



State Water Resources Control Board



Linda S. Adams
*Secretary for
Environmental Protection*

Division of Water Rights
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Arnold Schwarzenegger
Governor

April 29, 2010

Ellison Folk
Amy Bricker
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102

Dear Ms. Folk and Ms. Bricker:

DISMISSAL OF COMPLAINT FOR MODIFICATION OF WATER RIGHTS TO PROTECT PUBLIC TRUST RESOURCES ON THE EEL RIVER AND PREVENT UNREASONABLE USE OF WATER

The State Water Resources Control Board (State Water Board) has received the complaint of Friends of the Eel River and William Reynolds ("Complainants") to modify PG&E's water rights for the Potter Valley Project, which diverts water from the Eel River to the Russian River. The State Water Board is preempted from examining the instream impacts of PG&E's hydropower diversions, as discussed below. The State Water Board is not preempted from addressing impacts from PG&E's irrigation water rights. But, as discussed further below, it appears that conditioning the irrigation rights would not impact the amount of water diverted from the Eel River system to the Russian River system. Therefore, the State Water Board declines to take action on the complaint.

The State Water Board understands that Complainants may submit an amended complaint raising different issues concerning the same diversion. This dismissal is without prejudice to the consideration of any new issues or additional information that may be presented in connection with a new or amended complaint. This letter describes why the State Water Board will not pursue issues raised by the complaint, and does not constitute a final order or decision subject to the reconsideration process set forth under California Code of Regulations, title 23, section 768.

Background on PG&E Diversions for Potter Valley Project

PG&E owns and operates the Potter Valley Project hydroelectric facility under a license from the Federal Energy Regulatory Commission (FERC) as FERC Project No. 77. The Potter Valley Project stores water on the Eel River, diverts the water from the Eel River watershed and through its powerhouse, and then releases the water into the Russian River. The current FERC license for the project was issued in 1983, and was most recently amended in 2004 to protect federally listed salmonids in the Eel River.

California Environmental Protection Agency



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PG&E has three licensed water rights¹ for its Potter Valley Project diversions. License 1424, with a priority date of March 13, 1920, allows PG&E to divert up to 102,366 acre-feet per annum (afa) for the beneficial uses of hydropower generation and incidental Fish and Wildlife Protection and Enhancement. License 5545, with a priority date of March 11, 1930, allows PG&E to apply up to 4,908 afa of water used for hydropower for irrigation purposes within the Potter Valley Irrigation District in the Russian River watershed. License 5661, with a priority date of August 15, 1925, allows PG&E to apply up to 4500 afa of the water previously used for hydropower for irrigation purposes within the Potter Valley Irrigation District.

FERC Preemption of Hydropower Facilities

The Potter Valley Project is a FERC-licensed hydroelectric facility. The Federal Power Act preempts the field for regulating FERC-licensed projects, and state authority over hydroelectric power facilities is therefore limited to specific circumstances or exceptions to preemption. (*Sales-Hydro Assoc. v. Maughan* (1993) 935 F.2d 451, 455.) The primary exceptions that can apply to State Water Board actions and their applicability to the Potter Valley Project are discussed below.

Projects not subject to FERC licensing

The state may exercise jurisdiction over hydroelectric projects that are exempt from FERC licensing. Certain categories of hydroelectric facilities, such as federal facilities and federally authorized projects, are exempt from regulation under the Federal Power Act. (See e.g. *Uncompahgre Valley Water Users Ass'n v. FERC* (10th Cir. 1986) 785 F.2d 269, 274 [finding that FERC had no authority where Department of the Interior had power to contract for sale of hydropower incidental to irrigation]. See also *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (Mar. 30, 2010, (A124351) ___ Cal.App.4th ___ [2010 WL 1208424] [holding state regulation of FERC licensed hydroelectric facility is preempted, but distinguishing case where hydroelectric facility had been operating without a FERC license].)

