



# FRIENDS OF THE EEL RIVER

*Working for the recovery of our Wild & Scenic River, its fisheries and communities.*

November 13, 2020

Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission

submitted electronically

**RE: Potter Valley Project P-77-298**

**Friends of the Eel River COMMENTS ON INITIAL STUDY REPORT; STUDY PLAN DISAGREEMENTS and REQUESTS FOR AMENDMENTS**

Dear Secretary Bose and FERC staff:

On behalf of our members, staff, and board, Friends of the Eel River (FOER) submits the following comments on the Initial Study Report filed by the coalition of five entities known variously as the Two Basin Partners, the Notice of Intent (NOI) group, or the Planning Agreement Group (PAG) as part of their effort to complete the Federal Energy Regulatory Commission's (FERC) relicensing process for the Potter Valley Project (PVP) P-77, as well as our disagreements with, and requests for amendments of the Study Plans proposed by the PAG group.

FOER was founded in 1994 to secure the protection and recovery of the Wild and Scenic Eel River, particularly the fisheries which are the keystone of the watershed's ecosystems. FOER and its supporters use and enjoy the Eel River in the areas surrounding the Project and in Project-affected areas for recreational, aesthetic, and educational purposes, including but not limited to fishing, viewing, and enjoyment of the outdoors. Operations of the PVP under a new license could adversely affect those interests. FOER has actively participated in the existing license proceedings, and also attended the Scoping Meetings for this matter.

Seeking to restore the Eel River's ecological function and health, FOER has opposed the interbasin transfer of Eel River water to the Russian River, and sought removal of both Scott and Cape Horn Dams, the PVP's dams on the upper mainstem Eel River. The declining health of Eel River salmon and steelhead runs over the last several decades has only increased the urgency of the need to restore access to the habitat above Scott Dam. We supplied this information to FERC in our first comments on PG&E's relicensing. We see no evidence FERC has taken notice of the urgency demanded by the potential extinction of Eel River fisheries.

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The fish ladder at Cape Horn Dam (generally known as the Van Arsdale Fish Station) is the longest and highest ladder in the state of California. It has been modified many times over its century of existence. As we write, contractors for PG&E continue to work to install new metal doors on the Fish Hotel structure. Chinook will be attempting to move up the Van Arsdale ladder as soon as rains permit. With significant atmospheric river storms projected for the North Coast as soon as the date of this letter – Friday, November 13 – it is very likely that construction activities will result in another obstruction to salmonid passage at the Van Arsdale site. If PG&E has consulted with NMFS regarding the impacts of their door installation on the chinook run, we are not aware of it.

FOER requests that each of the proposed study plans which includes analysis of Scott Dam removal be amended to include a parallel analysis of Cape Horn Dam removal. Most essentially, this would include SE 1, socioeconomic, and AQ 7, fish passage. Cape Horn Dam removal analysis in both studies would closely parallel the analysis of Scott Dam removal already described in detail in both study plans. The issues, methods, and relevant questions for Cape Horn Dam closely track those already described for Scott Dam.

As detailed below, SE 1 should also be amended to require analysis of the potential public health impacts of the extremely high mercury levels found in fish in the Lake Pillsbury reservoir, as well as to clarify that its analysis of economic impacts will be based on the fantasy that PG&E can somehow be compelled to keep Scott Dam standing and operating even though it cannot relicense the dam.

Additionally, a separate study plan parallel to AQ 12, Scott Dam removal, should be required to analyze all aspects of Cape Horn Dam removal. Again, the issues, methods, and relevant questions for Cape Horn Dam removal are essentially identical to those already described for Scott Dam in AQ 12.

### **Project Background**

The existing Potter Valley Project, in Lake and Mendocino Counties, California, includes Scott and Cape Horn Dams and the Pillsbury and Van Arsdale Reservoirs behind them on the Eel River, a powerhouse at the head of the East Fork Russian River, and tunnels and penstocks connecting the powerhouse to the Van Arsdale Reservoir. The project occupies lands owned by PG&E and national forest system lands owned by the American people and administered by the Mendocino National Forest. However, these assertions of title do not reflect the ancient tenure of native peoples in the project area, nor the interests of their descendants in their ancestors' homes, graves, and other important sites.

