



Foothills Water Network

Hon. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
Via electronic filing

May 10, 2021

Re: COMMENTS IN OPPOSITION OF FoothILLS WATER NETWORK IN RESPONSE TO APRIL 2, 2021 PETITION OF PACIFIC GAS AND ELECTRIC COMPANY FOR ISSUANCE OF DECLARATORY ORDER FINDING WAIVER OF WATER QUALITY CERTIFICATION OF UPPER DRUM-SPAULDING, LOWER DRUM, AND DEER CREEK PROJECTS (P-2310, P-14531, P-14530)

Dear Ms. Bose:

The Foothills Water Network (FWN or Network) and its member organizations¹ respectfully submit this response in opposition to the April 2, 2021 Petition of Pacific Gas and Electric Company (PG&E) that the Federal Energy Regulatory Commission (FERC or Commission) to issue a declaratory order finding that the State of California, through the State Water Resources Control Board (State Water Board), has waived Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. §1341, for the relicensing of the Upper Drum-Spauldung, Lower Drum and Deer Creek Projects (FERC nos. 2310, 14531, 14530).² This response in opposition also responds to the Commission's "*Notice of Petition for Waiver Determination*," issued in the same docket on April 9, 2021.³

FWN and member organizations are parties to the joint relicensing proceedings for Yuba-Bear, Upper Drum-Spauldung, Lower Drum and Deer Creek Projects.⁴ Their motion to intervene contain descriptions of each organization and its interests in these proceedings.

For the reasons set forth below, FWN opposes waiver of certification. FWN requests that FERC deny waiver. FWN further requests that FERC include the water quality certification in

¹ Foothills Water Network, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council of Fly Fishers International (formerly Northern California Council Federation of Fly Fishers), Save Auburn Ravine Salmon and Steelhead, Sierra Club and its Mother Lode Chapter, South Yuba River Citizens League, and Trout Unlimited.

² April 2, 2021 Petition for Declaratory Order Requesting Waiver of Water Quality Certification of Pacific Gas and Electric Company, to Secretary Bose, eLibrary no. 20210402-5307 (Petition for Waiver).

³ FERC, *Notice of Petition for Waiver Determination*, eLibrary no. 20210409-3014.

⁴ See *Motion To Intervene By Foothills Water Network, American Rivers, American Whitewater, California Sportfishing Protection Alliance, Gold Country Fly Fishers, Northern California Council Federation Of Fly Fishers, Ophir Property Owners Association, Sierra Club, South Yuba River Citizens League, And Trout Unlimited*, Drum-Spauldung Project (now Upper Drum-Spauldung, Lower Drum, and Deer Creek Projects), FERC Project No. 2310-193 (Jul. 31. 2012), eLibrary no. 20120731-5147.

the new licenses for the Upper Drum-Spaulding and Lower Drum projects, as previously issued by the California State Water Resources Control Board. FWN also requests that FERC include the certification for the Deer Creek Project in the project license once the State Water Resources Control Board issues such certification.

The response letter is attached. Please feel free to contact me if you have any questions.

Respectfully submitted,



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**BEFORE THE
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

	)	Upper Drum-SpaULDing Project
	)	Project No. 2310-240
)	
	)	Deer Creek Project
Pacific Gas and Electric Company	)	Project No. 14530-002
)	
	)	Lower Drum Project
	)	Project No. 14531-001

**COMMENTS IN OPPOSITION OF FOOTHILLS WATER NETWORK IN RESPONSE
TO APRIL 2, 2021 PETITION OF PACIFIC GAS AND ELECTRIC COMPANY FOR
ISSUANCE OF DECLARATORY ORDER FINDING WAIVER OF WATER QUALITY
CERTIFICATION FOR UPPER DRUM-SPAULDING,
LOWER DRUM, AND DEER CREEK PROJECTS**

The Foothills Water Network and its member organizations, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council Fly Fishers International, Save Auburn Ravine Salmon and Steelhead, Sierra Club and its Mother Lode Chapter, South Yuba River Citizens League, and Trout Unlimited (collectively, “FWN” or “the Network”) respond in opposition to the Pacific Gas and Electric Company’s (PG&E) Petition for Declaratory Order requesting that the Federal Energy Regulatory Commission (FERC or Commission) “confirm” that the State of California, through the State Water Resources Control Board (State Water Board), has waived its authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, to issue water quality certification for the relicensing of the Upper Drum-SpaULDing, Lower Drum and Deer Creek Projects (FERC no. 2310, 14530, 14531, collectively, “Projects”).⁵

⁵ PG&E, Petition for Declaratory Order Requesting Waiver of Water Quality Certification of Pacific Gas and Electric Company, P-2310 -, P-14530-, P-14531- (April 2, 2021), eLibrary no. 20210402-5307 (Petition for Waiver).