Here, the Potter Valley Project operates under FERC license. Therefore, this exception does not apply.

Regulation to protect proprietary water rights

As Complainants point out in paragraph 51 of the complaint, Section 27 of the Federal Power Act provides that: "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821.) Complainants interpret this section to establish an "unequivocal" reservation of state authority over water rights. This savings clause does not extend to all potential conditions that state law authorizes the State Water Board to impose on a water right, however. The United States Supreme Court has interpreted this

¹ PG&E has also filed two Statements of Diversion and Use, S 1010 and S 4704, claiming pre-1914 rights for hydropower and irrigation purposes for up to 191,000 acre-feet per annum (afa) and 700 afa, respectively, but the complaint is limited to PG&E's licensed water rights.

section narrowly, to protect the states' ability to administer proprietary water rights. (*California v. FERC (Rock Creek)* (1990) 495 U.S. 490.) In *Rock Creek, supra*, California had imposed a streamflow requirement in a hydropower water right that increased the release requirement above which is required in a FERC license. (*Id.*, at 495.) Such an action to protect instream values was not permitted under Section 27's savings clause, because instream flow requirements were neither proprietary rights nor were they "rights of the same nature as those relating to the use of water for irrigation or for municipal or other uses." (*Id.*, at 497-98 [citing *First Iowa Hydro-electric Cooperative v. FPC* (1946) 328 U.S. 152, at 176].)

In the 2004 Order amending the FERC license for the Potter Valley Project, FERC stated:

Whether PG&E's present or future diversions of water from the Eel River to the Russian River are consistent with California law is a matter to be resolved by the California authorities, and it is not our intention to interfere with any actions they may take with respect to water rights. We have moreover retained authority to make any adjustments to the license in the future that may be needed in light of any such actions.

(106 FERC 61065, 61226.)

FERC further reserved authority to make modifications "necessitated by modification by the California State Water Resources Control Board of its Decision 1610." (106 FERC 61065, 61230, License Article 58.)

Complainants suggest that these statements from FERC's 2004 Order amending Potter Valley Project's license to mean that the State Water Board maintains the authority to "adjudicate water rights" on the Eel and Russian Rivers "in compliance with state law." (Complaint ¶s 52-53.) Complainants' implication is that all considerations of state law normally used in water rights, including protection of the public trust, apply here.

However, read in the context of federal preemption of state law except protection of proprietary water rights, the best interpretation of these statements in the 2004 Order is that FERC was simply reciting respect for the authority over proprietary rights that the state already exercises, and reserving the right to make any necessary modifications to the FERC license should any proprietary right decisions necessitate such a change. While FERC may be able to delegate to the states the power to exercise authority that the state would otherwise be preempted from exercising, we know of no instances where it has done so. The language Complainants cite is not sufficient to indicate such a delegation of authority.

One of the Complainants, Mr. William Reynolds, is a landowner with a claimed riparian right on the Eel River, downstream of PG&E's diversions. He uses the property to produce certified organic seeds, and expresses concern that the ongoing diversions "will negatively impact his ability to farm and thus his livelihood." However, the Complainant fails to allege that the diversions actually interfere with his exercise of riparian rights.

Here, Complainants do not allege any infringement of proprietary rights caused by the Potter Valley Project. Therefore, this exception does not apply.

Regulation of non-hydropower uses

States are not preempted from regulating non-hydropower uses of water in multiple-use projects that also generate power under FERC licenses. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931; *Georgia Power Co. v. Baker* (11th Cir. 1987) 830 F.2d 163.)

Licenses 5661 and 5545 allow PG&E to divert up to 9,408 afa from the Eel River for irrigation use within the Potter Valley Irrigation District, after it has gone through the power facility. The State Water Board is not preempted from exercising its full authority, including its public trust authority, over these diversions. These are discussed further below in the section titled "PG&E's Irrigation Rights." However, License 1424, which allows PG&E to divert up to 102,366 afa, is a hydropower right. While License 1424 lists fish and wildlife protection and enhancement as an incidental beneficial use, such use is only incidental to the hydropower generation use and cannot be separately regulated from it.

