

108 FERC ¶ 61,156
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Pacific Gas and Electric Company

Project No. 803-065

ORDER DENYING PETITION

(Issued August 5, 2004)

1. On April 13, 2004, California Sportfishing Protection Alliance, Friends of Butte Creek, Friends of the River, Institute for Fisheries Resources, Northern California Council of the Federation of Fly Fishers, Pacific Coast Federation of Fishermen's Associations, and Sacramento River Preservation Trust (Petitioners) filed a petition asking the Commission to initiate formal consultation with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries),¹ pursuant to section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), with respect to the impact of operation of the DeSabra-Centerville Water Supply Project No. 803 on spring-run Chinook salmon. For the reasons discussed below, we deny the petition.

BACKGROUND

2. The 24.85-megawatt DeSabra-Centerville Project, located in Butte County, California, includes two reservoirs, Round Valley and Philbrook, which impound water from the West Branch Feather River and its tributaries. Below the reservoirs, flows are diverted at the Hendricks Head Dam into the connected Hendricks and Toadtown canals and transported to the DeSabra Forebay. Additional flows are brought to the forebay via Butte Canal, which transports water diverted from Butte Creek. Some of the flows from the forebay pass through the DeSabra powerhouse, are discharged into Butte Creek, and then are diverted into the Lower Centerville Canal. Water for water users, as well as flows in excess of those needed for generation at the DeSabra powerhouse, are

¹ NOAA Fisheries was until recently commonly referred to as the National Marine Fisheries Service. For purpose of clarity, we refer to that agency as "NOAA Fisheries" throughout this order.

transported from the forebay, through the Upper Centerville Canal and Helltown Ravine to the Lower Centerville Canal. The Lower Centerville Canal discharges flows into the Centerville powerhouse penstock. After passing through the Centerville powerhouse, flows are returned to Butte Creek.

3. In 1980, the Commission issued a 30-year license to Pacific Gas and Electric Company (PG&E) to operate the DeSabra-Centerville Project.² See 11 FERC ¶ 62,207. The license will expire on October 11, 2009.

4. In order to maintain and restore fish populations in the project area, including Chinook salmon and steelhead trout, the Commission included in the license Article 39, which required PG&E to file for Commission approval, following consultation with NOAA Fisheries, the U.S. Fish and Wildlife Service, U.S. Forest Service, and California Department of Fish and Game, a comprehensive plan for the protection of fish and wildlife resources affected by the project. The plan was to include recommendations for minimum flow releases for the project's canal, Butte Creek, and the West Branch Feather River, and recommendations for reservoir operation levels for the enhancement of fishery resources. *Id.* at 63,398. The plan, which was supported by the federal and state resource agencies, was filed on June 13, 1983, and approved by order dated March 15, 1984. See 26 FERC ¶ 62,236.

5. On January 31, 1992, the Commission granted an application by PG&E to amend the project license to modify the project's Centerville Development in various respects. See 58 FERC ¶ 62,093. In response to concerns raised by resource agencies about the project's impacts on fish and wildlife – particularly spring-run Chinook salmon – the order required increased instream flows in the bypassed reach below the Lower Centerville Diversion Dam. *Id.* at 63,208 (Ordering Paragraph (E)). In addition, in order to determine whether current license requirements provided adequate protection of downstream fish habitat, the order added to the license new Article 402, which required PG&E to file for Commission approval a plan to study the project's impacts on streamflow and water temperature. *Id.* at 63,209-10. The Commission subsequently approved the plan on June 30, 1993. See 63 FERC ¶ 62,360.

6. On January 31, 1994, PG&E filed the study, the results of which showed that summer releases from the project's reservoirs could under some circumstances raise water temperatures in the West Branch Feather River and Butte Creek above the optimal levels for spring-run Chinook. Thus, the minimum instream flows required pursuant to the 1983 Order were not by themselves sufficient to protect fishery resources.

² The Commission issued PG&E a 50-year, minor-part license for the project in 1929. Tenth Annual Report of the Federal Power Commission at 236.

7. In response to the study, the Commission required PG&E to limit reservoir discharges when water temperatures rose above specified levels. *See* 80 FERC ¶ 62,171 at 64,274-75 (1997). In addition, because PG&E was obligated under a 1927 water rights agreement to deliver flows at times when doing so might require the passage of warm reservoir water, the Commission required PG&E to develop and file a plan to reduce the need to make such deliveries, including a discussion of how to obtain water from alternate sources for downstream users.³ *Id.* at 64,276-77.