On April 6, 2017, Pacific Gas and Electric Company (PG&E) filed with FERC a Notice of Intent (NOI) and a Pre-Application Document (PAD) and initiated the pre-filing steps of the Integrated Licensing Process (ILP) to relicense the Potter Valley Project (PVP; FERC No. 77). The PVP is a relatively tiny hydroelectric facility, which has not produced its rated capacity of 9.959-megawatt (MW) for decades. Demand for the PVP's relatively expensive hydroelectric power has plummeted, and is not projected to recover given the growth in less expensive renewables including wind and photovoltaic installations.

The last license granted by FERC to PG&E was found by the National Marine Fisheries Service to so gravely threaten the survival of Eel River salmon and steelhead that it resulted in a finding that it would jeopardize – lead to the extinction – of our fisheries if implemented as approved. Furthermore, the 2002 NMFS Biological Opinion analyzing PVP operations which led to that jeopardy finding did not even take into account evidence that the construction and operation of the Cape Horn Dam and the Van Arsdale fishway cause significant take of listed species.

When PG&E proposed to relicense the PVP as it stands in 2017, FERC declined, among other requests, to order PG&E to study: dam removal, because PG&E did not request it; potential mercury accumulation in the Pillsbury Reservoir, because that would be a dam removal study; and dam safety, because FERC refuses to consider dam safety during relicensing.

Although it had declared it would relicense the PVP in its present configuration, as outlined in the PAD, PG&E announced in the fall of 2018 that it would auction the project instead, with any buyer stepping into the utility's shoes in the relicensing process already underway.

PG&E was at that time on probation for gross safety violations which had led to the explosion of a gas main in San Bruno. Then the utility's poorly maintained powerlines failed and caused multiple major wildfires, including one that destroyed the Sierra mountain town of Paradise. PG&E had spent the previous decade resisting efforts at the California Public Utility Commission to require it to do more to keep its transmission lines from causing fires.<sup>1</sup> (PG&E ultimately pled guilty to criminal negligence charges stemming from some of these wildfires.)

PG&E sought shelter in federal bankruptcy court from the resulting liability. The utility cancelled its planned sale of the PVP. On January 25, 2019, PG&E filed a notice of withdrawal of its NOI and PAD, discontinuing its efforts to relicense the project. The withdrawal became effective on February 11, 2019. Having withdrawn its NOI, PG&E is no longer eligible to relicense the PVP.

On March 1, 2019, FERC issued a Notice Soliciting Applications for interested applicants, other than PG&E, to file NOIs, PADs, and requests to complete the pre-filing stages of the licensing process. If no other potential applicant had come forward by April 14, 2020, PG&E would have been required to file a schedule for the filing of a surrender application for the project.

A single NOI was filed, however. On June 28, 2019, the five entities joined as the Planning Agreement Group parties filed a Notice of Intent to file an application for a new license for the Potter Valley Project consistent with the Two Basin Solution framework articulated by

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<sup>1</sup> See *"Deflect, Delay, Defer:" Decade of Pacific Gas & Electric Wildfire Safety Pushback Preceded Disasters*. Frontline, August 18, 2020. <https://www.pbs.org/wgbh/frontline/article/pge-california-wildfire-safety-pushback/>

Rep. Jared Huffman. On August 1, 2019, FERC issued a public notice of the PAG parties' intent to continue the ILP initiated by PG&E and file a final license application by April 14, 2022.

On May 13, 2020, the Planning Agreement Group filed a Feasibility Study Report (FSR) for a project they present as consistent with the Two Basin Principles. The FSR includes information on a Regional Entity proposed to purchase the project from PG&E, and to operate and maintain it. The PAG parties' proposed changes to project facilities and operations include, but are not limited to, removal of Scott Dam, increasing diversion capacity at the Van Arsdale Diversion, providing improved fish passage at Cape Horn Dam, and modifications to the Commission's previously approved study plans.

## **Regulatory Background**

### **FERC's Klamath Decision Sets New Standards Exclusive to Dam Removal Projects**

In general, FERC has failed to provide effective mechanisms to resolve dam removal questions. Instead, the agency has suggested stakeholders work out their own solutions and bring them to FERC. The utilities which own hydroelectric dams are well aware they face significant potential liability for dam removal. So the tribes, fishing organizations, citizens' groups and conservationists who seek dam removal on both the Klamath and the Eel have sought solutions centered on offering utilities relief from that liability, in exchange for their agreement to support dam removal. Under the Klamath dam arrangement, the Renewal Corporation proposed to purchase four dams from PacifiCorp, secure the license, and remove the dams. Under the PAG Parties' proposal for the Eel River dams, the proposed Regional Entity intended to do the same with PG&E and its PVP.

