

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Pacific Gas and Electric Company

Project No. 1962-136

ORDER DENYING REHEARING

(Issued June 15, 2006)

1. California Sportfishing Protection Alliance (CSPA) has filed a request for rehearing of a March 7, 2006 letter from Commission staff which responded to a December 18, 2005 filing in which CSPA alleged that Pacific Gas and Electric Company (PG&E) was in violation of its license for the Rock Creek-Cresta Project No. 1962. This order concludes that staff's response to CSPA was appropriate, and therefore denies rehearing.
2. The 185-megawatt Rock Creek-Cresta Project is located on the North Fork Feather River, in Butte and Plumas Counties, California. In 2001, the Commission issued an order approving a settlement and granting PG&E a new license to continue to operate and maintain the project.<sup>1</sup>
3. Because the project is located in part on lands within the Plumas National Forest, the project license included conditions promulgated by the U.S. Forest Service. Condition 10 required the following fishery habitat improvements, intended to improve the trout fishery: establishing and maintaining a spawning gravel site in the Granite Creek tributary of the North Fork Feather River; removing portions of a weir located in the Rock Creek tributary; constructing, operating, and maintaining a spawning channel at the Opapee Creek tributary; and constructing, operating, and maintaining a spawning channel at the Milk Creek tributary. The measures in Granite Creek and Rock Creek were required to be completed within one year of license issuance, and the measures in

---

<sup>1</sup> *Pacific Gas and Electric Company*, 97 FERC ¶ 61,084.

Opapee Creek and Milk Creek within two years.<sup>2</sup> Article 404 of the license required PG&E, within six months of license issuance, to file for Commission approval a final plan for the fishery habitat improvements required by Condition 10.<sup>3</sup> Forest Service Condition 22 provided that PG&E, in consultation with the parties to the settlement agreement, establish an environmental resources committee for the purposes of assisting PG&E in designing monitoring plans, reviewing and evaluating data, and preparing adaptive management measures for implementation by the company.

4. PG&E timely filed its fishery habitat improvement plan, and Commission staff subsequently approved it.<sup>4</sup> Because the plan stated that obtaining the permits necessary to perform instream modifications might require changes in the schedules for implementing the measures, staff required PG&E to file, by October 24, 2002, a report summarizing the status of its efforts at Granite Creek and Rock Creek, and a similar report regarding work at Opapee Creek and Milk Creek by October 24, 2003.<sup>5</sup>

5. On January 9, 2003, PG&E filed a request for an extension of time, until July 30, 2003, to complete the Granite Creek spawning gravel site, because it had not yet been able to obtain all of the permits necessary to perform instream work. The company asked for an extension, until October 24, 2004, to remove the Rock Creek weir, in order to resolve concerns that removing the weir might undermine an adjacent footing of a railroad trestle. PG&E also noted that, in light of novel issues related to the construction of the Opapee Creek and Milk Creek spawning channels, it anticipated the need to ask for extensions of time regarding those measures, as well. Commission staff granted the requested extensions by unpublished order dated February 13, 2003.

6. On October 17, 2003, PG&E submitted an update on the status of the four measures required by Condition 10. PG&E reported that it had completed the Granite Creek spawning gravel site, and that it was attempting to resolve issues regarding the weir removal. As to construction of the spawning channels, the company stated that the environmental resources committee had conducted several field investigations, and issued a request for proposals to design and construct the facilities. PG&E asserted that, if necessary permits could be obtained expeditiously, the channels could be built by

---

<sup>2</sup> See 97 FERC at 61,448.

<sup>3</sup> *Id.* at 61,419-20.

<sup>4</sup> See *Pacific Gas and Electric Company*, 100 FERC ¶ 62,088 (2002).

<sup>5</sup> See 100 FERC at 64,103.

October 24, 2004, and asked for an extension of time until that date. By unpublished order dated January 15, 2004, staff granted the extension.

7. On November 13, 2004, PG&E filed a request for extension of time to complete, and for modification of, the Condition 10 measures. It stated that it had reached agreement with the Forest Service and the environmental resource committee to delete the weir removal condition, which was no longer deemed feasible or necessary.<sup>6</sup> With respect to the spawning channels, PG&E stated that the environmental resources committee had recommended focusing on the Milk Creek spawning channel, and deferring work at Opapee Creek until the success of the Milk Creek site could be determined. The company stated that it expected to begin work at Milk Creek in summer 2005. In consequence, PG&E requested an extension of time until November 30 2005, to complete the Milk Creek spawning channel, and an extension until November 30, 2007, to complete the Opapee Creek channel. The company also proposed filing annual reports on the success of the channels, following their completion. PG&E's requests were granted by unpublished order dated February 23, 2005.

