loop trails.
- e. Licensee (or Permittee) shall be responsible for maintaining the above recreational facilities in a usable fashion."

5.5 Request For Addition of Points of Rediversion to Order on Licensed Application 11115

The Company requests that six additional points of rediversion be added to Order on Licensed Application 11115. The additional points of rediversion are identified as follows:

"South Fork San Joaquin River: South 79° 34' 54" West 2, 533.12 feet from NW corner of Section 6, T8S, R28E, MDB&M, being within the NW1/4 of NE1/4 of Section 1, T8S, R27E, MDB&M.

"Big Creek Dam No. 1: North 32° 36' 01" East 2, 577.33 feet from SW corner of Section 14, T8S, R25E, MDB&M, being within the NE1/4 of SE1/4 of said Section 14.

"Stevenson Creek: North 27° 20' 18" East 1, 591.2 feet from South quarter corner of Section 13, T9S, R24E, MDB&M, being within NW1/4 of SE1/4 of said Section 13.

"Big Creek Dam No. 4: North 31° 43' 38" West 7, 948.23 feet from the South quarter corner of Section 34, T8S, R25E, MDB&M, being within NW1/4 of SE1/4 of Section 28, T8S, R25E, MDB&M.

"Big Creek Dam No. 5: North 0° 58' 32" West 6, 276.23 feet from the SW corner of Section 36, T8S, R24E, MDB&M, being within SE1/4 of SE1/4 Section 26, T8S, R24E, MDB&M.

"San Joaquin River Dam No. 6: North 8° 29' 55" West 9, 231.86 feet from the SE corner of Section 34, T8S, R24E, MDB&M, being within the SW1/4 of NE1/4 Section 27, T8S, R24E, MDB&M."

Review of the map depicting existing facilities in relation to watercourses indicates these points of rediversion should probably be

named in the order on the license; unfortunately, these points have never been previously approved nor has the Company even petitioned to have these points included in their license in accordance with the Water Code and our regulations (Water Code Section 1700 and 23 Cal. Adm. Code 738, et seq.). Under these facts, we must deny the Company's request.

6.0 CONCLUSION

Having considered the requests made by the Company and, where appropriate, having responded favorably to the Company's requests, we conclude that the petition for reconsideration should be denied for Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928 and 16102 and Permitted Application 26533.

7.0 ORDER

NOW THEREFORE IT IS ORDERED that Permitted Application 26533 and Orders on Licensed Applications 1341, 1342, 1343, 1344, 1345, 11115, 13928 and 16102 shall be amended as follows:

1. Condition 4.(9) shall be amended to read as follows:

"(9) To mitigate impacts to disturbed site, licensee (or permittee) shall develop and implement rehabilitation plans for laydown and construction areas and the Balsam Meadow spillway. Such plans shall be submitted to the State Water Resources Control Board for review and approval six months prior to project operation construction. The Board shall maintain continuing authority to change or add terms in the public interest to resolve issues arising from any impasse among the parties encountered in achieving the goals of the plans."

2. Condition "4(10)" shall be amended to read as follows:

"(10) To mitigate/compensate for effects on wildlife in the transmission line right-of-way, licensee (or permittee) shall develop and implement a vegetative clearing and maintenance plan which is satisfactory to the Department of Fish and Game and the United States Forest Service. Such plan shall be submitted to the State Water Resources Control Board for review and approval prior to implementation. The Board ~~should~~ shall maintain continuing authority to change or add terms in the public interest to resolve issues arising from any impasse among the parties encountered in achieving the goals of the plan."

3. Condition "7" in the orders on licensed applications and Condition "19" in the permit shall be numbered as condition 6 and amended to read as follows:

"Within 180 days the Licensee (Permittee) shall, in consultation with the California Department of Fish and Game, prepare a report (1) specifying meadow habitat mitigation objectives, (2) providing a monitoring program for measuring compliance with the objectives and submit the report to the State Water Resources Control Board for approval.

- o Mitigation objectives shall be stated as general terms and terms capable of measurement.
- o Monitoring shall result in data permitting comparison of mitigation objectives with mitigation accomplishments.

"Commencing January 1, 1989 and continuing through January 1, 1993, the Licensee (Permittee) shall submit annual reports to the Board summarizing mitigation work completed, work in progress or to be initiated and mitigation measures accomplished. If mitigation objectives are not accomplished by December 1, 1993, the Licensee (Permittee) shall, within 6 months

and in consultation with the Department, prepare a report which either recommends additional actions to ensure successful meadow rehabilitation or alternative mitigation measures and submit the report to the Board for approval. The Board retains jurisdiction to require the Company to implement additional actions to ensure successful meadow rehabilitation or alternative mitigation measures."

4. Condition 8 of the orders on licensed applications and

Condition 20 of the permit shall be amended to read as follows:

"8. ~~Licensee shall provide~~ The following recreational facilities shall be provided by the Licensee (or Permittee) unless substitute mitigation measures are agreed to by the Company and the United States Forest Service. The substitute measures shall be submitted to the State Water Resources Control Board for review and approval."

- a. A snow play area located just off State Highway Route 168 at the entrance road to the Balsam Meadow Forebay site, with a 20- to 30-car paved parking lot and vault toilets.
- b. A walk-in day use area with 5 picnic sites and vault toilets at the reservoir site.
- c. A snow play area, to be located at the existing turn-out/parking area on State Highway Route 168 near Pinchot Knob; portable toilets shall be provided in the winter.
- d. Cross-country ski trails, consisting of 8-10 miles of loop trails.
- e. Licensee (or Permittee) shall be responsible for maintaining the above recreational facilities in a usable fashion."

5. The petition for reconsideration of permitted Application 26533 and orders amending Licensed Applications 1343, 1344, 1345, 11115, 13928 and 16102 is denied.

CERTIFICATION

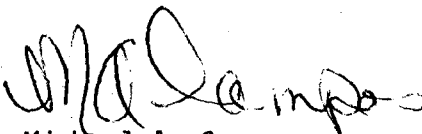
The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an Order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 6, 1984.

AYE: Carole A. Onorato
Warren D. Noteware
Kenneth W. Willis
Darlene E. Ruiz
Edwin H. "Ted" Finster

NO:

ABSENT:

ABSTAIN:


Michael A. Campos
Executive Director



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