



**Pacific Gas and
Electric Company**

Jennifer S. Abrams
Attorney at Law

Mailing Address
P.O. Box 7442
San Francisco, CA 94120

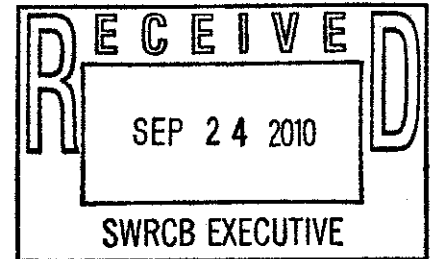
Street/Courier Address
Law Department
77 Beale Street, B30A
San Francisco, CA 94105

Phone: (415) 973-4462
Fax: (415) 973-5520
Internet: JSAd@pge.com

September 24, 2010

**Via Email and
First Class Mail**

Jeanine Townsend
Clerk to the Board
Executive Office
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814-2828
commentletters@waterboards.ca.gov



Re: Comment Letter – Oroville Draft Water Quality Certification

Dear Ms. Townsend:

This letter provides Pacific Gas and Electric Company's (PG&E) comments on the California State Water Resources Control Board's (SWRCB) draft Section 401 Water Quality Certification dated July 2, 2010 (401 Certificate), for the California Department of Water Resource's (DWR) application to the Federal Energy Regulatory Commission (FERC) for a new license to operate the Oroville Hydroelectric Facilities (FERC Project No. 2100) (Oroville Project).

PG&E appreciates the opportunity to provide comments. PG&E's specific comments address only the inclusion of the Habitat Expansion Agreement dated August 2007 (HEA) in draft Condition S9 of the draft 401 Certificate.¹ Under the HEA, PG&E and DWR share responsibility for identifying, evaluating, selecting, and implementing habitat expansion actions in the Sacramento River Basin that would accommodate an estimated net increase of 2,000 to 3,000 spring-run Chinook salmon for spawning. The intent of the HEA is to mitigate for any presently unmitigated impacts due to blockage of fish passage caused by the operation of certain hydroelectric projects owned and operated by DWR and PG&E in the Feather River watershed. Due to this shared responsibility, PG&E would be affected by issuance of a 401 Certification for the Oroville Project that included requirements related to the HEA. Draft Condition S9 states:

Within two years of license issuance, the Licensee shall complete identification, evaluation and recommendation of habitat expansion action(s) to expand spawning, rearing and adult holding habitat to accommodate a net increase of 2,000 to 3,000 spring-run Chinook salmon for spawning. If the final habitat expansion plan developed through the Habitat Expansion

¹ The HEA was executed by American Rivers, Arthur G. Baggett, Jr., California Department of Fish and Game, California Department of Water Resources, Pacific Gas and Electric Company, State Water Contractors, Inc., United States Department of Agriculture Forest Service, United States Department of Commerce National Marine Fisheries Service, and United States Fish and Wildlife Service.

Agreement (HEA) includes a schedule for completion of the recommended actions, is submitted to the Deputy Director for review, modification as appropriate, and approval within two years of license issuance, and is timely and appropriately implemented, the Licensee shall be deemed to have met the requirement for habitat expansion. For the purposes of this condition, if the Deputy Director does not either act on the Licensees' request for approval of the plan or identify the need for additional information or actions within 60 days of submission, the plan shall be deemed approved.

The State Water Board reserves the authority, delegated to the Deputy Director, to modify this condition if the goals of the habitat expansion plan are not met within the timelines in the plan, or if the Licensee withdraws from the HEA before the approved, final habitat expansion plan is fully implemented. If Pacific Gas and Electric Company (PG&E) does not agree to the plan, or refuses to implement the HEA, and the Licensee so requests, the Deputy Director will modify this condition as necessary to provide that the Licensee's responsibility is consistent with only the Licensee's share of the loss of habitat attributable to both PG&E's upstream facilities and the Project.

While PG&E certainly appreciates SWRCB's interest in the HEA and its implementation, PG&E strongly disagrees with SWRCB's draft proposal. It is not necessary to insert the HEA into the 401 Certificate for the Oroville Project to assure that SWRCB's responsibilities to protect water quality and beneficial uses for the Feather River watershed are met. Further, such an insertion would create a host of problems and unknowns including, among other issues, serious jurisdictional conflicts that would likely have the unintended effect of causing the HEA to be unworkable.

In these comments, PG&E first explains why the current draft Condition S9 is problematic and then provides alternatives and draft language for each alternative that will safeguard both the HEA and SWRCB's authority and responsibilities. These alternatives each assure that currently unmitigated impacts due to blockage of fish passage are mitigated.