8. On August 20, 1998, the Commission granted a request by PG&E for a temporary waiver of the temperature requirements, due to unusual weather conditions, and amended the August 21, 1997 Order to provide that the temperature/flow requirements therein could be modified upon mutual agreement among the U.S. Fish and Wildlife Service, NOAA Fisheries, and the California Department of Fish and Game.⁴ *See* 84 FERC ¶ 62,165.

9. On June 25, 1999, PG&E filed an operating plan for the project reservoirs, agreed to by NOAA Fisheries, Fish and Wildlife Service, and California Department of Fish and Game. *See* letter to David P. Boergers from Bill Zemke.

10. On September 16, 1999, NOAA Fisheries listed the spring-run Chinook salmon as a threatened species. *See* 64 Fed. Reg. 7764, 7781.

11. On May 31, 2000, PG&E filed a letter outlining operational measures it had taken or proposed to take to avoid adverse impacts to salmon at the Centerville powerhouse, including providing flows to route salmon into Butte Creek at times when one of the project's turbines is idle. *See* letter to Gary Taylor (Fish and Wildlife Service), Steve Edmondson (NOAA Fisheries), and Larry Eng (California Department of Fish and Game) from Bill Zemke.

12. On June 4, 2001, PG&E filed an amended agreement with the resource agencies concerning the operation of the project reservoirs for the summer of 2001. *See* letter to David P. Boergers from Bill Zemke.

³ PG&E ultimately reported that the high cost of alternative water supplies and the minimal environmental benefits that would be provided, were the water currently delivered to water users instead kept in Butte Creek, made it impractical to undertake these measures. *See* letter to David P. Boergers (Commission Secretary) from Bill Zemke (PG&E).

⁴ The order did not require Commission approval of agreed-upon modifications.

13. On June 14, 2002, PG&E filed with the Commission a 2002 reservoir operating plan it had developed with the concurrence of the resource agencies. *See* letter to Magalie Roman Salas (Commission Secretary) from Bill Zemke.
14. On August 29, 2002, NOAA Fisheries filed a letter discussing reports concerning mortality of spring-run Chinook in Butte Creek downstream of the DeSabra-Centerville Project. NOAA Fisheries stated that it, California Department of Fish and Game, and PG&E had agreed that the company would (1) pursue an emergency or short-term amendment of Article 39 of the project license in order to authorize it to reduce flows at Hendrick Head Dam below the current minimum flow requirements, in order to retain more coldwater storage in the Philbrook Reservoir so that the cold water would be available during spring-run salmon spawning, and (2) ask the Commission to initiate consultation with NOAA Fisheries under section 7(a)(2) of the ESA,⁵ 16 U.S.C. § 1536(a)(2). NOAA Fisheries stated that “the parties agreed that this consultation should be considered as part of the relicensing for this project.”⁶ *See* letter to Magalie R. Salas from Mark Helvey (NOAA Fisheries).
15. On September 6, 2002, PG&E filed a letter requesting Commission authorization to make the short-term flow reductions discussed in NOAA Fisheries’ letter. *See* letter to Magalie Roman Salas from Bill Zemke. Commission staff responded that Article 39 permitted deviation from required flows due to operating emergencies, and for short periods upon agreement with California Department of Fish Game. Thus, staff stated, the company was already authorized to make the short-term flow reductions, provided that it had the agreement of the state to do so. Staff also asked PG&E to respond to NOAA

⁵ The regulations implementing the ESA provide for both informal and formal consultation. Informal consultation is a process involving communication between a federal agency contemplating an action and the Service (NOAA Fisheries or the U.S. Fish and Wildlife Service, as appropriate) to determine whether formal consultation is required. Formal consultation is required for any action that “may affect” listed species or critical habitat. *See* 50 C.F.R. § 402.14 (2003). However, if during informal consultation the Service concurs, in writing, with the action agency’s determination that the action is “not likely to adversely affect” listed species or critical habitat, the consultation process is terminated. *See* 50 C.F.R. § 402.13 (2003). If the action may affect listed species or critical habitat, and the agencies are unable to agree that those effects are not likely to be adverse, the agencies enter into formal consultation.

⁶ NOAA Fisheries also asserted that “[a]lthough a small population of spring-run may historically have inhabited Butte Creek, the current abundance of spring-run in Butte Creek is largely the result of De Sabla Hydroelectric Project operations including an inter-basin transfer [presumably, the transfer of flows from the West Branch Feather River to Butte Creek].”

Fisheries' request that company ask the Commission to initiate ESA consultation. *See* letter to Randal S. Livingston (PG&E) from George Taylor (Chief, Biological Resources Branch, Division of Hydropower Licensing and Compliance) (September 6, 2002).

