
March 15, 2010

Sent via email

Tom Tidwell, Chief
USDA Forest Service
1400 Independence Avenue SW
Washington, DC 20250-0001
ttidwell@fs.fed.us

Randy Moore, Regional Forester
USDA Forest Service
Region 5
1323 Club Drive
Vallejo, CA 94592-1110
rmoore@fs.fed.us

Dear Mr. Tidwell and Mr. Moore:

We would like to bring to your attention specific actions taken by the United States Forest Service (USFS) as part of the relicensing of the McCloud/Pit Hydroelectric Project located in the Shasta Trinity National Forest in Northern California. We are concerned that the USFS has, by its actions, denied all parties other than the licensee due process in this proceeding.

On March 1, 2010 the USFS issued notice that they were revising their preliminary 4(e) conditions that were originally issued on January 29, 2010. In the letter explaining the amendment, the USFS stated that the intent of its negotiations with PG&E “was to develop a flow alternative that would better meet the needs of both parties, and to avoid an unnecessary Trial Type Hearing.” These new conditions were negotiated with the Licensee in the absence of other parties to the proceeding, which is contrary to guidelines adopted by those parties to develop a Collaborative working group to resolve issues in the proceeding. Our right to file a trial type hearing request or alternative conditions has been effectively denied by the USFS decision to amend the preliminary 4(e) conditions less than 48 hours before the deadline. By granting concessions resulting from closed-door negotiations with the Licensee, the USFS is inviting more trial type hearing requests from licensees and non-licensees in the future. We do not believe this is in the interest of any of the stakeholders that participate in these relicensing processes.

We request a response to the attached letter confirming our right to reserve the right to file a hearing request or alternative conditions within 30 days. We would also appreciate the opportunity to discuss this matter with you or your staff.

Sincerely,



Dave Steindorf
California Stewardship Director
American Whitewater
4 Baroni Drive
Chico, CA 95928
dave@americanwhitewater.org
530-343-1871



Kelly Catlett
Policy Advocate
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FRIENDS
OF THE
RIVER

Attachments - Letters dated 2/26/10 and 3/3/10



www.americanwhitewater.org

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February 26, 2010

Joshua S. Rider
United States Department of Agriculture
33 New Montgomery Street, 17th Floor
San Francisco, CA 94105

Re: McCloud/ Pit Relicensing

Dear Mr. Rider:

On January 29, 2010, the United States Forest Service (USFS) filed its Preliminary Section 4(e) Terms and Conditions and Section 10(a) Recommendations for McCloud/ Pit Hydroelectric Project (FERC No. 2106) before the Federal Energy Regulatory Commission. It is our view that these Preliminary Terms and Conditions have been developed in a collaborative manner during the relicensing process for this project. We believe that these terms and conditions are strongly supported by evidence / information in the decisional record.

One public meeting has taken place since the USFS issued its of the preliminary terms and conditions. In this meeting, Pacific Gas and Electric Company (PG&E) made it clear that they were considering using the Trial Type Hearing provisions found in section 241 of the 2005 Energy Policy Act to resolve disputed issues of material fact within these preliminary terms and conditions. The specific disputed issues of material fact that PG&E would attempt to resolve via such a trial type hearing remain unclear.

We understand that several subsequent meetings have taken place between USFS staff and PG&E. We are deeply concerned about the closed, non-public nature of these meetings, which lack the input from other agency and NGO stakeholders that have spent years in this collaborative relicensing process. We further understand that, as a result of these closed meetings, the USFS may be considering issuing amended preliminary 4(e) conditions for this project. If so, we request that the U.S. Department of Agriculture clarify that the deadlines for submitting alternative conditions pursuant to 7 C.F.R. § 1.671 and for filing a request for a trial-type hearing pursuant to 7 C.F.R. § 1.621 will be extended to allow all license parties 30 days to evaluate any amended preliminary 4(e) conditions and exercise their rights to submit alternative conditions or request a trial-type hearing to dispute any relevant issues of material fact.

The amendments to the Federal Power Act contained in section 241 of the Energy Policy Act were designed to give all license parties an opportunity to review an agency's preliminary section 4(e) conditions and submit alternative conditions or challenge any

underlying issues of material fact that might inform those conditions. This provision does not anticipate that an agency with 4(e) authority would publish revised preliminary conditions during the 30-day review window for preliminary conditions. Such a practice would preclude license parties from exercising their rights under the law.