PG&E objects to draft Condition S9 for several reasons, including timing issues; conflicts with the express and carefully negotiated terms of the HEA and Oroville Settlement Agreement (SA), and; unprecedented and untested conflicts of jurisdiction which would most likely undo the HEA. Because the last issue is such a roadblock to the successful implementation of the HEA, PG&E's comments focus on this issue.

For background, the HEA settled many parties' fish passage concerns related to the operation of four different hydroelectric projects in the Feather River watershed. However, making the HEA a condition of the 401 Certification and thus the FERC license for the Oroville Project is contrary to the Oroville SA and to the terms of the HEA itself, which each state that the HEA will be implemented outside the FERC license. Thus, on its face, SWRCB's draft proposal upsets the

hard-won negotiated balance of each of those agreements.² In SWRCB's comments,³ SWRCB explains that it retained certain conditions DWR had opposed in a previous draft, such as inclusion of the HEA in the 401 Certification and FERC license, because "DWR does not explain how these conditions will undermine the SA." The same comments explain that the 401 Condition modifies provisions of the HEA to "clarify" them. But the parties to the HEA placed great value on being able to develop proposed habitat expansion action(s) based on a collaborative process with a variety of stakeholders. This concept was fundamentally important to the signatories to the HEA (including signatory Arthur Baggett, Jr., as a recommendation to the SWRCB). Because each provision was carefully negotiated and balanced with other factors, *any* later change necessarily disrupts that careful balance and thus throws the whole agreement into question.⁴

More specifically, the parties were careful to include terms keeping the HEA out of the 401 Certifications for the Feather River hydroelectric projects and thus out of their FERC licenses because such inclusion raises a host of jurisdictional unknowns that would undermine the HEA. Without the assurance that the HEA is workable - and workable in a predictable timeframe - the major benefits of the HEA are lost. Further, it is neither necessary nor prudent to raise such jurisdictional conflicts to safeguard the HEA parties' and SWRCB's interests and responsibilities.

The reason that including the HEA in the 401 Certification and the FERC license creates jurisdictional issues is because the HEA allows for habitat expansion actions anywhere in the Sacramento River Basin. This flexibility is needed to support achieving off-site much greater benefits for the targeted beneficial use (access to spawning habitat for steelhead and salmon) than can be achieved through on-site mitigation using the best identified reasonable control measure (trap and haul). By assuming review and approval authority for HEA actions, SWRCB would be exercising uncertain jurisdiction over actions anticipated to be implemented away from the Oroville Project area and from the Feather River watershed. Similarly, by making the HEA a FERC license condition, draft Condition S9 would also invite, and perhaps necessitate, FERC extending the project boundary and FERC's corresponding jurisdiction to a location far from the Oroville Project facilities. Such a project boundary would likely overlap that of another FERC project license or potentially the property or facilities of an entity not otherwise or even able to be subject to FERC jurisdiction (such as a federal agency). Significantly, PG&E anticipates that if the final Oroville 401 Certification contains the HEA, one or more of PG&E's future licenses for projects on the Feather River would likely contain the same language, which would further

² Among other things, by making the HEA a condition of the license, draft Condition S9 effectively removes the cost-based off-ramps that are included in the HEA. Although perhaps not apparent, these off-ramps are a crucial component of the HEA and should not be changed by SWRCB after-the-fact through draft Condition S9.

³ Response to Comments on the January 21, 2010, Draft Water Quality Certification, dated July 9, 2010, at 3.

⁴ SWRCB's comments also state: "[i]f generation and costs are used as the measure of consistency, the Draft is consistent with the SA." *Id.* at 3. But, as noted in footnote 2, SWRCB's proposal does not keep costs the same so the proposal is inconsistent with the SA and HEA.

compound the jurisdictional confusion. There is no precedent for such overlapping project boundaries or jurisdictions. It bears repeating that the prospect of such jurisdictional conflict, if the draft language is not changed, will very likely make the HEA unworkable. Further, there is no need to test jurisdictional boundaries to safeguard the HEA parties' and SWRCB's interests and responsibilities.

Accordingly, PG&E urges SWRCB to replace Draft Condition S9 with a reservation of authority that would preserve SWRCB's ultimate authority to assure implementation of the HEA or alternate actions in the event the HEA isn't implemented, while avoiding the conflicts of jurisdiction and other problems that would result from inserting the HEA in the 401 Certification and the FERC license.² This approach is the one taken by NMFS with regard to its authority to prescribe fishways under Section 18 of the Federal Power Act. PG&E appreciates that SWRCB's draft Condition S9 language was intended to make the HEA provisions enforceable in a timely manner and has accordingly modified the reservation of authority language negotiated by the HEA parties for NMFS to reflect that concern, using language from draft Condition S9:

Authority is reserved for the SWRCB to prescribe the construction, operation, and maintenance of fishways at the project, including measures to determine, ensure, or improve the effectiveness of such prescribed fishways, but SWRCB will not do so for the term of the license provided the Licensee is fulfilling its obligations under the Habitat Expansion Agreement (HEA). If the final Habitat Expansion Plan developed through the HEA includes a schedule for completion of the HEA actions, and it is timely and appropriately being implemented, the Licensee shall be deemed to be meeting the HEA requirement for habitat expansion and to be fulfilling its obligations under the HEA.