FWN and its member organizations are parties to the relicensing proceeding for the Projects.⁶ Their motion to intervene contains descriptions of each organization and its interests in these proceedings.

I. Background

On February 7, 2012, PG&E filed an application with the State Water Board for 401 water quality certification for the Drum-Spaulding Project.⁷ PG&E voluntarily withdrew and resubmitted a new application for water quality certification every year until 2018.⁸ In 2018 and 2019, the State Water Board denied PG&E's application without prejudice; subsequent to each denial, PG&E resubmitted a new application for certification.⁹ In anticipation of PG&E selling Deer Creek assets to Nevada Irrigation District (NID), the Commission administratively separated the Projects into the Upper Drum-Spaulding Hydroelectric Project No. 2310 ("Upper Drum"), Deer Creek Hydroelectric Project No. 14530 ("Deer Creek"), and Lower Drum Hydroelectric Project No. 14531 ("Lower Drum") (collectively, the "Projects") on July 13, 2013. Beginning with its January 29, 2014 application, PG&E's applications for certification encompassed all three of the Projects. As of April 30, 2021, the negotiated sale of the Deer Creek Project to Nevada Irrigation District awaits the approval of the Commission.

On December 19, 2014, the Commission issued the Final Environmental Impact Statement for the Projects as required under the National Environmental Policy Act.¹⁰

⁶ See *Motion To Intervene By Foothills Water Network, Adventure Connection, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Gold Country Fly Fishers, Nevada City Rancheria, Northern California Council Federation Of Fly Fishers, Sierra Club, South Yuba River Citizens League, Tributary Whitewater Tours, And Trout Unlimited*, Drum-Spaulding Project (now Upper Drum-Spaulding, Lower Drum, and Deer Creek Projects), FERC Project No. 2310 (Jul. 31. 2012), eLibrary no. 20120731-5147.

⁷ PG&E's application for certification is included in its Petition for Waiver, pdf pp. 16 ff. PG&E filed a copy of the application for certification with the Commission August 25, 2017, eLibrary no. 20170825-5210.

⁸ PG&E's applications for certification are included as part of its Petition for Waiver, starting on pdf p. 20.

⁹ *Id.*

¹⁰ FERC, Final Environmental Impact Statement for Hydropower Licenses, Upper Drum-Spaulding Hydroelectric Project—FERC Project No. 2310-193; Lower Drum Hydroelectric Project—FERC Project No. 14531-000; Deer

On December 18, 2018, PG&E filed an application for certification, stating:

PG&E had intended to again withdraw and refile its request for water quality certification but received a SWRCB letter dated December 12, 2018, stating that PG&E's request for water quality certification had been denied without prejudice and that PG&E would need to file a new request for water quality certification.¹¹

On February 4, 2020, PG&E submitted its latest application for certification. The new application stated in part:

On December 20, 2019, the Board sent PG&E a letter stating that PG&E's request for water quality certification had been denied without prejudice and that PG&E would need to file a new request for water quality certification. PG&E questions the appropriateness of the Board's request considering the recent court decisions; however, PG&E recognizes that CEQA has not been completed and in the spirit of collaboration PG&E is filing this new request for water quality certification for the Upper Drum-Spaulding Project and Lower Drum Project, FERG Project Nos. 2310-193 and 14531-0001, respectively.¹²

On February 3, 2021, the State Water Board issued a Final Impact Statement/Mitigated Negative Declaration (IS/MND) as required under the California Environmental Quality Act (CEQA) and a final water quality certification for the Upper Drum-Spaulding and Lower Drum Projects. This issuance occurred before the one-year timeline as required under the Clean Water Act (CWA).¹³

On March 5, 2021, PG&E filed a Petition for Reconsideration of the water quality certification with the State Water Board. The Petition for Reconsideration claims a litany of grievances, most of them generic and based on the unlawful and inapplicable 401 Final Rule

Creek Hydroelectric Project—FERC Project No. 14530-000; and Yuba-Bear Hydroelectric Project—FERC Project No. 2266-102 (Final EIS) (2014), eLibrary no. 20141219-4003.

¹¹ Petition for Waiver, pdf. p. 35.

¹² Petition for Waiver, pdf. p. 36.

