

BEFORE THE UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company	)	FERC Project No. 77-320
	)	
	)	
	)	
Application for Temporary	)	
Variance of Flow Requirements	)	

**REQUEST FOR REHEARING BY THE CITY OF UKIAH  
OF THE FEDERAL ENERGY REGULATORY COMMISSION’S  
ORDER APPROVING TEMPORARY VARIANCE OF FLOW REQUIREMENTS  
(POTTER VALLEY PROJECT NO. 77-320)**

Pursuant to section 313(a) of the Federal Power Act (16 U.S.C. § 825*l*) and Federal Energy Regulatory Commission (“FERC”) regulations 18 C.F.R section 385.713, the City of Ukiah (“Ukiah”) hereby requests the Federal Energy Regulatory Commission (the “Commission”) reconsider its order approving Pacific Gas and Electric Company’s (“PG&E”) request that the Commission approve a temporary variance of the flow and irrigation releases requirements set forth in license Article 52 (the “Order”).

The Commission’s Order adds insult to injury by continuing to ignore, dismiss, and obfuscate the impacts to Ukiah and the entire Upper Russian River due to reductions in the delivery of water from the Eel River to the Russian River through the Potter Valley Project (“PVP Water”). The Order is predicated on two fundamental and patent errors: 1) a misplaced reliance on a twenty-four year old environmental impact statement which itself completely fails to take the required “hard look” at impacts to the Upper Russian River – including its ecology, economy, and community – caused by reduced imports of PVP Water and a misguided attempt to address that failure in a handful of paragraphs embedded in the Order; and 2) a

misrepresentation of the facts in the record – which are even now already outdated – to downplay the Order’s impacts to the Upper Russian River.

The Commission’s regime of unlawfully subordinating and dismissing the interests of an entire region will no longer be tolerated. Ukiah insists that it be afforded nothing more than the same dignity shown to other interests and regions affected by the Order. In a final attempt to avoid litigation, Ukiah, on behalf of our over 30,000 residents and neighbors, respectfully but urgently requests the Commission to reconsider the Order and stay implementation of that part of the Order approving reductions to the East Branch Russian River below 25 cfs while FERC complies with NEPA. Anything less is simply untenable and shall be resisted in every possible forum.

### **PARTIES**

Ukiah is an incorporated municipality in Mendocino County, California, with its principal place of business in Ukiah, California. Ukiah was incorporated in 1886. As an incorporated municipality, Ukiah has the powers to provide a variety of municipal services, including water services for domestic and municipal and industrial purposes. There are approximately 16,000 people who reside within Ukiah, and approximately another 15,000 living in the vicinity. The residents and the businesses, schools, and parks in the City receive their water service from Ukiah, which delivers that water by exercising water rights that rely in part on abandoned flows from the Potter Valley Project. Ukiah also owns and operates a hydroelectric facility at Coyote Valley Dam, the dam that creates Lake Mendocino on the East Branch of the Russian River. The generation of power is reliant on releases of water at Coyote Valley Dam, which is fed from water diverted from the Eel River through the Potter Valley Project to the East Branch Russian River. The Russian River flows just along the eastern edge of Ukiah’s boundaries, and its ecology, biodiversity, and beauty have been a consistent blessing to

our entire community.<sup>1</sup>

### **STATEMENT OF ISSUES**

1. The National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, (“NEPA”) requires that federal agencies take a hard look at the environmental impact of a proposed federal action. In issuing the Order, FERC relied on the 2000 EIS and additional information provided in the Order. Has FERC violated NEPA?
2. In the additional information provided in the Order, the Commission relies on statements by Sonoma County Water Agency to minimize the effects on water users and listed species in the Upper Russian River. But the Sonoma Water letter does not say what the Commission says it says, and new information provided by Sonoma Water undoes the Commission’s findings supporting the Order. Is the Order based on an accurate representation and understanding of the facts?

### **PROCEDURAL HISTORY**

On February 22, 2024, PG&E requested a temporary variance of its minimum flow requirements at two locations: 1) to preserve cold water for aquatic resources downstream of Scott Dam on the Eel River, PG&E proposes to release flows below Scott Dam, as measured at gage E-2, to be consistent with a *critical water year* type minimum flow of 20 cubic feet per second (“cfs”) (noting that actual releases would be closer to 35 cfs); and 2) the reduction of minimum flows in the East Branch Russian River, as measured at gage E-16, to match the *dry water year* minimum flow requirement of 25 cfs with the flexibility to further reduce flows to the critical water year requirement of 5 cfs (the “Variance Request”).

In its Motion to Intervene challenging FERC’s authority to approve the Variance Request, Ukiah observed in part that, in contravention to the requirements of NEPA, “the record

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<sup>1</sup> Further information regarding Ukiah and its interests was provided in its granted Motion to Intervene.

in front of the Commission is devoid of any meaningful discussion on and appreciation for the impacts the Variance Request, if approved, will have on Ukiah, specifically in terms of its potentially-reduced ability to provide water and generate clean electricity and its interests in protecting listed salmonids in the Russian River.” Ukiah’s Motion, at p. 2.