But then FERC changed the rules for dam removal projects, announcing in its Klamath decision of July 16, 2020 ("ORDER APPROVING PARTIAL TRANSFER OF LICENSE, LIFTING STAY OF ORDER AMENDING LICENSE, AND DENYING MOTION FOR CLARIFICATION AND MOTION TO DISMISS") two new barriers to any dam removal proposal. The first was a policy that appears to formalize the agency's institutional preference to avoid dam removal.

***"Transferring a project to a newly formed entity for the sole purpose of decommissioning and dam removal raises unique public interest concerns, specifically whether the transferee will have the legal, technical, and financial capacity to safely remove project facilities and adequately restore project lands. If a project is transferred to an entity that lacks the financial and operational capacity to complete these measures, and if the Commission can no longer hold the former licensee liable, the responsibility to decommission a project or restore project lands may fall to federal or state authorities. To prevent this, Commission staff applies more scrutiny to transfer applications where the transferee intends to surrender and decommission the project."*** (pp 25-26, emphasis added)

This heightened burden of proof for dam removal is an arbitrary barrier without basis in law, regulation, or even substantial evidence. It is far from clear why "(t)ransferring a project to a newly formed entity for the sole purpose of decommissioning and dam removal raises unique public interest concerns." Under FERC regulations, any potential licensee must "have the legal, technical, and financial capacity to safely remove project facilities and

adequately restore project lands,” because any licensee is liable for surrender and decommissioning of a project following license expiration.

FERC provides no rationale why a transfer “for the sole purpose of decommissioning and dam removal” should raise such “public interest concerns.” The proposed transfer of projects which cause severe environmental impacts, lose money, and present significant safety risks might reasonably be subject to more scrutiny, because those are the circumstances in which it is most likely that a new owner’s lack of “legal, technical, and financial capacity to safely remove project facilities and adequately restore project lands” will result in “the responsibility to decommission a project or restore project lands may fall to federal or state authorities.”

In the Klamath context, FERC was presented with a transfer request which demonstrated, far beyond what most licensees ever provide, a comprehensive, thoroughly documented, and fully funded plan to ensure that decommissioning and dam removal would be accomplished with the resources at hand. Nonetheless, FERC applied “more than usual scrutiny” to the Renewal Corporation’s application “to prevent” “the responsibility to decommission a project or restore project lands ... fall[ing] to federal or state authorities,” simply “(b)ecause the Renewal Corporation intends to decommission and remove the Lower Klamath Project.”

Finding the Klamath Renewal Corporation to have surmounted this heightened regulatory barrier, FERC then announced an additional policy peculiar to dam removal which appears to add regulatory suspenders to the belt it just applied. FERC apparently has adopted a policy that will require the utility owners of hydroelectric dams to remain co-licensees until dam removal is completed:

*“... (W)e find that **the public interest would be best served by approving a partial transfer of the license and requiring PacifiCorp to remain on as a co-licensee ... Moreover, as a matter of policy, we find that it would be inappropriate for PacifiCorp, which has been the licensee for the Klamath Project since 1988, to relieve itself of all liability associated with the proposed decommissioning should it be approved.**” (page 27, emphasis added.)*

This unnecessary and capricious ruling only makes it even more difficult to consummate the Klamath dam removal agreement, which a host of stakeholders have achieved through tremendous effort and in spite of FERC’s lack of support for proactive solutions. FERC’s policy ruling presents a new barrier, at best delaying dam removal that has been agreed to by all the relevant stakeholders and which is a matter of immediate and grave urgency for the fisheries dependent tribes of the lower Klamath.

Presented with a negotiated solution to a problem it refused even to squarely recognize, FERC has imposed on the utility a condition – potential liability should the cost of dam removal exceed the funds secured – which appears to contradict PacifiCorp’s contractual agreement to limit its liability after ownership of the four Klamath dams was transferred. If this policy is carried forward in other proceedings, FERC effectively will have changed the

rules, not just for Klamath stakeholders, but for all parties affected by all the federally licensed dams which face relicensing.