¹³ State Water Board Executive Director adopted the final IS/MND and found it in compliance with CEQA Guidelines section 15074. The final IS/MND is available at the State Water Board's office (1001 I Street, Sacramento, California) and on the webpage for the Projects at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/drum_spaulding_ferc2310.html.

The final water quality certification for the Upper Drum-Spaulding Project and the Lower Drum Project is available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/drum2310/udsld_wqc.pdf. It was also filed in the FERC eLibrary, no. 20210212-0023.

adopted by the Trump administration in 2020.¹⁴ The alleged grievances also include differences between conditions and timelines in the certification and those prescribed by the Forest Service, claims that certification cannot condition indirect or cumulative effects, objections to State Water Board approvals and reserved authority, and inapposite application to the Clean Water Act of improperly interpreted CEQA standards. On a more mundane level, PG&E argues that there is no connection between the Projects and bioaccumulation of mercury, notwithstanding reservoir fluctuations in a system that was largely constructed and developed to serve the gold mining industry for which the mercury was imported. PG&E also inexplicably argues that rainbow trout are not native to the area of the Projects and that the State Water Board must adjust its description to reflect this vision.

In its April 2, 2021 Petition for Waiver, PG&E now alleges that FERC should deem the State Water Board's authority to issue certification for the Upper Drum-Spaulding, Lower Drum and Deer Creek Projects waived. Citing to *Hoopa Valley Tribe v. Federal Energy Regulatory Commission (Hoopa Valley Tribe)*¹⁵ and *N.Y. State Department of Environmental Conservation v. FERC (NYDEC)*,¹⁶ PG&E argues for waiver on the basis that PG&E withdrew and refiled the

¹⁴ PG&E's argument that the certification exceeds the State Water Board's authority is based on a misreading of EPA's recently adopted 40 CFR 121. American Whitewater and the State of California have separately mounted legal challenges to this rule in the federal District Court in the Northern District in California. Even assuming the rule's validity, the rule became effective on September 11, 2020 and is inapplicable to applications for certification submitted prior to that date, including PG&E's February 4, 2020 application for certification of the Upper Drum-Spaulding and Lower Drum projects. An EPA Fact Sheet answering "Frequently Asked Questions on Clean Water Act Section 401 Certification Final Rule" states:

The final rule becomes effective 60 days after it is published in the federal register. Certification requests that have been submitted or that are currently being processed by states, authorized tribes, or EPA, should continue to be processed in accordance with existing law. Certification requests submitted after the effective date of the final rule should be processed consistent with the final rule.

See https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf (accessed May 5, 2021).

¹⁵ 913 F.3d 1099 (D.C. Cir. 2019).

¹⁶ No. 19-1610, slip op. (2d Cir. March 23, 2021).

same application for certification with the State Water Board over the years, and thus the State Water Board issued the initial decision denying certification more than one year after PG&E filed the original application.

II. Argument

A. The Commission Should Deny Pacific Gas and Electric Company's Request for a Finding of Waiver under Clean Water Act section 401.

In its Petition for Waiver, PG&E contends that, “[t]his case presents yet another example of the Board frustrating FERC’s ability to issue a timely license for a hydropower project by attempting to extend the one-year deadline through a line blurring arrangement, first through acceptance of the withdraw and resubmit ‘regulatory process’ and second through acceptance of the deny without prejudice and resubmit regulatory process.”¹⁷ PG&E argues that in light of the *Hoopa Valley Tribe* and *NYDEC* rulings, it would be incorrect to view PG&E’s February 4, 2020 certification request as a “new request” triggering a new one-year period,¹⁸ and that the State Water Board’s February 3, 2020 water quality certification is invalid.

As FWN and its member organizations have argued previously regarding petitions for waiver,¹⁹ PG&E’s repeated withdrawals and resubmittals of applications for certification were actions taken by PG&E on its own and sole motion. Absent such withdrawal, there is no doubt the State Water Board would have denied certification. There was no agreement, express or implied, on PG&E’s decision to withdraw applications. The State Water Board reasonably responded to PG&E’s withdrawals by initiating new time limits for issuance of certification.

¹⁷ Petition for Waiver, p. 10.

¹⁸ Petition for Waiver, pp. 9-10, citing to *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 650 (“*Hoopa Valley Tribe*”), *N.Y. State Department of Environmental Conservation v. FERC*, No. 19-1610, slip op. (2d Cir. March 23, 2021) (“*NYDEC*”).

¹⁹ Most recently in Comments on Notice of Petition for Declaratory Order Requesting Waiver of Water Quality Certification for McCloud-Pit Hydroelectric Project by American Whitewater and California Sportfishing Protection Alliance (Mar 18, 2021), eLibrary no. 20210318-5037.

