

Stephan C. Volker
Joshua A.H. Harris
Alexis E. Krieg
Stephanie L. Abrahams
Daniel P. Garrett-Steinman
Jamey M.B. Volker
M. Benjamin Eichenberg

Law Offices of
Stephan C. Volker
436 – 14th Street, Suite 1300
Oakland, California 94612
Tel: (510) 496-0600 ❖ Fax: (510) 496-1366
svolker@volkerlaw.com

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Via email and US Mail

avillalobos@waterboards.ca.gov

Amber Villalobos
State Water Resources Control Board
Division of Water Rights - Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Request for SWRCB's preparation of an EIR for its proposed CWA Section 401 water quality certification for the McCloud-Pit Hydroelectric Project FERC Project No. 2106

INTRODUCTION

On behalf of the Winnemem Wintu Tribe and the North Coast Rivers Alliance, we request that you prepare an Environmental Impact Report ("EIR") to analyze the impacts of your proposed water quality certification under Section 401 of the Clean Water Act (33 U.S.C. § 1341) of the Federal Energy Regulatory Commission's ("FERC's") relicensing of Project No. 2106, the McCloud-Pit Hydroelectric Project ("Project"). Your EIR should examine the Project's many potentially harmful impacts on water quality and beneficial uses in the McCloud and Pit Rivers. Even with the mitigations included in FERC's staff alternative, as described in its Final Environmental Impact Statement ("Final EIS" or "FEIS") that FERC has prepared pursuant to the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) ("NEPA"), there is substantial evidence to support a fair argument that the Project's environmental impacts remain significant.¹ For this reason, and because the FEIS does not satisfy the requirements of the California Environmental Quality Act (Public Resources Code § 21000 et seq.) ("CEQA"), the State Water Resources Control Board ("SWRCB") must prepare an EIR.

¹ These mitigations, many mandated by the Forest Service pursuant to section 4(e) of the Federal Power Act (16 U.S.C. section 797(e)) to address ongoing impacts of PG&E's existing hydroelectric project, themselves have significant, unstudied impacts that must be addressed as part of the CEQA project under review.

The Winnemem Wintu Tribe's cultural identity is inextricably linked to the McCloud River. "Winnemem" is the Tribe's name for the McCloud River itself, and the Winnemem Wintu Tribe has historically occupied the lands along the banks of the McCloud River. Although some of the Tribe's traditional lands are now submerged under the McCloud Reservoir – due to the construction of the McCloud-Pit Hydroelectric Project – and Lake Shasta, the Tribe has continuously maintained its spiritual, cultural and traditional connection to its remaining unsubmerged native lands and waters, cultural spaces and subsistence uses. Members of NCRA utilize the McCloud River and its watershed for fishing, swimming, photograph, picnicking and other recreational interests. As discussed below, the SWRCB's preparation of an EIR is necessary to adequately protect the McCloud River environment, the Tribe's cultural interests and NCRA's recreational interests.

Without a Clean Water Act Section 401 certification from SWRCB, FERC cannot issue a Record of Decision approving the Project. 33 U.S.C. § 1341. And, before it issues this required certification, the SWRCB must analyze the environmental impacts of the Project under CEQA. Pub. Res. Code § 21100. As the lead agency under CEQA, the SWRCB must prepare an EIR that examines the whole of the Project in order to adequately determine its impacts. CEQA does not allow for segmentation. CEQA's "requirements cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." *Plan for Arcadia v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726. The "mandate of CEQA" is "that environmental considerations do not become submerged by chopping a large project into many little ones — each with a minimal potential impact on the environment — which cumulatively may have disastrous consequences." *Bozung v. Local Agency Form. Com.* (1975) 13 Cal.3d 263, 283-84. For this reason the SWRCB's EIR must consider the environmental consequences of all aspects of relicensing the hydroelectric project and not merely water quality impacts. Based on its EIR, the SWRCB must then decide whether to approve or deny certification, and as appropriate, recommend mitigation measures to protect water quality for inclusion in FERC's Record of Decision.