Given that the deadline for filing a hearing request or submitting alternative conditions is quickly approaching, we look forward to your timely response in advance of the filing deadline next week. We appreciate the hard work that all of the USFS staff has put in on this project and we look forward to collaboratively developing the final conditions for this license.

Sincerely,

A handwritten signature in black ink that reads "Dave Steindorf". The signature is written in a cursive, slightly slanted style.

Dave Steindorf
California Stewardship Director
American Whitewater

cc: Bob Deibel
Julie Tupper
Dennis Smith
Kathy Turner
Stacy Smith

March 3, 2010

Deputy Chief
National Forest Systems
United States Forest Service
NFS, Washington Office (WO) Lands Staff
Mail Stop 1124
1400 Independence Avenue, SW
Washington, DC 20250-0003

RE: United States Forest Service's March 1, 2010 revised preliminary 4(e) conditions for the McCloud Pit Hydroelectric Project (FERC No. P-2106)

Submitted via facsimile (202-205-1604)

Dear Sir or Madam:

American Whitewater and Friends of the River respectfully notify the United States Forest Service (USFS) that we reserve the right, pursuant to section 4(e) of the Federal Power Act, to request a trial-type hearing to resolve disputed issues of material fact or to file alternative conditions with respect to the USFS' March 1, 2010 revised preliminary 4(e) conditions for Pacific Gas and Electric's (PG&E) McCloud-Pit Hydroelectric Project (FERC No. P-2106).

On January 29, 2010, the USFS submitted its preliminary 4(e) conditions for the McCloud-Pit Project. However, on March 1, 2010, the USFS submitted revised preliminary 4(e) conditions for this project, amending Part 1 of its Preliminary Condition #19, which addressed instream flows on the Lower McCloud River below the McCloud Dam. In the March 1 filing, the USFS further indicated that it intended to submit its revised conditions as its final 4(e) conditions; and that PG&E intended to file a substantively identical set of alternative conditions.

In its March 1, 2010 filing with the Commission, USFS stated that the intent of its negotiations with PG&E "was to develop a flow alternative that **would better meet the**

needs of both parties, and to avoid an unnecessary Trial Type Hearing.” (emphasis added).

While we acknowledge that USFS’ negotiations with PG&E may have helped avoid a PG&E-initiated trial-type hearing, we are concerned that by doing so, the USFS has denied the same opportunity to all other parties to the proceeding. The right to request a trial-type hearing under the Federal Power Act is not limited to the license applicant. In fact, section 4(e) of the Federal Power Act specifically provides that “[t]he license applicant **and any party to [a hydropower licensing] proceeding** shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to [conditions required pursuant to section 4(e) of the Federal Power Act].” (emphasis added). The law further provides that “the license applicant **or any other party to the license proceeding** may propose an alternative” to a section 4(e) condition.

The U.S. Department of Agriculture’s regulations implementing section 4(e) of the Federal Power Act provide license parties with a 30-day window to request a trial-type hearing after the USFS has filed preliminary conditions with the Federal Energy Regulatory Commission (FERC). In this instance, however, the USFS revised its preliminary conditions less than 48 hours before the deadline for filing a request for a trial-type hearing or filing alternative conditions.

Our organizations have carefully reviewed the USFS’ s January 29 preliminary 4(e) conditions and compared them to the project record. We are generally supportive of those preliminary 4(e) conditions, and do not dispute the underlying factual basis of those conditions. However, because the USFS’ *revised* preliminary conditions were filed at the 11th hour, we have not had sufficient time to review those conditions and determine if we

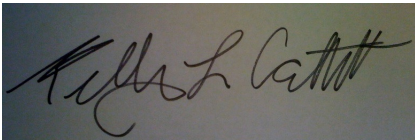
wish to dispute any issues of material fact that form the basis for these revised conditions. By running out the clock on the window identified in its regulations, the USFS has prejudiced other parties to this proceeding who were not party to USFS' closed-door negotiations with PG&E.

American Whitewater and Friends of the River fully intend to exercise our rights afforded under section 4(e) of the Federal Power Act. Within 30 days from the USFS' March 1 filing of its revised preliminary conditions, we will review the USFS' revised preliminary conditions and the record for the McCloud-Pit project in order to determine if they are consistent. If we determine that there is a need to dispute any of the issues of material fact underlying the revised conditions, or if there is a need to file an alternative condition, we will avail ourselves of our statutory rights to do so, not later than 30 days after the Forest Service's March 1 filing.

Sincerely,



Dave Steindorf
California Stewardship Director
American Whitewater
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