NYDEC does not apply to the present case because *NYDEC* deals with an explicit agreement to extend the deadline for action on the certification. There was no such “arrangement” between PG&E and the State Water Board.

The record further shows that any delay in completion of certification was not prejudicial to FERC’s administration of the Federal Power Act. In the Final EIS (2014), FERC staff announced its intention to delay Endangered Species Act (ESA) consultation for the Projects and the jointly operated Yuba-Bear Project until ESA consultation for the downstream Yuba River Development Project was ripe for initiation, so that consultation for the three sets of projects could be undertaken simultaneously.²⁰ On March 8, 2021, the Commission issued Additional Information Requests (AIRs) for the Drum Projects, the Yuba-Bear Project, and the Yuba River Development Project, in part to inform the *still-to-be-initiated consultation*.²¹ Among other issues, the AIRs identified deficiencies in the Final EIS for the Yuba-Bear and Drum Projects and in the Final Environmental Impact Statement for the Yuba River Development Project. The AIRs announced FERC staff’s intention to issue one or more supplemental EIS’s to correct these deficiencies.²² FWN notes that many of these deficiencies relate to the Commission’s prior treatment of cumulative effects in both NEPA documents, deficiencies whose promulgation was largely consistent with arguments made by all three licensees. FWN called out these many of these deficiencies in comments on the Final EIS.²³ The critical path in relicensing, *whose duration PG&E sought on May 7, 2021 to extend by six months*,²⁴ is in reality the provision by

²⁰ Final EIS, p. lxxv.

²¹ FERC (Mar. 8, 2021), Additional Information Request for the Drum Projects, eLibrary no. 20210308-3039; Additional Information Request for Yuba-Bear Project, eLibrary no. 20210308-3038; Additional Information Request for the Yuba River Development Project, eLibrary no. 20210308-3037.

²² *Id.*

²³ FWN, Comments on Final Environmental Impact Statement, P-2310 et al. (Feb. 9, 2015), eLibrary no. 20150209-5232; *see esp.* pp. 4-7; 10-13.

²⁴ *See* letter from Janet Walther, PG&E, to Secretary Bose (May 7, 2021), “Request of an extension of time of FERC’s March 8, 2021, Additional Information Request,” eLibrary no. 20210507-5191.

the three licensees of additional technical information to support legally adequate environmental review and ESA consultation.

In sum, PG&E voluntarily withdrew and resubmitted its applications for certification up till 2018. In response, the State Water Board never failed to act within one year of application for certification. Beginning in 2018, the State Water Board denied certification within one year of application, thus acting within a one-year period.²⁵ The issuance of certification in 2021 did not delay license issuance. Therefore, the Commission should deny PG&E's petition for waiver.

B. The Commission Should Reject PG&E's Petition for Waiver as Venue Shopping for Substantive Advantage Unrelated to Delay.

When PG&E filed its application for certification on February 4, 2020, its subsequently expressed concerns about delay were apparently not of import. Regardless of the fact that PG&E had had more than a year since *Hoopa Valley Tribe* ruling, PG&E expressed no concern about the water quality certification timeline when re-applying.

PG&E's issue with the water quality certification is one of substance, not of timing. PG&E simply seeks to avoid regulation under the Clean Water Act. As demonstrated by the repeated invocation of clearly inapplicable Trump-era modifications to 40 CFR 121 in both its petition for reconsideration of the certification filed with the State Water Board and in the Petition for Waiver, PG&E will argue against regulatory requirements regardless of how long advancing such argument prolongs the licensing process.

PG&E's petition for reconsideration of the Drum certification clearly demonstrates PG&E's selective concern about delay. In the last decade, PG&E has as a matter of practice petitioned for reconsideration of every water quality certification the State Water Board has

²⁵ Consistent with 174 FERC ¶ 61,042, Declaratory Order on Waiver of Water Quality Certification (denying waiver because denial of certification is acting in the meaning of the Clean Water Act).

issued for PG&E's projects. PG&E has raised in previous petitions for reconsideration issues now raised in the petition for reconsideration of the Drum certification. For example, PG&E's petition for reconsideration of the certification of the Chili Bar Project took issue with provisions that reserved authority to the State Water Board, arguing that conditions in a water quality certification are enforceable only by FERC.²⁶ PG&E's petition on Chili Bar also objected to conditions related to reintroduction of anadromous fish.²⁷ Similarly, in its petition for reconsideration of the certification for the DeSabra-Centerville relicensing, PG&E contested the SWRCB's authority to enforce the certification.²⁸ PG&E has no apparent hesitation in once again repeating such global concerns in contesting the present certification, regardless of having been rebuffed previously on the same issues by the State Water Board, and regardless of any further delay that may result.