On June 27, 2024, the Commission issued its Order, approving the Variance Request.

Ukiah hereby requests the Commission rehear the matter on the bases stated herein. This request for rehearing is filed in accordance with 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*, and FERC’s regulations at 18 C.F.R. § 385.713, and is timely filed in accordance with 18 C.F.R. § 385.2007.

### **STATEMENT OF FACTS**

#### ***The Order’s Imposition Of An Administratively-Manufactured Drought In A Normal Water Year For The Upper Russian River***

In its Order, the Commission rightly observes that the Eel and Russian River Watersheds are not, in fact, in dry or critical conditions, and that, as a consequence, and as analyzed in the 2000 EIS, the Russian River *should* be getting between 35 and 75 cfs this year.

The 2024 water-year is on track for a normal water-year classification for the Eel River below Scott Dam and the East Branch Russian River compliance locations, and a wet water-year in the Eel River at the Cape Horn Dam compliance location. Consequently, PG&E would also be required to release 35 cfs into the East Branch Russian River from April 15 through May 14, 75 cfs from May 15 through September 15, and 35 cfs from September 16 through April 14.

Order, at ¶ 15. But in its Variance Request PG&E “propose[d] to initially reduce minimum flow releases to the East Branch Russian River to the dry water-year requirement of 25 cfs, with the ability to further decrease these flows as low as 5 cfs.” *Id.*, at ¶ 17

In granting PG&E’s 2024 Variance Request, the Order allowed in part for the reduction of minimum flows in the East Branch of the Russian River – currently in a *normal* water year – to match the *dry* water year flow requirement of 25 cfs with the “flexibility” to further reduce

flows to the *critical* water year requirement of 5 cfs. A mere eight days after the Order, on July 5, 2024, PG&E immediately “flexed” its authority, driving flows into the Russian River down to a mere 5 cfs. Water is being diverted into the Russian River as if it were a *dry* or *critical* water year despite the fact that the two basins at issue are in *wet* and *normal* water years. As Ukiah observed in its Motion to Intervene, the Order imposes an administratively-manufactured state of drought, and one that is effected without adequately analyzing the impacts to the Upper Russian River’s ecology, economy, or community.

### ***Compliance with NEPA – A “Hard Look” Or Hardly Looking?***

Over twenty-four years ago, in May 2000, FERC published an EIS on proposed changes in minimum flow requirements at the Potter Valley Project, FERC Project No. 77-110 (the “2000 EIS”).

In its Order approving the 2024 Variance Request, the Commission argues that unanalyzed impacts caused by the Variance Request were previously analyzed in the 2000 EIS. The Commission states:

The proposed variance mirrors the minimum flow requirements for a dry water-year [sic] as outlined in Article 52 of the License and the RPA in NMFS’s 2002 Biological Opinion. The impacts of these flow requirements were previously analyzed in the Final EIS prepared for the 2004 license amendment adopting Article 52.

Order, at ¶ 46. Further, the Commission asserts that the “effects of the proposed variance are the same as the effects of the RPA that were analyzed previously in the Commission’s May 30, 2000 Final EIS, and include consideration of downstream water users in the Russian River watershed.” *Id.*, at ¶ 50.

First, as will be shown below, this is simply not the case – not only does the 2000 EIS fail to adequately analyze impacts to the Russian River, the argument that the impacts analyzed over

twenty-four years ago for different water year types was adequate would be laughable were it not so insulting.

Second, if the impacts were already adequately analyzed, then why the additional discussion in the Order – albeit in a mere handful of paragraphs? Despite the Commission’s assertions that the impacts of the Variance Request had already been analyzed in the 2000 EIS, the Commission states, “[i]n the following sections [of the Order], we have updated the Final EIS’s analysis to address effects to the human environment specific to the proposed temporary variance.” *Id.*, at ¶ 46.

The Commission acknowledges the impacts to water users in the Russian River in issuing the Order. *See: id.*, at ¶40 (“the proposed curtailment may reduce water available to downstream water users further below Lake Mendocino in the Russian River watershed”); *id.*, at ¶ 50 (“reduced diversions to the East Branch Russian River would result in reduced water quantity available to consumptive water users and for aquatic resources downstream”); *id.*, at ¶ 55 (“[i]nitially, continuing to release 75 cfs to the Russian River and only reducing releases as warranted would result in greater water quantity in the Russian River, which would minimize impacts to Russian River water users and aquatic resources”); and *id.* (“[i]n the event the storage reservoir depletes more quickly than projected, PG&E would have to significantly curtail flows to the Russian River to preserve the remainder of the water, which may negatively impact Russian River water users and aquatic resources”).

