

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In Re: Urgent Request for Flow Variance
Due to Limited Water Availability, Potter
Valley Hydroelectric Project

FERC Project No. 77-266

**FRIENDS OF THE EEL RIVER'S MOTION TO INTERVENE;
COMMENTS ON APPLICATION FOR TEMPORARY VARIANCE OF
LICENSE REQUIREMENT AND DECEMBER 12, 2013 FERC ORDER
GRANTING TEMPORARY VARIANCE OF MINIMUM FLOW
REQUIREMENTS**

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MOTION TO INTERVENE

Pursuant to the Federal Energy Regulatory Commission's ("FERC" or "Commission") Notice of Application Accepted for Filing, Soliciting Comments, Motions to Intervene, and Protests (dated December 16, 2013) ("Notice") and 18 C.F.R. section 385.214, Friends of the Eel River ("FOER") hereby moves to intervene in the above referenced matter. Commission Rule 214 allows for the filing of motions for intervention upon a showing of (1) the position taken by the movant and the basis in fact and law for that position; and (2) the movant's interest in the matter. 18 C.F.R. § 385.214(b)(1)-(2).

FOER's interest in the matter, as well as the basis in fact and law for its position, are set forth in detail in its comments on Pacific Gas and Electric Company's ("PG&E's") Application for Temporary Variance of Flow Requirement ("Application") and the December 12, 2013 FERC Order granting a temporary variance of minimum flow requirements ("Order") for the Potter Valley Project (FERC Project No. 77) (the "Project"), which are included below and filed concurrently herewith (these comments are heretofore referred to as "Comments").

As set forth more fully below, evidence in the record demonstrates that reductions in flows released to the mainstem Eel River may result in disruption of migration, spawning, and successful reproduction of salmon and steelhead listed under the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, while continued releases to the Russian River reduce the water available to Eel River fisheries. Further, FOER is aware that PG&E has just requested to extend the variance. *See* PG&E Extension

Request for Flow Variance Due to Limited Water Availability (January 15, 2014)

(“Request”); “PG&E Seeks More Flow Reductions to Eel and Russian Rivers; Comment Period Ends Thursday,” Redwood Times (January 15, 2014), available at

http://www.redwoodtimes.com/news/ci_24909369/pg-e-seeks-more-flow-reductions-eel-

[and#](#). It is absolutely critical that FERC examine this and any subsequent requests in proceedings involving full public participation. FOER wishes to fully participate in any and all such proceedings in order to protect the public interest and the invaluable resources in the wild and scenic Eel River. FOER does not have sufficient time to review PG&E’s new Request prior to the January 16, 2014 comment deadline, and hereby requests FERC to extend the comment deadline and not act on the Request until at least January 31, 2014 (the expiration of the current variance).

Moreover, if the current license results in recurrent conditions where there is insufficient water to protect listed species and there are dangers from accumulated sediment (as appears to be the case), it will become necessary to reopen the license proceeding, as well as revisit the biological opinion and environmental impact report for the Project. An *ad hoc* and hasty approach to altering flows as PG&E believes necessary is both unwise and not sanctioned under applicable law, including but not limited to the Federal Power Act (“FPA”), the Endangered Species Act (“ESA”), and the National Environmental Policy Act (“NEPA”).

I. THE POSITION TAKEN BY FOER IN THIS PROCEEDING, AND THE BASIS IN LAW AND FACT FOR THAT POSITION (18 C.F.R. § 385.214(B)(1)).

FOER's position in this proceeding, and the basis in law and fact for its position, are detailed in its Comments filed concurrently herewith, hereby incorporated by reference.

In summary, FOER's position is that the listed fish in the Eel River may be subject to serious additional harms due to the operations of the Project during periods of low flows. FOER would hope to assist FERC in order to avoid potential harms in its further consideration of modifications to Project flow schedules. Failure to consider viable alternatives in view of potential harms to Eel River fisheries could result in violations of the ESA and NEPA. The potential and actual harms to listed fish implicated in the present decision strongly suggest that FERC should reopen the license for the PVP to establish operating requirements that will reduce the potential for take of listed species in similar circumstances.

FOER would note as well that PG&E has today (1/15/14) submitted an additional Request to FERC for an indefinite extension of reduced releases to the Eel River. The Request does not give a date certain for the reduced flows to cease, but appears to leave that determination up to PG&E ("until the reduced flows are no longer operationally necessary"). Because there is not sufficient time to review and provide detailed comments on this new Request before tomorrow's deadline, we request FERC extend the comment deadline and not act on PG&E's Request until at least January 31, 2014. We

further request that if FERC is inclined to grant this Request that, at a minimum, a date certain be set for its expiration. We would suggest March 1, 2014.

II. FOER'S INTERESTS WILL BE DIRECTLY AFFECTED BY THE OUTCOME OF THE PROCEEDING AND ITS INTERVENTION IS IN THE PUBLIC INTEREST (18 C.F.R. § 385.214(B)(II) & (III)).

FOER's position is in the public interest. FOER is a non-profit, tax-exempt corporation organized under the laws of California and headquartered in Arcata, California. Founded in 1998, FOER is a membership organization of thousands of concerned conservationists from Humboldt, Mendocino, Sonoma, Marin and other counties dedicated to protecting and restoring the Eel River watershed and its dependent fish and wildlife. FOER has actively participated in prior proceedings related to the Pacific Gas & Electric Company's ("PG&E") license for operation of the Potter Valley Project. FOER also submits Comments herewith. FOER's position is not adequately represented by current parties to the proceeding. No organization dedicated to the protection of fishery resources in the Eel River has thus far intervened in this proceeding. In any event, FOER offers a unique perspective regarding the resources in the Eel River watershed. Therefore, FOER's Comments and interests represent issues that are not presented by other parties, but should be considered by FERC.

III. CONTACT INFORMATION

Pursuant to Commission Rule 203(b), FOER requests that all communications and service in this matter be directed to:

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IV. CONCLUSION

For the foregoing reasons, Friends of the Eel River respectfully requests that its Motion for Intervention be granted.

DATED: January 15, 2014

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Amy Bricker
AMY BRICKER

Attorneys for Friends of the Eel River

COMMENTS

Friends of the Eel River (FOER) is a nonprofit citizens' group that advocates for policies and practices consistent with the protection and recovery of the Wild and Scenic Eel River's outstanding resource values, particularly the three salmonid species protected under the federal Endangered Species Act. Eel River coho salmon and steelhead, but especially chinook salmon, are affected by the operation of the Potter Valley Project dams and diversion tunnel in a variety of ways.

The decision to grant a flow variance here at issue illustrates that, even in circumstances of extreme water scarcity, both the utility and FERC continue, improperly, to balance the potential for severe, unmitigable harms to imperiled fish with mere economic convenience. By PG&E's own admission, fish listed under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, have again suffered serious harms, likely rising to the level of a "take" generally forbidden by the ESA, as a result of the operations of the Potter Valley Project.

FOER is thus both interested in the process and substance of decisions like the flow variance granted here, and concerned by the potential for real harm to Eel River chinook and other salmonids that may result from further decisions regarding the operations of the Potter Valley Project.

We note that PG&E has today (1/15/14) submitted an additional request to FERC for an indefinite extension of reduced releases to the Eel River. The Request does not give a date certain for the reduced flows to cease, but appears to leave that determination up to PG&E ("until the reduced flows are no longer operationally necessary"). Because

there is not sufficient time to review and provide detailed comments on this new Request before tomorrow's deadline, we request FERC extend the comment deadline and not act on PG&E's Request until at least January 31, 2014. We further request that if FERC is inclined to grant this additional Request, that a date certain be set for its expiration. We would suggest March 1.

The 2013 water year proved to be not merely the driest on record for much of northwestern California, but one that saw significantly less rainfall than the previous low marks. The National Weather Service and other experts have cautioned that while conditions may change, the region may well be facing a period of protracted and severe drought. Thus, decisions on questions like the flow variance at issue here need to be considered not only as addressing a single unique event, but as potential precedent for similar issues that may arise if serious drought conditions persist.

Under the unique conditions present this year, FOER does understand that the licensee and agencies were hoping to limit harms to spawning salmon and their redds, among other purposes, by reducing releases to the upper Eel River below the Reasonable and Prudent Alternative's ("RPA's") specified 100 cfs for the remainder of December 2013. We do, however, see that the decision could have been improved. By considering the need for such an alteration earlier, the licensee might have avoided altogether the potential for a spike and reduction in flows during chinook spawning. By setting a release floor higher than the very low 25 cfs, FERC could have significantly ameliorated public concerns regarding potential impacts on listed Eel River fish without requiring more than the licensee was prepared in any event to offer. Above all, by conserving some portion of

the Eel River water that was diverted to the Russian River at a rate in excess of 80 cfs from mid-April to mid-October of 2013, more water would now be available to address the needs of Eel River fish. The potential and actual harms to listed fish implicated in the present decision strongly suggest that FERC should reopen the license for the PVP to establish operating requirements that will reduce the potential for take of listed species in similar circumstances.

Given the threat to redds in the mainstem Eel that are likely to be more important to this cohort of chinook under the present critically dry conditions – many fewer chinook having climbed the Van Arsdale fish ladder than in the past two years – FOER joins the Round Valley Indian Tribes in taking exception to the flow variance to the extent it authorizes any continued releases of Eel River water to the Russian River through the Potter Valley Project diversion tunnel. While the electricity generated by low-level hydropower operations can be substituted from other sources, Eel River fish have no alternate source of the flows that will allow their next generation to survive.

Eel River salmon are genetically distinctive fish, particularly adapted to their native watershed. If extirpated, their unique genetic heritage will be lost irrevocably. In critically dry years, as 2013 clearly has been, relatively small changes in flow may spell the difference not only for adults seeking access to their spawning grounds, but for redds subject to drying, and for young dependent on the food produced in drying riffles. If fish protected by the Endangered Species Act, in a river designated as a Wild and Scenic River, are not given clear priority in these extreme circumstances, when can they reasonably expect to receive it?

Our specific concerns with respect to the decision at issue here are ameliorated to some degree by our awareness that the actual flows released into the upper mainstem Eel River during December 2013 and January 2014, following FERC's decision to grant the requested variance, have been in excess of the requested 25 cfs floor because PG&E has implemented an approximate 10 cfs buffer in actual flows released. As reported by the California Department of Water Resources' California Data Exchange Center at (<http://cdec.water.ca.gov/cgi-progs/queryDgroups?s=PG2>), the average flows released to the Eel for the period 12/15/13 to 1/12/14 were just over 36 cfs.

However, by the same token, while the variance sought a minimum flow to the Russian River basin of 5 cfs, those flows continued at more than three times that level. While those flows have declined in just the last week, they have consistently run at or above 15 cfs for most of the period in view, averaging 14.72 cfs for the days from 12/15/13 to 1/12/14.

FOER respectfully requests a clear and thorough rationale for the decision to allow continued Russian River diversions be released to the public, and that the decision be reconsidered in light of all evidence gathered in the course of this decision and any decision on the pending Request, including any responses to the questions raised below.

FOER requests that FERC provide evidence as part of the record for this decision, to demonstrate the electric generating capabilities of the PVP power plant with an inflow of 5cfs. Please also provide any evidence of PG&E's economic justification for continuing to operate the PVP power plant with inflows down to 5cfs, particularly in comparison with their ability to provide electric generation from other, more reliable

sources. This information goes to the heart of a discussion as to why PG&E should continue to operate the PVP, and why FERC should allow any diversions from the Eel River to the Russian River through the PVP, during a period of designated "critical dry water year," in light of the threats to continued survival of listed salmonids in the Eel River.