This reservation of authority includes SWRCB's concept of a schedule for completion of HEA actions and assurance that the schedule is being followed timely and appropriately, with final approval by SWRCB: SWRCB has final say whether the HEA actions are being timely and appropriately implemented – if they are not, SWRCB can prescribe additional actions. Thus, the reservation preserves SWRCB's conditions.

² In SWRCB's comments, referenced above, SWRCB states "[a] contractual agreement among settlement parties to the measures is not sufficient to satisfy the State Water Board's independent duty to ensure that water quality is adequately protected. (See *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245, at p. 265.)" Notably the situation in that case is different than here: There the contractual agreement was a private settlement for potential water uses (water purchases that had not yet been agreed to) that might not be implemented. Here, by contrast, DWR would be subject to liability outside the HEA if the HEA were improperly implemented— including from SWRCB if the SWRCB adopts PG&E's suggested reservation of authority. Significantly, the case does *not* hold that a reservation of authority is insufficient to fulfill the SWRCB's obligations. The case specifically allows the SWRCB to impose conditions to safeguard water quality and a reservation of authority as proposed by PG&E does that by giving the SWRCB ultimate power to create an alternative to the HEA on the Feather River if the HEA is not implemented, without changing the terms of the HEA as the draft 401 Certification would.

In the alternative, if SWRCB does not agree that the suggested reservation of authority is sufficient - although PG&E fully believes that it is - PG&E suggests that SWRCB use another modified reservation of authority. This modification adapts SWRCB's draft language regarding timing of approval and would allow SWRCB to have approval authority over the HEA actions prior to implementation instead of after, while also keeping the HEA out of the 401 Certification and the FERC license and thereby avoiding the conflicts of jurisdiction described above:

Authority is reserved for the SWRCB to prescribe the construction, operation, and maintenance of fishways at the project, including measures to determine, ensure, or improve the effectiveness of such prescribed fishways, but SWRCB will not do so for the term of the license provided the Licensee is fulfilling its obligations under the Habitat Expansion Agreement (HEA) and further provided that SWRCB approves the final Habitat Expansion Plan developed through the HEA prior to implementation, which Licensee shall submit to the Deputy Director for this purpose. It is further provided that if the Deputy Director does not either act on Licensee's request for approval of the final Habitat Expansion Plan or identify the need for additional information or actions within 60 days of submission, the plan shall be deemed approved.

While this language would give SWRCB approval authority prior to implementation of the Habitat Expansion Plan, details of how any SWRCB suggestions to the plan approved by NMFS would be worked out remain to be resolved (although that would be done outside the 401 Certification process); thus PG&E does not recommend this option.

PG&E believes that SWRCB appreciates the intent and value of the HEA and thus urges SWRCB to follow PG&E's suggestion of how to safeguard this agreement and the solutions it represents for the many different parties involved in its development and responsible for its outcome — not least of which is SWRCB.

If you have any questions or wish to discuss PG&E's comments, please contact me at (415) 973-4462 or by email at JSAd@pge.com, or you may contact David Moller at (415) 973-4696, or by email at DXMa@pge.com.

Sincerely,



JENNIFER S. ABRAMS

Jeanine Townsend
September 24, 2010
Page 6

cc:

Victoria A. Whitney, Deputy Director
Division of Water Rights
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

Arthur G. Baggett, Jr.
Board Member
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Donald Koch, Director
Department of Fish and Game
1416 Ninth Street, Room 1207
Sacramento, CA 95814

Rebecca Wodder, President
American Rivers
1101 14th St., NW, Suite 1400
Washington, DC 20005

Terry Erlewine, General Manager
State Water Contractors, Inc.
1121 L Street, Suite 1050
Sacramento, CA 95814

Dean F. Messer
Division of Environmental Services
California Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001

Rodney R. McInnis
Regional Administrator, Southwest Region
United States Department of Commerce
National Marine Fisheries Service
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802

Ren Lohofener, Regional Director
California and Nevada Region
United States Fish and Wildlife Service
2800 Cottage Way
Sacramento, CA 95825

Beth G. Pendleton, Deputy Regional Forester
United States Department of Agriculture
Forest Service
1323 Club Drive
Vallejo, CA 94592