16. On September 14, 2002, the Friends of Butte Creek filed a letter expressing concern about operation of the DeSabra-Centerville Project and its impacts on spring-run Chinook. *See* letter to Magalie R. Salas from Allen Harthorn. On October 15, 2002, the California Sportfishing Protection Alliance filed a similar letter. *See* letter to Magalie R. Salas from Jerry Mensch.

17. On September 17, 2002, PG&E filed a letter expressing its intention to file a notice of intent to relicense the DeSabra-Centerville Project, and asking the Commission to designate it as the non-federal representative for purpose for initiating informal consultation for relicensing.⁷

18. On September 27, 2002, Commission staff responded to Friends of Butte Creek. Staff explained the agreement between NOAA Fisheries and PG&E concerning short-term releases, as well as the proposed consultation process. *See* letter to Allen Harthorn from George H. Taylor. On December 11, 2002, Commission staff responded to the California Sportfishing Protection Alliance, stating its conclusions that the mortality of spring-run Chinook had occurred for reasons beyond PG&E's control, that the company had undertaken responsive action upon mutual agreement with the resource agencies, and that PG&E was in compliance with all Commission requirements.⁸ *See* letter to Jerry Mensch from George H. Taylor.

19. On November 26, 2002, Commission staff granted PG&E's request to designate the company as the non-federal representative for ESA consultation with NOAA Fisheries. Staff stated:

From your letter, you envision that consultation would primarily focus on relicensing of the project. Given the conditions in September 2002 (where high water temperatures placed spring-run Chinook salmon at risk), Commission staff feel you should begin consultation with [NOAA

⁷ The regulations implementing the ESA provide that a federal agency may designate a non-federal representative to conduct informal consultation. *See* 50 C.F.R. § 402.08 (2003).

⁸ On October 24, 2002, PG&E filed a response to the California Sportfishing Protection Alliance's letter.

Fisheries] immediately regarding any interim measures that may improve conditions for listed species in Butte Creek, particularly in the warm summer months.^{9]}

20. Staff asked PG&E to file quarterly progress reports with the Commission documenting the consultation and “the progress you have made over the previous three months regarding project effects on spring-run Chinook.” *See* letter to Randal S. Livingston from George H. Taylor (November 26, 2002).

21. On March 3, 2003, Friends of Butte Creek filed another letter alleging that PG&E’s operation of the DeSabra-Centerville Project in July and August 2002 had resulted in the death of a large number of spring-run Chinook, in violation of the project license. *See* letter from Alan Harthorn to Magalie R. Salas. Commission staff responded to the letter on May 8, 2003, again concluding that the deaths were the result of conditions beyond PG&E’s control, and summarizing the ongoing consultation with NOAA Fisheries. Staff explained that “we expect this consultation in the short term to address temporary changes in operation that might improve water temperatures in Butte Creek in certain situations.” *See* letter to Alan Harthorn from George H. Taylor (May 8, 2003).

22. On June 30 2003, PG&E filed a 2003 reservoir operating plan, agreed to by the federal and state resource agencies. *See* letter to Magalie Roman Salas from Bill Zemke. The letter included as an attachment a letter from NOAA Fisheries stating that “implementing the plan “will ensure that short-term measures necessary to reduce or avoid impacts to salmon and steelhead are in place this season.” *See* letter to William E. Zemke from Miles M. Croom (NOAA Fisheries).

23. On August 22, 2003, Friends of Butte Creek filed a letter expressing concern that a fish kill was occurring in Butte Creek, due to high water temperature, low oxygen, and resulting bacterial infection. *See* letter to George Taylor from Allen Harthorn.

⁹ In its December 18, 2002 letter to NOAA Fisheries and Fish and Wildlife Service requesting a listing of threatened and endangered species for purposes of consultation, PG&E recognized that “FERC believes that the consultation should include any interim measures that may improve conditions for listed species in Butte Creek.” *See* letter to Rodney McInnis (NOAA Fisheries) and Wayne White (Fish and Wildlife Service) from R. S. Livingston (filed January 2, 2003).

24. On August 29, 2003, Commission staff wrote to PG&E, requesting a report within 10 days on adult Chinook mortality in Butte Creek. *See* letter to Randal S. Livingston from George H. Taylor. Also on August 29, 2003, staff responded to Friends of Butte Creek, explaining the steps staff was taking to investigate the matter, and providing background information. *See* letter to Alan Harthorn from George H. Taylor.