As cited above, PG&E commented in its February 4, 2020 application for certification that it was filing the application "in the spirit of collaboration."²⁹ Considering the substantive as well as procedural attacks on the State Water Board's Section 401 authority in both the Petition for Waiver and the petition for reconsideration, it is clear that "collaboration" in this instance meant testing the waters. The Commission should not reward this abuse of process by now granting waiver of certification.

²⁶ See PG&E, Petition for Reconsideration of the certification for the Chili Bar Project (P-2155), eLibrary no. 20121212-5138, p. 3.

²⁷ *Id.*, pp. 6-7.

²⁸ See PG&E Petition for Reconsideration of the certification for the DeSabra - Centerville Project (P-803), eLibrary no. 20150511-0087, p. 12.

²⁹ February 4, 2020 application for certification, contained in Petition for Waiver, pdf p. 36.

C. The Commission Should Adopt the Conditions in State Water Board's Certification to Mitigate the Projects' Impacts on Beneficial Uses in the Yuba River, Bear River, and Auburn Ravine Watersheds.

FWN concurs with the May 4, 2021 comments of the California Department of Fish and Wildlife (CDFW) on the instant Petition for Waiver.³⁰

As partly noted in CDFW's comments on the Notice of Petition for Waiver, the State Water Board in its Water Quality Certification for the Projects provided mitigation measures and rationale for the following impacts:

- Hydropower operations that cause rapid and extreme increases and decreases in flow, which adversely impact aquatic organisms and the overall riparian ecosystem due to stranding and potential dewatering of previously inundated habitat.
- Blockage by dams of natural sediment recruitment and consequent ecosystem impacts to flora and fauna, specifically to threatened and endangered species.
- Discharges into and dewatering of Auburn Ravine, a key riverine resource for Chinook salmon and steelhead trout.
- The cumulative effects of past and present Project facilities and operation, in combination with impacts of legacy mining, on water quality and sediment accumulation.
- Droughts, requiring management planning for consecutive critical and extremely critical dry years.
- Impacts of climate change, requiring ongoing stakeholder coordination, monitoring and adaptive management.

Without proper examination and mitigation of these issues as required under CEQA and the Clean Water Act, the beneficial uses of water in the Yuba and Bear River watersheds are at risk for the next thirty to fifty years from environmental harms that the Federal Power Act may not address.

III. Conclusion

The record shows that the State Water Board has diligently acted in processing PG&E's application and issuing a certification within the one-year timeframe. Contrary to PG&E's

³⁰ California Department of Fish and Wildlife, CDFW Comments on Notice of Petition for Declaratory Order for FERC P-2310-240, P-14530-002, and P-14531-001 (May 4, 2021), eLibrary no. 20210505-5109,

assertions, any delays in the water quality certification proceeding are due to PG&E's sole decision to withdraw applications for certification in preference to denial.

The Commission should find that the California State Water Resources Control Board has not waived water quality certification under Clean Water Act § 401 for the relicensing of the Upper Drum-Spaulding, Lower Drum and Deer Creek Projects. The Commission should incorporate the water quality certification as conditions in the new license.

Thank you for considering this response in opposition to Pacific Gas and Electric Company's Petition for Waiver.

Respectfully submitted this 10th day of May,



Foothills Water Network

A handwritten signature in black ink, appearing to read 'TST' or similar initials.

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**BEFORE THE
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

	)	Upper Drum-Spaulding Project
	)	Project No. 2310
)	
	)	Deer Creek Project
Pacific Gas and Electric Company	)	Project No. 14530
)	
	)	Lower Drum Project
	)	Project No. 14531
	)	Project No. 2246-065

Certificate of Service

I hereby certify that I have this day electronically filed with the Federal Energy Regulatory Commission the foregoing *Comments in Opposition of Foothills Water Network in Response to April 2, 2021 Petition of Pacific Gas and Electric Company for Issuance of Declaratory Order Finding Waiver of Water Quality Certification for Upper Drum-Spaulding, Lower Drum, and Deer Creek Projects* in the above-captioned proceedings and have this day served this document via email or surface mail (as required) upon each person designated on the Service Lists compiled by the Commission Secretary for these projects.

Dated at Berkeley, California this 10th day of May, 2021.



Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance