



# State Water Resources Control Board



## Division of Water Rights

1001 I Street, 14<sup>th</sup> Floor ♦ Sacramento, California 95814 ♦ 916.341.5300  
P.O. Box 2000 ♦ Sacramento, California 95812-2000  
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Linda S. Adams

Secretary for

Environmental Protection

Arnold Schwarzenegger

Governor

**December 16, 2008**

Mr. Dustin C. Cooper  
Minasian, Spruance, Meith, Soares & Sexton, LLP  
PO Box 1679  
Oroville, CA 95965-1679

Dear Mr. Cooper:

### RESPONSE TO COMMENTS AGAINST APPROVAL OF 401 CERTIFICATION FOR BATTLE CREEK SALMON AND STEELHEAD RESTORATION PROJECT

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division), received your letters dated December 18, 2007 and January 17, 2008, commenting on the above-referenced matter. The Division received another letter dated April 25, 2008 in response to the notice of application of the Bureau of Reclamation for the same project, in which you incorporate your previous comments. On December 9, 2008, the State Water Board issued water quality certifications to PG&E and U.S. Bureau of Reclamation. Prior to issuance, the Division reviewed your comments and provides the following responses:

In your December 18, 2007 letter, you raise several issues relating to compliance with the California Environmental Quality Act (CEQA). As you know, the State Water Board analyzed the environmental impacts associated with implementation of the entire Battle Creek Project in the *Battle Creek Salmon and Restoration Project Final Environmental Impact Statement/Environmental Impact Report* (July 2005) (State Clearinghouse No. 2000042043) (Final EIS/R). After reviewing and considering all of the comments and information, the State Water Board certified the adequacy of the Final EIS/R on September 19, 2006. (*State Water Resources Control Board Certification, Pursuant to the California Environmental Quality Act, of the Final Environmental Impact Report for the Battle Creek Salmon and Steelhead Restoration Project.*)

Once certified, and after considering the final EIS/R, the lead agency may decide whether or how to approve or carry out the project. (Cal. Code Regs., tit. 14, § 15092.) The decision before the State Water Board is whether to issue water quality certification under section 401 of the Clean Water Act (33 U.S.C. § 1341) to accompany a license amendment that will be issued by the Federal Energy Regulatory Commission (FERC) for the implementation of Phase 1 of the project. The relevant inquiry is whether the proposed project, as conditioned, will comply with provisions of the Clean Water Act and the Basin Plan for the Central Valley-Sacramento/San Joaquin River Basins. The State Water Board already certified the adequacy of the Final EIS/R and is not required to, nor does it intend, to reevaluate its determination. Once an EIR has been certified, additional CEQA comments must be viewed in the context of whether a subsequent EIR is required pursuant to Public Resources Code section 21166 and California Code of Regulations, title 14, section 15162.

*California Environmental Protection Agency*

## **The State Water Board is Prohibited from Requiring Subsequent Environmental Reports**

The EIR/EIS for the Battle Creek Project properly analyzes the environmental impacts of the Project. As provided in Public Resources Code section 21166, the lead agency is prohibited from requiring subsequent reports for a certified project unless specific events have occurred. Those specific events are: (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report; (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; and, (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, became available.

Public Resources Code section 21166 is echoed in the California Code of Regulations. Thus once certified, no subsequent EIR shall be prepared unless the lead agency determines, on the basis of substantial evidence, that substantial changes are proposed in the project or circumstances under which the project is undertaken, which will require major revisions to the EIR due to new significant effects or a substantial increase in the severity of previously identified significant effects. (Cal. Code Regs., tit. 14, § 15162, subdivision (a); see also *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer et al.*, (2006) 144 Cal. App. 4<sup>th</sup> 890.)

*1. There are no proposed substantial changes to the project or the circumstances under which the project is being undertaken that require major revisions of the EIR.*

The main focus of your comments stem from the Applicant's decision to conduct the project in phases. You state that conducting the project in phases constitutes a "new project" that will create potentially significant impacts that were not analyzed in the EIR/EIS. This amounts to a reverse-piecemeal challenge, relying on the notion that impacts were over-analyzed. For the purposes of CEQA, "project" means the "whole of the action." (Cal. Code Regs., tit. 14, § 15378.) An agency may not "segment" or "piecemeal" a project into smaller parts if that results in avoiding disclosure of environmental impacts. Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project as described in California Code of Regulations, title 14, section 15168.

Your letter points to several environmental conditions that would remain the same or would not be improved if Phase 2 is not constructed; however, you present no law or facts to support your conclusion that environmental impacts not previously identified result from the phasing of the project. As with the phasing of the project discussed above, these issues do not equate to substantially changed circumstances that require major revisions in the EIR.