8. On November 30, 2005, PG&E filed a progress report, in which it stated that it had planned construction of the Milk Creek spawning channel for late summer, but that, while it had applied in early 2005 to the California State Water Resources Control Board for a certification for the construction under section 401 of the Clean Water Act, the certification had not yet been issued.<sup>7</sup> PG&E explained that it planned to begin work that could be accomplished "in the dry" in early November, and planned to complete construction by the end of 2006, if it timely received necessary authorization. It added that it was continuing to work with the environmental resources committee to establish a schedule for completion of the work.

9. On December 27, CSPA filed a letter stating, without further specificity, that it was invoking the alternate dispute resolution provisions of the Rock Creek-Cresta settlement agreement for PG&E's "direct and intentional" violation of the agreement.

---

<sup>6</sup> The request was granted by Commission staff order. *See Pacific Gas and Electric Company*, 112 FERC ¶ 62,054 (2005).

<sup>7</sup> While PG&E had obtained state water quality certification during the licensing process, construction of the spawning channels requires a Clean Water Act section 404 dredge and fill permit from the U.S. Army Corps of Engineers. The Corps requires applicants to obtain a separate state certification as part of the section 404 process.

10. On December 28, 2005, CSPA filed a two-page pleading styled “Comments on PG&E Filing of November 30, 2005 on Rock Creek-Cresta Project (FERC 1962) Fisheries Habitat Improvement Projects (License Article 404 and Condition 10) and Complaint of Non-Compliance with License Article.” CSPA asserted that

PG&E has delayed and refused to initiate design, permitting and construction of fisheries measures required by the License and Settlement Agreement. To this date, over three years after license issuance PG&E has refused to initiate ANY activities including design, permit application or funding of the Opapee Spawning Channel. They have repeatedly delayed action on the Milk Ranch Creek Spawning Channel. These are specific fisheries mitigation measure[s] included in the License and Settlement Agreement and specified to be completed within two years of License issuance.

CSPA also alleged that PG&E had proposed to remove the requirement for removal of the Rock Creek weir without formal concurrence of the environmental resources committee, and that PG&E generally has not worked in a cooperative manner to develop an acceptable schedule.

11. On January 17, 2006, PG&E filed an answer to CSPA’s filing. In brief, PG&E asserted that it had sought Commission approval to delete from the project license the Rock Creek Weir removal requirement with the concurrence of the Forest Service and the environmental resources committee, had similarly obtained an extension of time to delay construction of the Opapee Creek spawning channel improvements, and was prepared to move ahead with Milk Creek channel improvements, but was waiting for the requisite water quality certification.

12. On January 26, 2006, CPSA filed a notice that alternative dispute resolution had failed, and that it therefore was setting a date for a mediation meeting.<sup>8</sup>

13. On February 7, 2006, CSPA filed an answer to PG&E’s answer, contending that PG&E and the environmental resources committee lacked authority to agree to changes

---

<sup>8</sup> Although neither this letter nor the December 27 letter regarding dispute resolution sets forth the subject of the dispute, it appears clear that the matter at issue is the fishery habitat improvement plan.

in the settlement agreement, without first following procedures established therein. It also averred that the Commission could not delegate authority to the committee.<sup>9</sup>

14. On March 7, 2006, Commission staff responded to CSPA's December 28 letter and related filings.<sup>10</sup> Staff opined that the dispute resolution process established in the settlement agreement appeared to be the best vehicle for resolving differences among the parties to the agreement.<sup>11</sup> With respect to the schedule for the Milk Creek and Opapee Creek spawning channels, staff explained that the work in Opapee Creek would be dependent on the success of the Milk Creek work, and that PG&E was waiting to receive necessary permits to complete the latter. Staff concluded by requiring PG&E to file, within 60 days, an updated schedule for the completion of the Milk Creek work, and to address whether the current November 30, 2007 deadline for finishing the Opapee Creek work is still feasible.

15. On March 30, 2006, CSPA filed a request for rehearing, alleging that staff had incorrectly treated its complaint as a comment letter, and had improperly deferred action on the complaint to the dispute resolution process.