In an attempt to minimize those impacts, the Commission relies on an outdated and simply incorrect assumption that Lake Mendocino provides a “buffering effect, especially during periods of high reservoir storage[,] the cumulative effects to water users below Lake Mendocino is expected to be minimal, as Sonoma County Water Agency expects to be able to meet water use objectives downstream in 2024 due to the wetter water-year and existing storage in the

reservoir.” *Id.*, at ¶ 51. This not only misstates and misunderstands what, in fact, Sonoma Water said in its March 1, 2024, Letter, but is also already outdated.

***Sonoma Water’s March Letter: Misunderstood, Misrepresented, And Outdated***

As mentioned above, the Order relies on a March 1, 2024, letter that Sonoma County Water Agency (“Sonoma Water”) provided to the California State Water Resources Control Board (the “State Water Board”) as part of a separate process under California Water Law (“Sonoma Water’s March Letter”). In that letter to the State Water Board, Sonoma Water stated that, based on what was then the current hydrology of a normal water year and current and projected water levels in Lake Mendocino, it would be able to “fully meet the requirements of the authorized uses of storage releases:

- a) minimum instream flow requirements on the Russian River
- b) rediversion by the [Russian River Flood Control District] pursuant to License No. 13898
- c) rediversion by Sonoma Water pursuant to its Permit No. 12947A
- d) rediversion by post-1949 water-right permittees and licensees within Sonoma County that are under the 10,000 ac-ft storage reservation.”

Sonoma Water’s March Letter, at p. 2.<sup>2</sup> Furthermore, Sonoma Water observed that, “[u]nder *Normal* water year classification, the East Fork Russian River minimum instream flows are passed through Lake Mendocino and are sufficient enough to meet pre-1949 water rights and provide additional water to Sonoma Water to offset some of the storage releases[.]” *Id.* In March, Sonoma Water was clear about its ability as the operator of Coyote Valley Dam during water supply operations to meet these four specified conditions of its water rights; those conditions

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<sup>2</sup> March 1, 2024 letter from Sonoma Water to Erik Ekdal, California SWRCB.  
[https://www.sonomawater.org/media/PDF/Environment/BiologicalOpinion/TUCP/2023/Term10\\_rpt\\_1Mar24.pdf](https://www.sonomawater.org/media/PDF/Environment/BiologicalOpinion/TUCP/2023/Term10_rpt_1Mar24.pdf).

included the ability to make releases for pre-1949 water right holders. It says nothing of those whose water rights fall after 1949, and it says nothing of its ability to manage temperature for Russian River Listed Salmonids. Most importantly perhaps, it says nothing of its ability to meet the requirements in the face of reduced flows per the Variance Request – the letter simply was not addressing the issue at bar.

Unsurprisingly, after PG&E immediately ratcheted down diversions to the Russian River to 5 cfs on July 5, 2024 – eight days after the Order – Sonoma Water provided the State Water Board with an updated letter. In the attached letter from Sonoma Water to the State Water Board, dated July 17, 2024, (“Sonoma Water’s July Letter”) Sonoma Water expresses concerns about the reduction on July 5<sup>th</sup> to 5 cfs of PVP Water to the Russian River, and now “projects that Lake Mendocino storage will be about 12,000 acre-feet lower by the end of this water year with the [Order] than it would have been otherwise.” Sonoma Water’s July Letter, p. 1. Sonoma Water also states that “[w]ith this reduction of Eel River water imports into the Russian River basin ... there may no longer be water available for many diverters on the East Branch and mainstem of the Russian River.” *Id.* “*There may no longer be water available.*” Assuming there was a true “buffer” to begin with, it is now 12,000 acre-feet less buff, and, for “many” it is gone entirely.

### **ARGUMENT AND AUTHORITY**

#### **I. FERC Has Violated NEPA Because The Commission Has Failed To Take A Hard Look At The Impacts Of Granting The Variance Request To The Russian River’s Water Users And Listed Salmonids**

##### ***The National Environmental Policy Act – Preventing Uninformed Action***

Signed into law on January 1, 1970, NEPA establishes a “national policy [to] encourage productive and enjoyable harmony between man and his environment,” and was intended to reduce or eliminate environmental damage and to promote “the understanding of the ecological systems and natural resources important to” the United States. 42 U.S.C. § 4321. “NEPA itself



does not mandate particular results” in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather, NEPA imposes “procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 689 (2004). At the heart of NEPA is a requirement that federal agencies

“include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

“(i) the environmental impact of the proposed action,

“(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

“(iii) alternatives to the proposed action,

“(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

“(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”

42 U.S.C. § 4332(2)(C). This detailed statement is called an Environmental Impact Statement (an “EIS”).

An EIS has both an “informational purpose” and an “action-forcing role” (*Dept. of Transp.*, 541 U.S., at 768-69) The “informational purpose” of an EIS is to “giv[e] the public the assurance that the agency ‘has indeed considered environmental concerns in its decisionmaking process,’ (*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) and, perhaps more significantly, provid[e] a springboard for public comment” in

the agency decision making process itself. *Robertson*, 490 U.S., at 349. As the Supreme Court in *Department of Transportation* reiterated, the purpose here is to ensure that the “larger audience” (*id.*) of the general public – and not just specially selected interests on one side of the NEPA calculus – can provide input as necessary to the agency making the relevant decisions.