25. On September 3, 2003, NOAA Fisheries filed a letter concerning spring-run chinook mortality. *See* letter to Magalie R. Salas from Michael E. Aceituno (NOAA Fisheries). The agency stated that the Commission

has not yet consulted with NOAA Fisheries on ongoing impacts of the DeSabra-Centerville project on Central Valley steelhead and Central Valley spring-run Chinook salmon. . . . NOAA Fisheries has and will continue to work with PG&E and California Department of Fish and Game (DFG) to identify solutions to avoid or minimize impacts to and steelhead; however. . . [we] respectfully request FERC to initiate formal section 7(a)(2) consultation of these efforts.

NOAA Fisheries also included 11 operational measures which it asked the Commission to consider imposing.

26. On September 11, 2003, Commission staff forwarded NOAA Fisheries' letter to PG&E and asked it to respond within 20 days. *See* letter to Randal S. Livingston from George H. Taylor.

27. PG&E filed a report on salmon mortality on September 15, 2003. *See* letter to Magalie Roman Salas from Bill Zemke. The company asserted that the mortality was linked to an outbreak of disease, compounded by high water temperature and fish densities; that the project is a run-of-river operation, such that water temperatures are driven by natural atmospheric conditions; and that instream flow releases at project dams were above license requirements during the period in question. By letter dated September 25, 2003, PG&E stated that it was exploring NOAA Fisheries' operational recommendations. *See* letter to Magalie Roman Salas from Bill Zemke. However, the company asserted that because there was currently no pending federal agency action, it was premature for the Commission to initiate formal consultation under ESA section 7(a)(2), which deals with consultation respecting agency actions.

28. Commission staff then scheduled a November 18, 2003 public meeting with NOAA Fisheries and PG&E to discuss NOAA Fisheries' recommendations. *See* letter to Parties Addressed from George H. Taylor. At the meeting, the parties agreed that eight of the measures were best considered in the context of project relicensing, while three

others could be initiated in the near future. Commission staff asked PG&E to provide within 30 days information relating to the short-term measures. *See* letter to Parties Addressed from Diana Shannon (Commission Aquatic Ecologist).

29. On January 12, 2004, PG&E provided a schedule for implementing the three short-term measures: conducting a risk assessment of project flumes and canals; creating a Butte Creek science workshop; and performing an identification and risk assessment of possible bypass locations on Centerville Canal. In addition, PG&E proposed to schedule a meeting with NOAA Fisheries in February 2004 to discuss the conduct of ESA consultation. *See* letter to Magalie Roman Salas from Bill Zemke.

30. On March 24, 2004, Petitioners filed a notice of intent to sue the Commission for alleged violations of the ESA relating to mortality of spring-run Chinook salmon in Butte Creek allegedly due to the operation the DeSabra-Centerville project. *See* letter to Magalie Roman Salas, *et al.* from Trent W. Orr.

31. On March 31, 2004, PG&E filed a report of its ongoing discussions with NOAA Fisheries. *See* letter to Magalie Roman Salas from Bill Zemke. With respect to ESA consultation, PG&E stated that it and NOAA Fisheries were considering pursuing a Habitat Conservation Plan under ESA section 10 as a means of resolving ESA issues.¹⁰

32. On April 13, 2004, Petitioners filed a petition before the Commission, asking it to initiate consultation with NOAA Fisheries with respect to Central Valley spring-run Chinook salmon.

33. On May 12, 2004, PG&E filed an answer to the petition. PG&E asserted that the DeSabra-Centerville Project has had beneficial impacts on spring-run Chinook, to the point where Chinook numbers may be straining the creek's carrying capacity, and that formal consultation would provide no benefits in addition those accruing from the company's ongoing consultation with NOAA Fisheries and other affected entities. PG&E stated that it had met with Petitioners, and agreed to discuss their proposals with the federal and state resource agencies while completing the 2004 operating plan. PG&E asked the Commission to coordinate any formal consultation with the upcoming relicensing proceeding.

¹⁰ Pursuant to section 10(a)(2) of the ESA, 16 U.S.C. § 1539(a)(2), the otherwise prohibited taking of endangered species may be permitted, pursuant to an incidental take statement, if an applicant obtains approval of a conservation plan for the species.

34. On June 16, 2004, PG&E filed its 2004 operating plan. It stated that NOAA Fisheries and California Department of Fish and Game concur with the plan, and that Fish and Wildlife Service has not provided any comments.¹¹ *See* letter to Magalie Roman Salas from Bill Zemke.