The SWRCB cannot approve a CEQA project if its significant impacts can be avoided or reduced by feasible alternatives or mitigation measures, unless those alternatives or mitigations are incorporated into the project. In order to determine whether a project's significant impacts can be avoided or reduced, a legally adequate EIR must analyze those impacts, and the alternatives and mitigation measures that are proposed to minimize them. Pub. Res. Code § 21100(b). While the SWRCB informed FERC of these CEQA requirements in its comment on FERC's Draft EIS, the Final EIS for this Project does *not* comply with these CEQA mandates. The Final EIS does not even address the degree of significance of the Project's impacts, let alone whether feasible alternatives or mitigation measures would reduce these impacts of unknown magnitude to less than significant levels.

Because the FEIS does not meet CEQA's standards, the SWRCB cannot utilize the FEIS as a substitute for the EIR that CEQA requires. CEQA Guidelines § 15170. Consequently, the SWRCB must prepare an EIR and examine ways to reduce this Project's impacts to insignificance itself. Only after it complies with CEQA can the SWRCB determine whether it can authorize the Section 401 certification necessary for this Project to move forward.

THE PROJECT POSES POTENTIALLY SIGNIFICANT IMPACTS THAT MUST BE ADDRESSED IN AN EIR

The Project Will Create Significant, but Unexamined Impacts

The Project, as described as the FERC's staff alternative in the Final EIS, includes many actions that will have significant environmental impacts. Instead of adequately addressing them, however, the Final EIS states merely that "*continued operation* of the project would result in some *minor unavoidable* adverse effects on geologic, soil and terrestrial resources." FEIS 417 (emphasis added). The Final EIS claims that the various resource management plans that will be finalized after FERC's approval of the Project will be sufficient to reduce these effects even though these plans are still being developed. FEIS 418. For example, although the Final EIS acknowledges that the Project could create a "short-term loss of vegetation along the proposed transmission line," it claims most of these impacts would be minimized by these future resource management plans. *Id.* The Final EIS does not address the Project's many other impacts on the environment, particularly on water quality and the beneficial uses of the McCloud and Pit Rivers. Those unstudied impacts include:

- (1) The construction of recreational accommodations as part of a Recreation Development Management Plan ("RDMP"), proposing new day-use areas (including restrooms, picnic areas, and potable water in some cases), campgrounds or campsites, access points for the McCloud Reservoir, boat ramps, parking spaces, paths, and other facilities.
- (2) The placement of large woody debris in the McCloud River below the McCloud Dam.
- (3) The periodic addition of 150 to 600 metric tons of gravel and coarse sediment to the McCloud River below the McCloud Dam, from deposits above the McCloud Dam.
- (4) The possible construction of additional powerhouses and transmission lines at the McCloud Dam and Pit 7 Afterbay Dam.

As discussed below, the Final EIS fails to support a conclusion that the Project's environmental impacts are less than significant. Because the Project's impacts are significant, the SWRCB must prepare an EIR to address them along with feasible alternatives and mitigation measures that might reduce or avoid them. And, if the Project's significant impacts can be feasibly avoided, the SWRCB cannot approve the Project unless those impacts are avoided.

1. Construction of Recreational Accommodations

As a condition of Project approval under section (4)(e) of the Federal Power Act, the Forest Service has mandated an RDMP that requires significant construction or reconstruction of recreational facilities. This plan include the addition of surface parking, new camp sites, vault toilets, potable water, picnic tables, cooking grills, and car-top boat access points to various sites along the McCloud and Pit Rivers. While the Forest Service's Draft RDMP includes language requiring that such construction comply with existing Forest Service rules, the Final EIS is silent on the construction-related and ongoing impacts of these facilities. FEIS 398-412. These additional facilities have the clear potential to degrade the environment around the McCloud and Pit Rivers in several ways, including increased run-off, increased traffic, soil degradation and compaction, loss of habitat, and potential waste spills associated with the vault toilets. The construction of new day-use areas along the McCloud River is intended to increase recreational access to the river, but the Final EIS does not address how this increase in recreational use will impact water quality. In addition, the planned development of a large campground near Star City Creek poses the potential to negatively impact the Tribe's cultural resources in the area.