#### The Planning Agreement Group's Proposal Is Untenable Under FERC's Klamath Decision

As we noted in our comments on FERC's SD3, the Planning Agreement Group's proposals to have the Regional Entity purchase the PVP from PG&E prior to dam removal, and their assumption that PG&E will bear the costs of relicensing, no longer appear tenable under FERC's Klamath ruling. The lack of funding means that no study plans can be conducted in 2020, putting the relicensing at least another year behind schedule.

If FERC were to follow the same path laid out in the Klamath decision, PG&E may be obligated to remain a co-licensee if either or both of the PVP dams are to be removed, as any Two Basin Solution would require. The proposed Regional Entity could not assume PG&E's liabilities, and could take ownership of the PVP only after dam removal had been completed. Certainly, if "... as a matter of policy ... it would be inappropriate for PacifiCorp, which has been the licensee for the Klamath Project since 1988, to relieve itself of all liability associated with the proposed decommissioning should it be approved," as FERC just ruled, then PG&E, which owned the Potter Valley Project for fifty years before PacifiCorp put its name on the Klamath Project license, cannot be relieved of its liability for decommissioning of the PVP dams.

The problem is not just a matter of licensing and liability. If PG&E must remain a co-licensee, and bear liability for dam removal, any incentive for the utility to fund the Planning Agreement Group's relicensing application appears sharply diminished – particularly given that PG&E cannot itself receive a future license for the PVP, having withdrawn its NOI. In fact, given that no other party has applied to continue PG&E's relicensing process, if the PAG and PG&E cannot reach an agreement to complete the current relicensing in the next several months, it would appear that the requisite Study Plans will not be completed in time for a draft license application to be prepared by the April 2022 expiration of PG&E's license. If FERC is aware of any progress toward such an agreement, many stakeholders would be very glad to hear it. Unfortunately, SD3 offered no guidance to the PAG on how best to proceed if PG&E must remain a co-licensee through dam decommissioning and removal.

#### **If Any Dams Should Be Removed, Scott Dam Should Be**

As we have noted previously, the PVP is not an ordinary dam relicensing project. PG&E has ended its relicensing efforts. Without even beginning to consider its environmental impacts or the potential costs of necessary mitigations, the project is not even close to economically sustainable as a hydroelectric project. FERC's policies are clear that the agency may not require a dam owner to continue to operate a project which it has chosen not to relicense. In that situation, which PG&E now faces, FERC may only impose conditions on the utility's surrender of the license.

Second, only the Planning Agreement Group proposed a way to relicense the project, albeit in a dramatically different form. As noted, FERC's Klamath decision appears to render the

PAG parties' initial proposal a dead letter. Thus, unless the PAG both dramatically restructure their plan, and secure significant financial support in the next few months, relicensing of the PVP does not appear practical. Again, PG&E cannot relicense, and FERC cannot force the utility to continue to operate after the current license expires, except as necessary to comply with surrender proceedings.

Further, Scott Dam faces truly significant dam safety issues. PG&E's long history of failure to address very serious public safety issues is hardly reassuring in this respect, but FERC appears to have taken no notice of this history in its actions to date. As well, both Scott and Cape Horn Dams are causing harms to ESA-listed fisheries which demand immediate action, and which are certain to implicate provisions of the Federal Power Act requiring effective fish passage.

On October 14, 2020, the Planning Agreement Group parties filed with FERC their Initial Study Report Meeting Summary. The document includes a few notes regarding proposed changes to previously proposed Study Plans. In our comments on both the FSR and to FERC's SD3, FOER noted that the proposed project was not complete, and the proposed Study Plans would not be adequate. We noted in some detail the need to analyze removal of Cape Horn Dam, consistent with the Two Basin Principles. The ISR meeting summary includes a summary of comments and responses.