The Supreme Court observed that the Council on Environmental Quality’s implementing regulations build on this purpose and highlight NEPA’s action-forcing role as well. *See: Dept. of Transp.* 541 U.S., at 768; 40 CFR § 1500.1(c) (“NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment”); *id.*, at § 1502.1 (“The primary purpose of an environmental impact statement ... is to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government”).

There are circumstances when federal agencies must supplement an existing EIS. The CEQ’s Implementing Guidelines provide that federal agencies:

Shall prepare supplements to either draft or final environmental impact statements if a major Federal action is incomplete or ongoing, and:

- (i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or
- (ii) There are substantial new circumstances or information about the significance of adverse effects that bear on the analysis.

40 CFR § 1502.9(d)(1). Agencies “[m]ay also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.” *Id.*, at §1502.9(d)(2).

The Supreme Court observed that, while federal agencies properly apply a “rule of reason” to determine whether to supplement an EIS, NEPA requires agencies to take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, at 374 (1989).

An agency's decision not to adequately prepare an EIS or a Supplemental EIS can be set aside upon a showing that doing such was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). *See also Marsh*, 490 U.S., at 375–376 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

The Ninth Circuit has explained that “to prevail on a claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are ‘*substantial questions* whether a project may have a significant effect on the environment’ is sufficient.” *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)) (italics in original). The same holds true for the requirement to prepare a Supplemental EIS. *See Marsh*, 490 U.S., at 371 (emphasis added) (“It would be incongruous with this approach to environmental protection, and with *the Act’s manifest concern with preventing uninformed action*, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval”); *id.*, at 373 (federal agencies have a duty to prepare supplements to final EIS’s if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts).

***A. Reliance On The Twenty-Four Year Old 2000 EIS And It’s Outdated Analysis Is Misplaced***

The CEQ advises that EIS’s that are a mere five years old should be carefully scrutinized

to determine whether a supplement should be prepared.<sup>3</sup> The 2000 EIS, upon which the Commission relies in its Order, is over twenty-four years old. By its own terms much of its analyses were predicated on a twenty-one year simulation. See, e.g., 2000 EIS at 4-19, 4-63, 4-93, 4-95, 4-110, and 4-113. While the EIS's age itself may not necessarily require new analysis under NEPA, given the lack of analysis noted below and the simulation period of the analyses – running only through 2020 – the 2000 EIS is clearly outdated in terms of time and substance. A Supplemental EIS is entirely warranted, appropriate, and called for by law.

***B. The 2000 EIS's Analyses Of Impacts On Russian River Listed Salmonids And Water Users, When Any Exists, Is Woefully Inadequate And Outdated***

The Commission states it has complied with its obligations under NEPA to analyze the impacts of its Order on the Upper Russian River. See, Order, at ¶ 46. Yes, twenty-four years ago, FERC developed a document it called an Environmental Impact Statement. And yes, twenty-four years ago, there was indeed some discussion on some of the impacts Ukiah, and others, said must be analyzed for FERC to avoid violating NEPA. But the idea that the 2000 EIS identifies these impacts, much less take the requisite “hard look”, is simply false. It does not take long to read through the EIS to identify where these analyses are, or to understand they are simply not there.

The 2000 EIS spends *one paragraph* (and just over one page buried in Appendix D) discussing and lumping together the impacts of the Proposed Action on the Russian River Listed Salmonids and references some tables for Steelhead and Coho – but not Chinook – that purportedly analyze impacts to those species. See, 2000 EIS, at p. 4-63, D-9-10.<sup>4</sup> In comparison, the 2000 EIS spends *over nine pages* – not including additional analyses in Appendix D –

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<sup>3</sup> 40 Most Asked Questions Concerning the CEQ's National Environmental Policy Act Regulations, Question 32. (March 23, 1981). “As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.”

<sup>4</sup> More room is spent analyzing the impacts on *introduced species* in the Eel River and the reservoirs than on *endangered and threatened species* in the Russian River. See, e.g., *id.*, at pgs. D-7-9.

discussing, and breaking out, the impacts for each Eel River salmonid.<sup>5</sup> See, 2000 EIS, at pp. 4-54 – 4-63. The 2000 EIS spends *several pages* talking specifically about the impacts to temperature for Eel River salmonids. See, 2000 EIS, at p. 4-63 – 4-66. It says *nothing* about the temperature impacts to Russian River Listed Salmonids that Ukiah identified in its Motion to Intervene. *Nothing*.

The only attempt to discuss impacts to water users in the Russian River due to the Proposed Action to the Upper Russian is grouped under Economics as agricultural, recreational, and hydropower (apparently all we do in the Upper Russian River is grow things, play, and turn on lights) – which, when combined and excluding graphs, get a page and a half of analysis and discussion. See, 2000 EIS, at 4-110-113. Without in any way minimizing the severity of these impacts to our residents and neighbors, there is simply no discussion about the economic impacts to the businesses and families in Ukiah or other towns in the 2000 EIS, nor to the magnitude or impacts of reduced imports of PVP Water to the Upper Russian River. *None*. Ukiah may be a small town of only 16,000 people, but it is the County seat with a significant boutique and a growing industrial sector. We even have a Costco and an In-N-Out – though, since the last drought in 2021, we are beginning to see major stores such as JC Penney close their doors. The 2000 EIS is completely devoid of any identification of these impacts, much less robust, thoughtful discussion and analyses, perhaps partly because its simulation only ran out to 2020 – four years ago.

These patent failures and absences are perhaps why the Commission attempts to “update” the 2000 EIS in the Order itself. We turn to that next.

### ***C. The “Update” Provided In The Order Patently Fails To Comply As An Adequate EA Or Supplemental EIS***

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<sup>5</sup> The comparison is drawn only to provide a picture of the disparate quality and quantity of the impacts analyses between the two basins; it is in no way offered to suggest that nine pages is somehow too much to fully analyze the impacts to Eel River salmonids – indeed, even that, twenty-four years later, is likely woefully inadequate. The same principle and observation apply to the succeeding point about impacts to temperature between the two basins.

Which begs the question of what to do with, and how to characterize, the “update” in a whopping 17 paragraphs of the Order. The Commission states, “[i]n the following sections, we have updated the [2000 EIS’s] analysis to address effects to the human environment specific to the proposed temporary variance.” Order, ¶ 46. This statement leads to at least two conclusions: 1) the analysis in the 2000 EIS did not specifically address the impacts of the Variance Request or the Order but rather only to the minimum flow regime under the specified water year type; and 2) the 2000 EIS did not adequately analyze the impacts and therefore needs to be “updated.”

To the first conclusion, the impacts analysis in the 2000 EIS did not, in fact, address the effects of the Variance Request. It failed here not only for the reasons stated above in terms of the failure to take a “hard look” at the environmental impacts Ukiah observed in its Motion, but for the rather obvious fact that *we are not in a dry or critical water year*. The baseline of the effects analyses was the year-type in question: in a *dry year* – an *actual dry year* – the minimum flows were to be 35 cfs; in a *critical year* – an *actual critical year* – the minimum flows could go as low as 5 cfs; but in a *normal* or *wet year* – such as the present one in which real people in the Upper Russian River are trying to live and enjoy their lives – the minimum flows were much higher. But here, through its Order, the Commission has divorced the premises driving the minimum flows (the year type) from impacts of the minimum flows themselves, allowing PG&E to operate as if it were a dry or critical year *without any supporting analyses short of a dismissive acknowledgment of “reductions” of the impacts of this administratively-manufactured drought*. But for FERC, the people in the Upper Russian River would be under the illusion that they just enjoyed the blessings of two consecutive years of above-normal precipitation. We can all be thankful that the administrative state – ostensibly there to, if not serve us, at least acknowledge we exist – is there to assure us that our five senses and our common sense have conspired to deceive us.

To the second conclusion, the Commission’s “update” to the 2000 EIS in less than 17 paragraphs fails to satisfy NEPA. Is this purported “update” an Environmental Assessment (an “EA”)? If so, it falls short. An EA is required to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact” and must include “brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 C.F.R. § 1508.9(a)(1), (b). “If an agency . . . opts not to prepare an EIS, it must put forth a ‘convincing statement of reasons’ that explain why the project will impact the environment no more than insignificantly.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2004). This statement assists a court in evaluating whether the agency took the requisite “hard look” at the potential impacts of a proposed action. *Id.*

The purported “update” does none of this – assuming, of course, the Commissioners do not actually believe (as they do not say in the Order) that thrusting an entire region into a manufactured drought, living off 5 cfs and enough water only to satisfy *minimum human health and safety*, is “insignificant.” Even if the “update” in the Order did find such impacts to be insignificant, it provides no statement of reasons explaining why those impacts are insignificant. While the Order acknowledges “the reduced diversions to the East Branch Russian River would result in reduced water quantity available to consumptive water users and for aquatic resources downstream[,]” (Order, at ¶ 50) it provides no analysis and engages in no discussion on these impacts. So it cannot be a lawful EA under NEPA.

Is this purported “update” a Supplemental EIS? If so, it fails on both procedural and substantive grounds. Any Supplemental EIS is subject to the same notice-and-comment requirements of an EIS. *See*, 40 C.F.R. § 1502.9(d)(3) (An Agency “[s]hall prepare, publish, and

file a supplement to an environmental impact statement (exclusive of scoping[]) as a draft and final environmental impact statement, as is appropriate to the state of the environmental impact statement involved, unless the [CEQ] approves alternative arrangements [.]” FERC offered no draft of the “update”, nor was the Order styled as a “Draft Supplemental EIS,” with the requisite information providing the general public, and not just parties to the instant matter, with the means or time to comment as required by NEPA. There was no “springboard for public comment”. *Robertson*, 490 U.S., at 349. So, without even going into the substantive shortcomings of the 17-paragraph “update,” it fails as a lawful Supplemental EIS under NEPA.

The purported “update” is not an EA. It’s not a draft Supplemental EIS. Its’s not a final Supplemental EIS.

What it is is an insult to injury.

## **II. The Order Is Predicated On A Misrepresentation And Misunderstanding Of Facts Offered In Another Proceeding Which Are Now Already Outdated**

The Order, including the purported “update” suffer from a misrepresentation of facts key to the Commission’s approval of the Variance Request. The Commission asserts that, “[w]hile the proposed curtailment may reduce water available to downstream water users further below Lake Mendocino in the Russian River watershed, storms in the winter of 2023-2024 largely replenished Lake Mendocino, which should buffer any effect the temporary variance would have on those users.” This statement demonstrates a fundamental misunderstanding of California Water Law, for which the Commission may be forgiven had it not passed over the issue so quickly, and takes Sonoma Water’s March Letter completely out of context. Sonoma Water’s March Letter simply says nothing of its ability to meet its requirements in the administratively-manufactured drought the Order creates – indeed, the letter is predicated on a Normal water year up to that point, observes that the Variance Request, if granted, will “effectively increase reliance on Sonoma Water’s release of storage to maintain instream flows in the Upper Russian River,”



and qualifies its initial assessment based on whether the basin receives late-spring rainfall. See, Sonoma Water’s March Letter, at p. 2.

In its Motion to Intervene, Ukiah made clear that its water rights were to water in the Russian River. There are only two water right holders with the right to store water in Lake Mendocino: Russian River Flood Control & Water Conservation Improvement District and Sonoma County Water Agency. While water stored behind Lake Mendocino may “buffer” the effects of the Order on some water users on the Russian River, including Ukiah, it will certainly not buffer all of them. Additionally, there is simply no analysis of the extent of this buffer.

What is offered instead is Sonoma Water’s March Letter, written to the State Water Board in an entirely separate and disconnected proceeding. The Commission states that “[t]he administrator of flow releases in the Russian River from Lake Mendocino, Sonoma Water, has also stated that it is able to meet all of its water commitments during the current water season due to significant tributary flows and maximum storage levels in Lake Mendocino.” Order, ¶ 40. This is an accurate statement, but must be understood for only saying what the letter says: that Sonoma County Water Agency is reporting to the State Water Board in March – before the Order – that it anticipated it would be able to “fully meet the requirements of the authorized uses of storage releases:

- e) minimum instream flow requirements on the Russian River
- f) rediversion by the District pursuant to License No. 13898
- g) rediversion by Sonoma Water pursuant to its Permit No. 12947A
- h) rediversion by post-1949 water-right permittees and licensees within Sonoma County that are under the 10,000 ac-ft storage reservation.

Sonoma Water’s March Letter, at p. 2.

Even then, Sonoma Water’s March Letter does not say that it will make releases for other

water right holders, including pre-1949 water right holders and post-1949 water right holders who are not part of the 10,000 acre-foot storage reservation. In short, the Commission must understand what Sonoma Water said it thought it could do in March, and not misunderstand that to mean more than it does. Namely, there is no promise in Sonoma Water’s March Letter that it will make releases to meet Ukiah’s 16,000 residents’ demand for water, much less the demand of its 15,000 surrounding neighbors in the Ukiah Valley or those beyond. Even this, however, and a mere month after the Order, has proven not to hold up in a world after the Order.

In the attached letter from Sonoma Water to the State Water Board, dated July 17, 2024, Sonoma Water expresses concerns about the reduction on July 5, 2024, to 5 cfs of PVP Water to the Russian River, and “projects that Lake Mendocino storage will be about 12,000 acre-feet lower by the end of this water year with the [Order] than it would have been otherwise.” Sonoma Water’s July Letter, p. 1. Sonoma Water also states that “[w]ith this reduction of Eel River water imports into the Russian River basin ... there may no longer be water available for many diverters on the East Branch and mainstem of the Russian River.” *Id.*

This updated information – this time directly addressing the effects of the Variance Request and the Order – is directly at odds with the Commission’s findings that Lake Mendocino will be able to provide a “buffer” for other water right holders in the Upper Russian River and that there will somehow be sufficient water available for all water users. Sonoma Water’s July Letter entirely validates Ukiah’s assertion in its Motion to Intervene that granting the Variance Request puts the entire Upper Russian River, including Ukiah, in a manufactured state of drought, potentially restricting the use of water to only that necessary to meet minimum human health and safety needs. This means no parks, no gardens, no tree-lined walkways, no soccer fields, dying and stressed orchards and vineyards – essentially the impoverishment of a Northern California community in what would otherwise, both hydrologically and as identified in the 2000

EIS, would be a normal water year. It is an impoverishment that goes by unanalyzed by FERC, if not dismissed, in direct contravention to our law, including NEPA.