Instead of studying these impacts, the Forest Service's RDMP defers analysis and refers readers to the Water Quality and Water Temperature Monitoring Plan ("WQWTMP"), the Road and Transportation Facility Management Plan ("RTFMP"), Historic Properties Management Plan ("HPMP") and other plans that will be finalized *after* FERC's approval. Because these plans are neither finalized nor specific, the SWRCB cannot rely upon them to minimize as-of-yet unstudied impacts to a less than significant level. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306 ("adopt[ion of] mitigation measures [to be] recommended in a future study is in direct conflict with the guidelines implementing CEQA"); *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-794 (mitigation measures that merely "require a report be prepared and followed," without establishing specific performance standards, violate CEQA). The impact of the new parking lots, campgrounds, toilets, boat ramps, floating platforms, potable water, access points and other facilities must be studied now, in an EIR. In addition, the EIR should examine whether the Project's new recreational facilities will attract additional users to the region, and analyze their resulting impacts on the environment.

2. Large Woody Debris

While downed trees (or “large woody debris”) are currently removed from the McCloud Reservoir, PG&E does not reintroduce them into the McCloud River below the dam. The Project proposes the placement of retrieved large woody debris downstream of the McCloud Dam, in order to mimic debris that would be deposited in the riverbed absent the dam. The Final EIS states that this large woody debris is designed to provide new fish and aquatic habitat. FEIS 78. However, the Final EIS does not address how frequently and how much large woody debris will be placed in the river, nor does it address the potential changes in temperature, turbidity or flow patterns that these additions pose to the McCloud River below the dam. Instead, the Final EIS refers to a Large Woody Debris Management Plan (“LWDMP”), to be finalized *after* FERC approves the Project. It states that the monitoring program included in the LWDMP “would provide information necessary to assess whether the locations and quantity of LWD placement are appropriate to achieve the objectives.” FEIS 78. The Forest Service’s Draft LWDMP identifies a preferred site for the introduction of the debris below the dam, but is silent as to the potential impacts of placing the debris in the McCloud River. The SWRCB cannot rely on mitigations to be adopted in the *future* LWDMP as a basis for approving the Project *now*. *Sundstrom, supra*, 202 Cal.App.3d at 306.

3. Gravel and Coarse Sediment

The Final EIS does not address the impacts of extracting the 150 to 600 metric tons of gravel and coarse sediment from Star City Creek that is proposed in the Project’s Draft Gravel and Coarse Sediment Management Plan (“GCSMP”). The Forest Service’s Draft GCSMP is equally silent regarding these impacts. In addition, the Final EIS never examines the full range of impacts of gravel supplementation below the dam, including impacts on turbidity, temperature, flow or habitat. Instead, the Final EIS and the Draft GCSMP simply assume – with no analysis – that coarse sediment augmentation will benefit the McCloud River below the dam. The Final EIS asserts *without supporting data and analysis* that the GCSMP “would help mitigate project effects on aquatic habitat,” and “would likely mimic patterns of sediment deposition created below downstream tributary confluences in the Lower McCloud River.” FEIS 86. The Draft EIS likewise fails to analyze the GCSMP’s impacts on turbidity, temperature, flow and habitat within the McCloud River. DEIS 79-83.

The Forest Service’s Draft GCSMP proposes that there be a separate Section 401 approval for the GCSMP. Such segmentation is antithetical to both CEQA and the Clean Water Act. The impacts of the GCSMP need to be evaluated *as part* of the relicensing process, because the new license relies on the GCSMP to mitigate the Project’s impacts.

4. New Powerhouses

PG&E has not decided whether it will construct powerhouses – and the transmission lines associated with those powerhouses – at the dams at the Pit 7 Afterbay and on the McCloud River as part of the relicensing process. PG&E’s application included the potential addition of these new powerhouses. FEIS 15, 321. Yet the Final EIS does not adequately address the impacts of placing transmission lines on the Project’s environment, including water quality impacts from construction road and tower pad erosion and run-off, the destruction of biological resources, the loss of or infringement on Winnemem Wintu Tribe’s cultural resources, or increased fire risks and impairment of aerial fire suppression from the lines themselves.