16. On May 8, 2006, PG&E filed the updated schedule required by Commission staff. PG&E reported that the California State Water Resources Control Board had informed the company that water quality certification would be issued in the near future. PG&E stated that construction of the Milk Creek spawning channel can be completed by November 2006, if the certification is issued soon. PG&E added that the environmental resources committee had agreed that it is reasonable to await the results of the first year's operation of the Milk Creek Channel before beginning work in Opapee Creek, and that the current November 30, 2007, deadline for completing the Opapee Creek channel may still be achievable, and thus should not be revised absent a change in circumstances.

### **Discussion**

17. The Commission has established regulations which specify the contents of a complaint.<sup>12</sup> CSPA's December 28, 2005 pleading fails to satisfy a large number of these

---

<sup>9</sup> The Commission's regulations generally prohibit answers to answers (*see* 18 C.F.R. § 385.213(2) (2005), and CSPA's February 7, 2006, pleading is therefore rejected.

<sup>10</sup> *See* letter from George Taylor (Commission staff) to Jerry Mensch (CSPA).

<sup>11</sup> CSPA was a signatory to the settlement and is a member of the environmental resources committee.

<sup>12</sup> *See* 18 C.F.R. § 385.206(b) (2005).

requirements, including: setting forth the business, commercial, economic, or other issues presented by the action or inaction as such relate to or affect the complainant; making a good faith effort to quantify the financial impact or burden created for the complainant as result of the action or inaction complained of; indicating the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction; stating whether the issues are pending in an existing Commission or other forum; stating the specific relief or remedy requested; including all documents that support the complaint; stating whether the Commission's Enforcement Hotline, Dispute Resolution Service, or other informal dispute resolution procedures have been used; and including a form of notice suitable for publication. In addition, CSPA's pleading in fact appears to be comments on PG&E's filing, and it is only by carefully examining it that one can discern that it purports to be, among other things, a complaint.

18. Entities seeking to file formal complaints must clearly delineate them as such, and must comply with the relevant regulations. Because CSPA failed to do so, we conclude that the December 28, 2005 filing was not in fact a formal complaint, and staff's treatment of it was appropriate.

19. Moreover, even had CSPA's pleading been a complaint, we would have concluded that it had no merit. As detailed above, PG&E has completed the Granite Creek spawning gravel measure, and the Commission has amended the project license, at PG&E's request and with the concurrence of the Forest Service and the environmental resources committee, to remove the Rock Creek weir requirement. PG&E has apparently constructed as much as it can of the Milk Creek spawning channel improvement and must wait for the state to issue Clean Water Act certification before it proceeds further, and the environmental resources committee has agreed that the Opapee Creek work should not proceed until the effectiveness of the Milk Creek work has been established. PG&E has obtained extensions of time from the Commission with respect to these activities. As staff noted, the best way for CSPA to resolve its concerns with respect to whether the parties are following the procedures envisioned by the settlement agreement is to follow the dispute resolution proceeding set forth therein. We conclude that CSPA has not demonstrated that PG&E has in any way violated the terms of the license for the Rock Creek-Cresta Project.

The Commission orders:

The request for rehearing filed on March 30, 2006, by the California Sportfishing Protection Alliance is denied.

By the Commission. Commissioner Kelliher concurring with a  
separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Project No. 1962-136

(Issued June 15, 2006)

Joseph T. KELLIHER, Chairman, *concurring*:

I support this order, but I am writing separately to explain how I believe concerns about compliance with license conditions should be handled by the Commission.

The Commission regularly receives pleadings styled as complaints regarding whether licensees are complying with the terms of their licenses. The Commission's Office of Energy Project has within it a Division of Hydropower Administration and Compliance (DHAC), a major mission of which is to ensure license compliance. When interested entities raise issues regarding compliance with license conditions, DHAC investigates the matter and takes appropriate action, such as ordering licensees to conform to license requirements or issuing letters finding that there has been no non-compliance.

It would be inconsistent, and a waste of administrative effort, for us to treat differently those allegations of license non-compliance that are styled "formal complaint" and those that are not. It is only those complaints that raise substantial legal or policy issues that warrant immediate Commission consideration as formal complaints, rather than being handled at the initial stage by our compliance staff. Therefore, I believe that, as a general matter, allegations regarding compliance with hydroelectric licenses should be handled in the first instance by our compliance staff. We of course retain the discretion to take up at the Commission level any matters that we deem warrant our immediate attention.

---

Joseph T. Kelliher