The Order also minimizes the impacts to Russian River Listed Salmonids, despite the tacit acknowledgment that “reduced flows in the East Branch Russian River under the proposed variance have the potential to reduce aquatic habitat and increase water temperatures in the Russian River below Lake Mendocino.” Order, ¶ 41. The Order dismisses the concerns Ukiah, and others, raised by asserting, without evidence or analysis and as a *non sequitor*, that “[t]he temporary variance would minimize these effects by reducing flows below 25 cfs only if necessary to protect listed species in the Eel River.” Order, ¶ 42. How effects to listed species in the Russian River are minimized by protecting listed species in the Eel River makes sense only in the perverted calculus that says it’s okay to kill listed species in this place to protect listed species in this other place. Nonsense. The people on the Eel River are connected to their listed species – good, they should be. So are we, and our interests must be given equal weight with those in the Eel instead of being summarily dismissed.

Again, the Commission relies on the replenishment of Lake Mendocino and Sonoma Water’s March Letter in an attempt to minimize the impacts. This again misunderstands the issue in two distinct ways. First, Ukiah raised concerns about temperature in Lake Mendocino in its Motion to Intervene. As observed above, temperature for Eel River species was addressed in the 2000 EIS but it was completely silent on the issue for the Russian River or for Lake Mendocino. But less water in Lake Mendocino, as in Lake Pillsbury, means warmer water, which means greater impact to listed salmonids in the Russian River who require cool water, just as they do in the Eel River, especially in the Fall when they begin to migrate and spawn. There is simply no analysis on the Order’s impacts to temperature for Russian River Listed Salmonids – it does not exist in the 2000 EIS, and the Order fails to address the fact that the reduced diversions from the

Eel River will result in warmer water. The entire focus is on the Eel at the expense of the Russian. This NEPA simply does not allow.

Further, the Commission again misrepresents what Sonoma Water asserts in its March 1, 2024, Letter, improperly conflating Sonoma Water's ability to meet minimum instream flows – which are focused on the quantity of water in the Russian River – with the concerns about temperature in Lake Mendocino that Ukiah raised. Sonoma Water's requirement to maintain certain minimum instream flows is focused on the quantity of water in the Russian River below Lake Mendocino in part for fish – it has nothing to do with managing temperature in Lake Mendocino or managing the temperature of releases from Lake Mendocino. Indeed, the design of Lake Mendocino, a seventy-year old earthen dam with a single outlet at the bottom, completely precludes the ability to effectively manage the temperature of releases for Russian River Listed Salmonids downstream.

Finally, Sonoma Water's July Letter anticipates a reduction of about 12,000 acre-feet of water in Lake Mendocino, thus reducing the amount of cold water pool available in the reservoir and further exacerbating the impacts to Russian River Listed Salmonids due to the Order. The reduction in temperature is unidentified, and the impacts are unanalyzed. Though the Commission tacitly acknowledges a future environmental document (see, Order, ¶ 47) and observes "PG&E should monitor for and alert the resource agencies and the Commission to any adverse effects to aquatic resources during the temporary variance" (see, Order, ¶ 63), this is far too little, far too late. Despite failing to issue a similar directive to look for impacts to the people in the Russian River, who apparently do not rate such a directive, how is PG&E to observe these effects absent specific direction for them to do so?

### **CONCLUSION**

The insults and injuries continue to compound and build. The Order's flagrant disregard

for NEPA's mandates for FERC to analyze the impacts of its Order, along with its cursory dismissal of the interests of an entire region, are as disappointing and insulting as they are untenable.

In its Motion to Intervene, Ukiah, and others, observed FERC could not grant the Variance Request absent complying with NEPA. Through the Order, the Commission's conflated, tortured, and dismissive response is that it has complied with NEPA. It has clearly not: the twenty-four year old 2000 EIS does not identify the impacts of the Order's imposition of an administratively-manufactured drought on the Upper Russian River; it does not begin to adequately analyze the few impacts it does identify; the purported "update" in the Order entirely fails to satisfy NEPA, much less lend equal dignity to interests in the Russian River; and the facts the Order relies on in attempt to minimize any impacts are misrepresented and misunderstood, and are already – within a single month – outdated.