Instead, the FEIS states that constructing the transmission line from the proposed generator at the Pit 7 Afterbay could generate additional erosion, which would be addressed in a site-specific management plan to be developed *after* relicensing. FEIS 154. The FEIS assumes that loss of vegetation would be mitigated by management plans to be finalized *after* relicensing, and that other transmission line related impacts (such as fire dangers and destruction of cultural resources) will be addressed by other *future* management plans. FEIS 417-18, A-124. This repeated reliance on future mitigations violates NEPA. *Foundation for Northern American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1181 (9th Cir. 1982) (future mitigation deficient because “[i]t represents an agency decision to act now and deal with the environmental consequences later”); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (“The Forest Service’s perfunctory description of mitigation measures [to protect redband trout] is inconsistent with the ‘hard look’ it is required to render under NEPA”) (9th Cir. 1998); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998) (“mere listing” of mitigation measures violated NEPA); *National Parks and Conservation Ass’n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (mitigation measures must be “developed to a reasonable degree;” neither a “perfunctory description” nor a “mere listing” of mitigation measures, in the absence of “supporting analytical data,” is sufficient to sustain a finding of no significant impact); *Dine Citizens Against Ruining Our Environment v. Klein*, 747 F.Supp.2d 1234, 1259 (D. Colo. 2010) (agency’s uncritical reliance on vague mitigation measures to reduce impacts on cultural resources was arbitrary and capricious in violation of NEPA regulations); *Wyoming Outdoor Council, Powder River Basin Resources Council v. U.S. Army Corps of Engineers*, 351 F.Supp.2d 1232, 1251-1252 (D. Wyo. 2005) (agency reliance on vague and unproven mitigation measures rejected); *Western Land Exchange Project v. U.S. Bureau of Land Management*, 315 F.Supp.2d 1068, 1092 (D. Nev. 2004) (deferred definition of mitigation measures violated NEPA). The SWRCB’s reliance on vague and deferred mitigation measures likewise would violate CEQA. *Sundstrom, supra*, 202 Cal.App.3d at 306; *Endangered Habitats League, supra*, 131 Cal.App.4th at 793-794.

Likewise, the Final EIS is silent on the potential water quality impacts of the new generators on levels of dissolved oxygen, turbidity or water temperature. PG&E states that its decision on whether to install these new powerhouses is contingent upon the minimum flow requirements that FERC adopts in the Project's new license. While FERC has noted that new power generation might cost more than it could generate in revenue, FERC states that it is up to PG&E to determine whether it will undertake this financial risk. FEIS 350. Instead of addressing the potential impacts of this power generation during this licensing proceeding, the FEIS states vaguely that, if PG&E opts to move forward with new power generation units, "further analysis would be required *at that time*." FEIS A-16 (emphasis added). Because future power generation is a reasonably foreseeable consequence of the Project, its impacts must be considered at the time of Project approval under CEQA. *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396.

THE PROJECT DOES NOT PROVIDE ADEQUATE PROTECTION FOR THE BENEFICIAL USES IDENTIFIED IN THE BASIN PLAN

The Basin Plan for the Sacramento River and San Joaquin River Basins (the "Basin Plan") designates the existing and potential beneficial uses for the McCloud River and Pit River. The McCloud River's existing beneficial uses include (1) municipal and domestic water supply; (2) hydroelectric power generation; (3) contact recreation; (4) non-contact recreation; (5) cold fresh-water habitat; (6) salmon and steelhead spawning habitat; and (7) wildlife habitat. Canoeing and rafting are considered *potential* beneficial uses of the McCloud River. The Basin Plan's beneficial use designation segments the Pit River into six reaches. The Project falls into the reach running from the mouth of Hat Creek to Shasta Lake. This reach's existing beneficial uses include (1) municipal and domestic water supply; (2) agricultural uses including irrigation and stock watering; (3) hydroelectric power generation; (4) recreation, including contact recreation, canoeing and rafting and non-contact recreation; (5) cold fresh-water habitat; (6) striped bass, sturgeon and shad spawning habitat; (7) salmon and steelhead spawning habitat; and (8) wildlife habitat. In addition, the Basin Plan designates warm fresh-water habitat as a potential beneficial use on this reach of the Pit River.

The Project does not adequately protect the beneficial uses identified in the Basin Plan, including salmon and steelhead spawning habitat, and cold fresh-water habitat on the McCloud River. The existing operation of the McCloud-Pit Hydroelectric Project also impairs the potential beneficial use of the Pit River as warm fresh-water habitat because the cold water of the McCloud River is diverted through a series of tunnels and generators to the warmer Pit River. While the Project increases the cold-water flows downstream of the McCloud Dam (and thus has the potential to reduce hydroelectric diversions that flow to the Pit River), the Project's new flow regime still fails to adequately protect the beneficial uses of the McCloud River as cold fresh-water habitat and spawning habitat for salmon and steelhead, as discussed below.