35. On June 29, 2004, PG&E filed a report on its consultation with NOAA Fisheries. *See* letter to Magalie Roman Salas from Bill Zemke. The company stated that it had held numerous discussions with NOAA Fisheries, and that the two entities were contemplating, in addition to the habitat conservation plan, a near-term process in which NOAA Fisheries could produce a preliminary biological opinion prior to the 2005 summer season.¹²

36. On July 8, 2004, Commission staff responded to PG&E's 2004 operation plan. *See* letter to Randal S. Livingston from George H. Taylor. Staff stated that, while PG&E had asserted that it had completed work on the three short-term items agreed upon with NOAA Fisheries, staff needed more details to determine if this was the case. Staff also stated that it would contact PG&E and NOAA Fisheries in the near future to schedule a meeting to discuss the progress they were making toward resolving issues relating to ongoing project operations.

¹¹ PG&E did not indicate to what extent, if any, the plan incorporated Petitioners' recommendations.

¹² A biological opinion is prepared by NOAA Fisheries or Fish and Wildlife Service, as part of formal consultation, and includes a summary of relevant information, a detailed discussion of the effects of an action on listed species or critical habitat, and an opinion as to whether the action is or is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. If a "jeopardy" finding is made, the biological opinion will include any "reasonable and prudent alternatives" to avoid jeopardy. *See* 50 C.F.R. § 402.14(h) (2003). A preliminary biological opinion may be issued following early consultation, which can take place, at the request of a prospective applicant, before an application for a federal license or permit is filed. *See* 50 C.F.R. § 402.11 (2003).

DISCUSSION

37. Petitioners ask the Commission to initiate formal consultation with NOAA Fisheries with respect to the impacts of the DeSabla-Centerville Project on listed spring-run Chinook salmon. They argue that because portions of the project license, such as Article 37, reserve the Commission's authority to impose new operating conditions on the project, section 7(a)(2) of the ESA requires the Commission to initiate formal consultation with NOAA Fisheries.

38. In *Phelps Dodge Morenci, Inc.*, 94 FERC ¶61,202 (2001), we considered and rejected a similar argument. We found that it "improperly blurs the distinction between the Commission's discretion to act and the actual exercise of that discretion, thus ignoring the statutory requirement that ESA consultation be premised on a federal agency's action." *Id.* at 61,750-51. We explained, *id.* at 61,753:

Ongoing operation of a licensed hydroelectric project does not require any particular action on the Commission's part. It is the licensee that it authorized, pursuant to the license, to continue to operate the project. Unless the licensee seeks to make changes to project operations or facilities that are not authorized by the license, no Commission action is required. Thus, ongoing operation of the project constitutes private, not federal action. The Commission does not "oversee" the operation of a project in the sense of managing or controlling it; the licensee is responsible for managing and operating the project in accordance with the terms of its license. If the Commission determines that a change in those terms is needed, we must take action to change them pursuant to authority reserved in the license.

39. Thus, there is currently no proposed federal action that could provide a basis for initiating formal consultation under section 7(a)(2). If, on the other hand, PG&E's discussions with NOAA Fisheries resulted in a proposal to change project works or operations in a manner not contemplated in the license, or were we to determine to exercise our reserved authority to require such a change, we would indeed be required to consult with NOAA Fisheries before acting to authorize such activity.¹³ See *Phelps Dodge*, 94 FERC at 61,753. See also *Puget Sound Energy, Inc.*, 95 FERC ¶ 61,015 (2001).

¹³ Of course, action on an application for a new license will likely require formal consultation.

40. As we concluded in *Phelps Dodge* and *Puget Sound Energy*, the petition here is premature. Consultation is ongoing between NOAA Fisheries and PG&E, as our non-federal representative. They are considering various possible steps pursuant to the ESA, including preparation of a preliminary biological opinion or the implementation of a habitat conservation plan. As demonstrated above, Commission staff clearly has been active in asserting the need to protect spring-run Chinook salmon, and in urging the parties to examine interim measures, in addition to the requirements of a new license. To assist in moving this process forward, we hereby direct Commission staff to gather necessary information to make an independent determination whether further interim measures are necessary, and whether PG&E is willing to file an amendment application to put any such measures in place, or whether, in the alternative, we should use our reserved authority to begin a proceeding to consider requiring them. If PG&E files an amendment application, or if we decide as a result of our review to require interim measures, then formal consultation will likely be required. However, there has as yet been no determination as to whether a federal action will be required. Thus, we deny the petition as premature, without prejudice to Petitioners' ability to renew it following the completion of informal consultation and our review of what actions may be appropriate for the DeSabra-Centerville Project.

The Commission orders:

The petition filed by California Sportfishing Protection Alliance, Friends of Butte Creek, Friends of the River, Institute for Fisheries Resources, Northern California Council of the Federation of Fly Fishers, Pacific Coast Federation of Fishermen's Associations, and Sacramento River Preservation Trust on April 13, 2004, is denied without prejudice.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.