To be clear, we ask for nothing more than that our interests be given equal weight to others' and that the impacts to our community: our families, our schools, our businesses, our orchards and vineyards, our listed species, and our environment, simply be identified and analyzed in accordance with the mandates of the National Environmental Policy Act. Why those interests go unheeded baffles us as much as it does steel our resolve. If the water which our ecology, economy, and community – our entire way of life – relies upon can be so summarily taken from us while our interests are dismissed and the impacts are ignored – if we are not to be afforded the simple dignity of equal treatment – it appears we have nothing to lose. If forced to, we shall conduct ourselves accordingly.

We earnestly and sincerely urge the Commission to grant a rehearing, to revisit the erroneous findings and factual predicates in its Order, and to stay implementation of that part of the Order approving reductions to the East Branch Russian River below 25 cfs until FERC

complies with NEPA by lawfully identifying and analyzing the impacts of the Variance Request to the ecology, economy, and communities of the Upper Russian River.

### **CONTACT INFORMATION**

Pursuant to FERC Rule 203(b), Ukiah requests that all communications and service in this matter be directed to:

Philip A. Williams  
Law Offices of Philip A. Williams  
202 W. Perkins St., Ste. B  
Ukiah, CA 95482  
pwilliams@azimustlaw.com  
(707) 234-3435

Sincerely,  
/ s / Philip A. Williams

Philip A. Williams

*Attorney for Intervenor City of Ukiah*

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company	)	FERC Project No. 77-320
	)	
	)	
	)	
Application for Temporary	)	
Variance of Flow Requirements	)	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served by electronic mail, the **Request for Rehearing by The City of Ukiah on The Commission’s Order Regarding Pacific Gas & Electric Company’s Application for Temporary Variance of Flow Requirements (Potter Valley Project No. 77-320)**, on each person designated on the official Service List compiled by the Commission in the above-captioned proceedings, and by electronic mail and U.S Postal Service, the Federal Energy Regulatory Commission and National Marine Fisheries Service.

Dated this 29<sup>th</sup> day of July, 2024, at Ukiah, California.

/ s / Philip A. Williams  
Law Offices of Philip A. Williams  
202 W. Perkins St., Ste. B  
Ukiah, CA 95482  
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(707) 234-3435



**Sonoma  
Water**

July 17, 2024

Erik Ekdahl, Deputy Director of Water Rights  
State Water Resources Control Board  
Division of Water Rights  
P.O. Box 2000  
Sacramento, CA 95812-2000

**RE: Notice of Change in Russian River Hydrologic Conditions**

Dear Mr. Ekdahl:

The Sonoma County Water Agency (Sonoma Water) staff have prepared this letter to notify you of a significant change to the hydrologic conditions of the East Branch and mainstem Russian River. On June 26, 2024, the Federal Energy Regulatory Commission (FERC) issued an order approving Pacific Gas & Electric Company's (PG&E) temporary flow variance request for the Potter Valley Project (Project). The order initially approves a reduction in minimum releases of Eel River water into the East Branch Russian River from 75 cubic feet per second (cfs) to 25 cfs and authorizes further reductions to 5 cfs if daily average release water from Lake Pillsbury exceeds 15 degrees C or as needed based on determinations by PG&E, the resource agencies and the Round Valley Indian Tribes. On July 5<sup>th</sup> PG&E decreased releases to the East Branch Russian River to 5 cfs based on a recommendation from the resource agencies and the Round Valley Indian Tribes due to Lake Pillsbury release water temperatures exceeding 17 degrees C. A copy of the order is enclosed.

With this significant reduction of Eel River water imports into the Russian River basin, Sonoma Water is deeply concerned that, as natural flow declines, there may no longer be water available for many diverters on the East Branch and mainstem Russian River. The attached figure shows projected Lake Mendocino storage through the end of the water year without the FERC order in place and under the FERC order with a minimum release into the East Branch of 25 cfs starting June 27, reduced to 5 cfs on July 5<sup>th</sup>. Both projections assume all historical East Branch and mainstem Russian River water demands, regardless of basis of right, are being met during the modeling period. As the attached figure shows, Sonoma Water projects that Lake Mendocino storage will be about 12,000 acre-feet lower by the end of this water year with the FERC order than it would have been otherwise.



Sonoma Water staff would be more than willing to schedule a time to meet with you and/or your staff to discuss further and provide additional information. Please contact me at [Grant.Davis@scwa.ca.gov](mailto:Grant.Davis@scwa.ca.gov) or Don Seymour at [Donald.Seymour@scwa.ca.gov](mailto:Donald.Seymour@scwa.ca.gov) if you have any questions or require additional information.

Sincerely,



Grant Davis  
General Manager

c: J. Ling, K. Emanuel – State Water Resources Control Board  
P. Jeane, D. Seymour, T. Schram, J. Martini Lamb, K. Gylfe – Sonoma Water  
C. O'Donnell, A. Brand – Sonoma County Counsel  
R. Bezerra – Bartkiewicz, Kronick & Shanahan

### Lake Mendocino Storage Projection: Comparing Impact of Potter Valley Project Flow Variance Operations (Variance Starts 6/27/2024)