Market-participant exception

Federal preemption, including statutory field preemption, applies only to a state's authority to regulate, not to a state's actions as a market participant or an owner of property. (See *Building and Construction Trades Council v. Associated Builders and Contractors* (1993) 507 U.S. 218 [finding that a pre-hire collective bargaining agreement requirement by state agency was not preempted by the National Labor Relations Act under the market-participant doctrine]; *Engine Manufacturers Association v. South Coast Air Quality Management District* (9th Cir. 2007) 498 F.3d 1031 [explaining the market-participant doctrine, and finding that Clean Air Act preemption does not apply to a rule imposing emissions standards on vehicles purchased for government-owned fleet].) State or local government entities own or operate certain FERC-licensed facilities. While those entities must comply with the FERC licenses, the state may add additional conditions to operation under the market-participant exception to preemption.

Here, the PG&E, a private entity, owns and operates the Potter Valley Project. Therefore, the market-participant exception does not apply.

State regulation pursuant to federal statutory authority

The state may regulate federally licensed FERC facilities pursuant to authority provided by other federal statutes, including section 401 of the Clean Water Act. (See *PUD No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700; see also *Monongahela Power Co. v. Marsh* (1987) 809 F.2d 41 [FERC licensed facilities are subject to permitting requirements under section 404 of the Clean Water Act]; 33 U.S.C. § 1344(b) [authorizing states to issue 404 permits for some waters of the United States].)

The complaint specifically asks for the State Water Board to apply state laws regarding reasonableness and public trust. The FERC license for the Potter Valley Project is current, and no amendments to or construction on the project are being considered that would trigger review under Clean Water Act section 401. Complainants have not alleged that any discharge requiring the state to issue a Clean Water Act section 404 permit is occurring or anticipated.

The State Water Board is not aware of any other federal statutory authority that would apply here.

PG&E's Irrigation Rights

The complaint is not clear as to whether Complainants would wish to pursue a complaint solely against PG&E's irrigation use. Since PG&E only diverts water for irrigation after the water has run through the powerhouse, and because PG&E is not licensed to divert irrigation water in an amount above what is licensed for its hydropower use, it does not appear that conditioning or even eliminating PG&E's licensed irrigation water rights would significantly affect diversions out of the Eel River system. Diversions from the Eel River appear to be Complainants' primary concern. As such, the State Water Board declines to pursue the complaint based solely on PG&E's irrigation rights.

Complainants anticipate filing additional claims concerning PG&E's diversions for the Potter Valley Project. If Complainants did intend to pursue a charge of unreasonableness against the irrigation licenses, the Complainants may clarify their intent, and provide support regarding the potential public trust benefits for evaluating just those rights, without imposing any limitations on PG&E's water right licenses for hydropower, in the new filing.

William Reynolds' Riparian Rights

As discussed above, Mr. Reynolds claims riparian rights on the Eel River downstream of PG&E's diversions for the Potter Valley Project. However, Mr. Reynolds does not claim that the diversion has interfered with his ability to use water for his seed farm, only that he fears it may do so in the future. The complaint does not explain the basis for these fears, given that the amount of the water diverted under the licenses cannot be increased. Because the complaint does not provide an adequate basis for establishing harm to the downstream water user, Mr. Reynolds' riparian claim cannot form the basis of a legitimate complaint.

For the above reasons, the State Water Board will take no further action on the complaint as submitted. If you have any questions, please contact me at (916) 341-5302, or Mr. John O'Hagan, Manager of the Division's Enforcement Section, at (916) 341-5368.

Sincerely,

/ORIGINAL SIGNED BY/

Victoria A. Whitney
Deputy Director for Water Rights