FERC's conclusory statement in its Dec 12 Order that "...the Tribes petition for a cessation of flow releases to the East Branch Russian River altogether is not prudent, given the existing fishery and the consumptive water uses downstream" fails to identify the significance of even incremental additional flows to Eel River fish, and appears to grant improper weight and consideration to "consumptive water uses downstream" that are neither the subject of FERC's proper jurisdiction (*see* 16 U.S. Code § 821) nor equal in urgency to the biological requirements of ESA-listed fish and their young.

These concerns are only amplified by our observation that the actual flows to the Russian River, as noted above, continue to be well in excess of the 5 cfs floor granted in the flow variance. While those flows may be economically convenient for the licensee and the "consumptive water uses downstream," the federal government's public trust and ESA responsibilities include an obligation to avoid the take of listed species unless specifically authorized after due consultation with the appropriate state and federal agencies.

FERC's order and comments from the California Department of Fish and Wildlife reference the potential for harm to fisheries and impairment to the operations of the PVP if eroding sediments in the Lake Pillsbury basin were to collapse. FOER respectfully

requests FERC require submission, analysis and release of data and modeling to verify this suggestion and to provide guidance for an evidence-based approach to future decisions that may implicate similar concerns. FOER requests that FERC and/or PG&E provide as part of the record for this decision, complete mapping of where the unstable vertical walls of sediment are located behind Scott Dam, including any recent survey of materials, slopes, volume and elevations of the suspect unstable sediments.

What monitoring information is available to evaluate its rate of accretion? Given these factors and other relevant information, including stability, what is the likelihood of Lake Pillsbury sediment collapses resulting in sediment releases to the Eel River downstream? How can FERC be assured that the proposed variance will in fact “eliminate the risk of vertical bed collapse in the Lake Pillsbury reservoir bed,” as stated in FERC’s Order of December 12, 2013?

What, if any, are the implications of this accumulated sediment for the stability and safety of the Scott Dam over the short and long term? For the storage capacity of Lake Pillsbury? What impact would a reasonably foreseeable sediment release have on fisheries in the Eel River system? Would such a release bear a risk of substantially impairing the operations of the Van Arsdale reservoir and the diversion tunnel? It is our general understanding that it was the rapid silting-in of the Van Arsdale reservoir that led to the construction of the Scott Dam upstream: how much additional sediment can the Van Arsdale reservoir accommodate without disruption to its operations?

We note the statements by PG&E’s consulting biologist, both to the effect that flows in the mainstem Eel were inadequate through the fall of 2013 to allow chinook

migration up to the Van Arsdale fish ladder, and with respect to the levels allowed by the flow variance, that “the majority of the early salmon redds would remain (in) the wetted channel if the flows were reduced from 100 cfs to the proposed 25 cfs below Cape Horn Dam,” as noted in FERC’s December 12 Order. (p. 2)

We share the concern indicated by FERC’s Order in noting “we question whether the flow reduction would avoid negatively impacting some quantity of the spawning fish, especially those that may have already begun to spawn in shallow portions of the Eel River.” FOER respectfully requests FERC solicit and consider those monitoring data which may reveal the extent to which those concerns were well-founded. Without considering such information, it is very difficult for agencies and the public to credibly evaluate the potential risks associated with alternative courses of action.

As well, FOER would note that the harm the licensee and agencies seek to avoid in allowing a temporary spike in flows in early December to confuse spawning chinook could have been avoided with an earlier consideration of the need to adjust flows.

FOER respectfully requests that FERC consider engaging a broader range of stakeholders to consider the potential issues raised by flows from the Potter Valley Project, particularly in critically dry years. Future decisions should better reflect the priority that should be given to avoiding serious harm to the Eel River’s imperiled fisheries.

DATED: January 15, 2014

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Amy Bricker
AMY BRICKER (on behalf of Scott Greacen,
Executive Director, Friends of the Eel River)

Attorneys for Friends of the Eel River

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic or first class mail, to each person designated on the official service list compiled by the Secretary in this proceeding, as well as the Applicant Contact.

Executed in San Francisco, California on January 15, 2014.

/s/ Sean Mulligan

Sean Mulligan