1. Use of the McCloud River as Cold Fresh-Water and Spawning Habitat

The National Marine Fisheries Service (“NMFS”) identifies the McCloud River as a priority area for the re-colonization of steelhead, and winter-run and spring-run Chinook salmon. NMFS, *Draft Central Valley Salmon and Steelhead Recovery Plan*. NMFS has described such reintroduction as “imminent” in its comments to FERC on this Project. Despite this, and repeated requests by both NMFS and EPA that FERC adopt a flow regime that would support reintroduced salmonids within the Project area, neither FERC nor PG&E has proposed a flow regime that could support reintroduced salmonids.

Throughout the integrated relicensing process, the Winnemem Wintu Tribe and other interested parties requested that PG&E and FERC consider, study and plan for the reintroduction of native fish species along the McCloud River. These requests fell on deaf ears. For example, in studying the impact of various flow regimes at the McCloud Dam on fish species, PG&E did not include habitat criteria appropriate for the bull trout or the native salmonids *despite the Tribe’s requests*. FEIS 141. PG&E claimed that the previous collapse of these fisheries due to construction of Shasta and Keswick Dams excused PG&E from complying with NMFS’ direction that these salmon be restored. PG&E’s *SD-1, PAD, and Study Plan Comments Reply* (January 5, 2007), p. 25. But the public, not PG&E, owns these rivers and their public trust fisheries. As the duly authorized public manager of these fisheries, NMFS – and not PG&E – decides if these nearly extirpated salmon are to be reintroduced. Accordingly, during the pendency of PG&E’s relicensing application process, the U.S. Bureau of Reclamation and NMFS moved forward with plans to reintroduce endangered native salmonids to areas above Shasta and Keswick Dams. Final EIS 387.

The Final EIS mistakenly subordinates these public agency plans to PG&E’s private pecuniary interests as an investor-owned utility, and dismisses the minimum flows requested by NMFS because “the requested flows have not been based on results of the minimum flow studies *conducted by PG&E*.” Final EIS A-59. Had PG&E and FERC properly analyzed the flow regimes in the first place, and complied with NMFS’ direction as NEPA requires, this omission of required information would not have occurred. The SWRCB must now, itself, examine in an EIR alternate flow regimes that would support reintroduced salmonids.

The Basin Plan includes cold fresh-water and cold water spawning habitat that supports salmon and steelhead in the list of the McCloud River’s beneficial uses. Without adequate protection for reintroduced native salmonids within the Project’s new flow regime, the Project will impair these beneficial uses of the McCloud River. The SWRCB must examine alternatives that will protect these beneficial uses as required under the Clean Water Act and Water Code sections 13240 et seq.

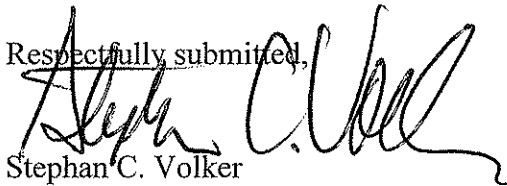
2. Water Quality Standards

As discussed above, the Project includes management plans to construct extensive recreational accommodations (including vault toilets), augment the McCloud River below the dam with large woody debris, gravel and coarse sediment, and alter the flow regimes at the McCloud Dam. All of these actions will impact the water quality of the river by, for example, increasing erosion and run-off, increasing the risk of bacterial contamination, increasing the turbidity, and altering the temperature of the Pit River and McCloud River below the diversion. The FEIS does not quantify whether these impacts would exceed the limits set in the Basin Plan, and in many cases is silent as to whether the impact will occur. The SWRCB must examine these conflicts in an EIR.

CONCLUSION

For the reasons discussed above, a negative declaration is wholly inappropriate to address the potentially significant and largely unstudied water quality impacts of the Project. The SWRCB must prepare an EIR to address these deficiencies as part of its Section 401 water quality certification review.

Respectfully submitted,



Stephan C. Volker
Attorney for the Winnemem Wintu Tribe
and North Coast Rivers Alliance