These environmental issues include: 1) leaving spring fed refugia above and below South Diversion Dam unattainable by salmonids; and 2) less reduction of the mixing of South and North Fork waters. These are not substantial changes or new impacts; rather, they constitute the baseline environmental setting by which impacts of a project are compared. Both phases of the project are designed to create environmental benefits: the positive and negative environmental impacts of each phase will occur independently from one another. CEQA does not require a quantification of the beneficial impacts of a project. The relevant inquiry is whether the impacts from the proposed project were properly addressed and the State Water

Board finds that they were. Accordingly, the Applicant's decision to conduct the project in phases does not amount to a substantial change that will require major revisions to the EIR/EIS.

You allege that the phasing of the Project will result in unexamined loss of hydroelectric power. Again you provide no law or facts to support this comment. The major purpose of the Project is to restore Battle Creek habitat while minimizing the loss of clean and renewable energy produced by the Hydroelectric Project. By alleging that the EIS/R and the 401 certification do not review the alleged "loss of hydroelectric power", you overlook the role of Federal Energy Regulatory Commission or FERC. Briefly stated, it is FERC's responsibility to issue or amend licenses for hydroelectric facilities. FERC examines the impact of a licensing decision on the development, transmission, and utilization of electric power. During this process, FERC is also responsible for giving equal consideration to the purposes of energy conservation, the protection, mitigation of damage to and enhancement of fish and wildlife, including related spawning grounds and habitat. FERC will review the balance of hydroelectric energy production with habitat needs when issuing the amended license. Thus, these and other related issues will be examined by FERC as mandated by federal law. (See 16, U.S.C. § 797.)

Additionally, according to the Draft License Application, Exhibit D, and the Final EIS/EIR, average power generation loss at the end of Phase 1 would be 14.7% of the average power generation under the current license's conditions. Average power generation loss after full project completion would be 30.0% of the average power generation under the current license's conditions. However, the existing project is managed under an interim agreement that runs power generation at 8.2% less than allowed under the current FERC license. Accounting for this, power generation loss after Phase 1 is actually only 7.0%, and 23.6% after full project completion. Power generation loss after project completion are always greater than the power generation loss resulting from the actions of Phase 1.

*2. There is no new information that was not known and could not have been presented during the EIR process.*

You allege in your comments that the EIR/S does not address climate change impacts from the loss of clean energy due to the demolition of hydroelectric dams on Battle Creek. You have provided no new substantive information in your comments. The timing of and the information provided in your comments does not give the State Water Board any legal or factual basis to prepare a supplemental or subsequent EIR for this Project.

You make the general statement that global warming is a major environmental problem facing California. You also point to recent laws passed by the California legislative and executive orders that address global warming. However, climate change and global warming as a phenomenon has been known for several years. For the State Water Board to overcome the prohibition provided in Public Resources Code section 21166 and prepare a new EIR, it must have been presented with new information that was not available during the lead agency's CEQA process and that the new information must show that the proposed activity will cause new and more intense environmental effects. (See *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4<sup>th</sup> 1773, 1800 [citing Cal. Code Regs., tit. 14, § 15162].)

You appear to recognize that California is in the forefront of addressing and reducing the factors that contribute to global warming and climate change. Additionally, global warming has been recognized and discussed for years. However, you did not raise these issues during the EIR/S process. Also, you have presented nothing that is specific to the Project in regards to global warming as a result of the approval of the EIR/S or the Section 401 certification process.

Climate change is an important, challenging and continuing issue for the state. However, the effects of the restoration project on the climate are not negative when the power grid as a whole is examined. While the project will result in the loss of hydroelectric power at the project site, statewide PG&E has a commitment to provide 20% of their power generation using renewable sources. In light of this, the project is removing older, less efficient power generation units at this site while actively proposing the installation of higher capacity, more efficient power generation units at other sites statewide. The net effect by PG&E's actions should reduce reliance on power generation activities that may increase negative climate change. Additionally, all parties to the EIR/S must comply with all applicable federal, state and local laws, including those that pertain to climate change. All parties intend to do so.

### **The State Water Board is the Proper Lead Agency**

The State Water Board is an appropriate lead agency for the Battle Creek Project. CEQA defines a lead agency as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." (Pub. Resources Code, § 21067.) Section 401 of the Clean Water Act (33 U.S.C. §1341) requires every applicant for a federal license or permit with certification that the project will be in compliance with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313). Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project.

The State Water Board is the lead agency because of its responsibility and expertise in issuing water quality certifications to accompany licenses and permits issued by the Federal Energy Regulatory Commission (FERC) to PG&E and by the Army Corps of Engineers (ACE) to the Bureau of Reclamation (BuRec). (33 U.S.C. § 1313; Cal. Code Regs., tit. 23, § 3855, subd. (b)(1)(B)(2).) In addition, the Division of Water Rights will oversee the transfer of water rights at removed diversion dams for instream use. Where a project is to be carried out or approved by more than one public agency, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole. (Cal. Code Regs., tit. 14, § 15051, subd. (b).) The Department of Fish and Game (DFG) is also a public agency with conditional approval over the Project, but lacks specific authority in the federal regulatory environment. Therefore, the lead agency decision was appropriate. DFG is a responsible agency for this project and has worked closely with the Water Board in carrying out its responsibilities.

**Failure to Fund Mitigation Measures**

The water quality certification requires Applicant to fully implement the mitigation measures described in the EIR/EIS to the extent they are applicable to Phase 1. The State Water Board expects Applicant to implement mitigation and monitoring requirements as described and there is no evidence that there are no funds to do so.

**Delegated Authority of the State Water Board Executive Officer to Certify EIS/R and Issue Water Quality Certification**

Petitioner alleges that the Executive Director's certification violates CEQA Guidelines at section 15090, which require that the decision making body certify the environmental document. (Cal. Code Regs., tit. 14, § 15090.) Under CEQA, a "decision making body" means any person permitted by law to approve the project. (Cal. Code Regs., tit. 14, §15356.) The State Water Board has delegated authority to the Executive Director to take all actions connected with water quality certification, including issuance and denial of certification. (Cal. Code Regs., tit. 23, §3838, subd. (a).) Section 7 of the Water Code allows such delegation. The Executive Director is the decision making body and her certification of the CEQA document was pursuant to lawfully delegated authority and proper under section 15090 of the Guidelines.

**Fee Deposit**

In your second letter dated January 17, 2008, you raise several issues related to the adequacy of PG&E's water quality certification application, including an allegation that PG&E failed to provide the application fee as required in title 23, California Code of Regulations, section 3833.1, subdivision (b)(4). While not specifically addressed in PG&E's application letter, the Division of Water Rights received full annual payment for FERC Project No. 1121 on November 9, 2007. PG&E has maintained a record of diligence with its payments of the annual application fee.

**Complete Draft Application**

You also allege that PG&E failed to submit a complete application for water quality certification. California Code of Regulations, title 23, section 3856, lists items needed for an application to be considered complete, including applicant information, project description, identification of the federal licenses/permits sought, and complete copies of the federal applications, if required and available. (Cal. Code Regs., tit. 23, §3856, subd. (d).) Under subdivision (e) of that section, a complete water quality certification application shall include a complete copy of a draft application for the FERC license or amendment "meeting the requirements of title 18 of the Code of Federal Regulations, section 4.38(c)(4)." Section 4.38(c)(4) details certain federal requirements for second stage consultation in the FERC licensing process, which occurs prior to the FERC filing under FERC's traditional licensing procedures. In second stage consultation, potential applicants are required to provide resource agencies and tribes: 1) a copy of its draft application that indicates the type of application applicant expects to file and responses to any comments and recommendations made during the first stage consultation; 2) the results of any studies requested and any proposed protection, mitigation, or enhancement measures; and 3) request for review and comment.

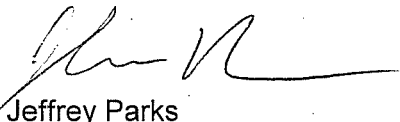
On March 1, 2000, FERC approved the use of alternative licensing procedures (ALP) for the Battle Creek license amendment. The goal of the ALP is to "combine into a single process the pre-filing consultation process, the environmental review process under NEPA, and the administrative processes associated with the Clean Water Act and other statutes." (18 C.F.R. § 4.34(i)(2)(i).) PG&E has complied with the ALP provision under title 18, Code of Federal Regulations, section 4.34(i)(6), including filing progress reports with FERC summarizing the progress in the pre-filing consultation process every six months. Under ALP for the Battle Creek Project, its documents and actions have already met the requirements of second stage consultation and therefore, these requirements have been met for the purpose of finding a complete application. The amount of scoping and public outreach that has taken place for this project is voluminous. In addition, the State Water Board provided notice of PG&E's application for water quality certification on Phase 1 to all parties on the FERC interested parties list. The State Water Board finds that these actions more than satisfy the requirements for a complete application under the California Code of Regulations.

### **Adequate Project Description**

Similarly, State Water Board staff find that the draft FERC application, together with the final EIR/EIS and associated documents, adequately describe the project for the purpose of a complete application. We find nothing misleading or inaccurate about PG&E's request to move forward with Phase 1 of the project. Because the project is wholly voluntary, the State Water Board lacks authority to require any assurances that Phase 2 be completed. The State Water Board will review the hydroelectric project's effects on water quality next in 2026 when the current license is set to expire.

The response to your comments will be posted on our public website by December 19, 2008. If you have any questions, please contact me at (916) 341-5319 or at: [jparks@waterboards.ca.gov](mailto:jparks@waterboards.ca.gov).

Sincerely,



Jeffrey Parks  
Water Resource Control Engineer

cc: Liv Imset  
Pacific Gas & Electric Company  
Mail Code N11C  
PO Box 770000  
San Francisco, CA 94177

Mary Marshall  
Bureau of Reclamation  
2800 Cottage Way, MP-200  
Sacramento, California 95825-1898

James Pedri  
Assistant Executive Officer  
Central Valley Regional Water Quality  
Control Board  
415 Knollcrest Drive  
Redding, CA 96002