### **No Action Alternative**

As we noted in our comments on SD3, FERC's process of environmental analysis under NEPA is fundamentally flawed, in that it takes the status quo as the No Action Alternative. The California State Water Resources Control Board (State Water Board) will require an analysis of the project under the California Environmental Quality Act (CEQA), in which a true No Project alternative must be evaluated. As well, FERC will have to consider Cape Horn Dam removal as a feasible alternative under NEPA. It makes very little sense to refuse to analyze the question at this point – unless the purpose of the refusal is to make it clear that Cape Horn Dam removal is off limits, regardless of the facts regarding fish passage. This is not the deal we agreed to when we agreed to support a continued diversion of Eel River water to the Russian River.

It also makes no sense to conduct a study, as SE 1 is proposed, which will analyze the proposed project against the *status quo ante*. In the wake of PG&E's withdrawal of its relicensing application, there is no proposal, let alone any feasible proposal, to keep Scott Dam in place. Such an economic analysis will of necessity presume that PG&E can be compelled to keep maintaining Scott Dam indefinitely – when all available evidence indicates the opposite is true. An analysis that counts benefits but ignores costs is unlikely to prove informative. SE 1 should provide a full account of all expenditures by PG&E necessary to maintain the status quo, and explain as clearly as possible that its basic assumption that the status quo will continue is nothing but a fantasy.

### **Public Health Impacts from Mercury in Lake Pillsbury Reservoir Fish**

In the ISR meeting, we sought clarification as to how the PAG are proposing to analyze the consequences for public health of the extremely high level of mercury found in fish in the Lake Pillsbury Reservoir behind Scott Dam:

*(FOER): Given that (according to PGE's PAD) "tissue sampling results for fish from Lake Pillsbury showed high mercury concentrations, averaging 1.31 parts per million (ppm) in 350 millimeter (mm) largemouth bass (Micropterus salmoides), and the highest concentration for an individual fish (4.08 ppm in a 559 mm largemouth bass) in statewide sampling (Davis et al. 2009)," how do you assess the economic impact of the public health threat from mercury in Lake Pillsbury fish?*

*Study SE 1 – Socioeconomics will consider the recreation value of fish in Lake Pillsbury. The economic impacts of mercury concentrations in fish in lake Pillsbury are not currently included in Study SE 1 – Socioeconomics and the NOI Parties are not aware of subsistence fishing on Lake Pillsbury or that any current restrictions on consumption of fish from Lake Pillsbury have significant economic impacts.*

The response misses the point of the question. It appears to deny that there are or could be public health impacts from consumption of such high levels of mercury. While subsistence fishing would obviously present an even more dangerous scenario, consumption of fish with such high levels of mercury by, e.g., pregnant women and young children is clearly quite dangerous given mercury's well-documented impacts as a neurotoxin and developmental hazard.

Has PG&E, FERC, the Forest Service or any other party taken any steps to provide information to the public about high levels of mercury, especially in older, larger Lake Pillsbury Reservoir fish? To prevent consumption of fish by at-risk populations? Absent such information, people are much more likely to consume fish that could be hazardous.

Analyzing the economic effects *on fishing* is not the same as analyzing the *potential public health effects* of this powerful neurotoxin. The study plan should be revised to include consideration of potential human health effects from methylmercury consumption, including consequent economic impacts, not just impacts on fishing and related activities.

### **The Two Basin Principles Require A Higher Standard of Fish Passage**

Rep. Jared Huffman convened a stakeholder group to consider the possibility of a solution to PVP relicensing that would maintain a diversion from the Eel to the Russian during the wet months but allow dam removal to restore fish passage to the upper Eel River basin. The stakeholders agreed to a set of Two Basin Principles that would guide any resolution.

For our part, we want to be very clear that FOER agreed to the Two Basin Principles on the explicit understanding that our common purpose was to secure a mutually workable resolution as quickly as possible, in view of the protracted delays to which other FERC licensing efforts have been subjected. We are willing to agree to a continued diversion of Eel River water to the Russian in order to secure a rapid resolution of the fish passage issues that are now critical to the survival and recovery of Eel River fisheries. We made that

commitment in the understanding that implementing such a project relatively quickly will require broad and enthusiastic support from key stakeholders across both the Russian and Eel River basins.

We are aware that the Two Basin Principles are a private agreement, of little obvious concern to FERC as it decides what studies should be conducted by the Planning Agreement Group. But to the extent the PAG's project depends on our collective support, it must reflect those principles.

Notably, these Two Basin Principles include as a goal, *coequal* with maintaining water diversions to the Russian, to:

*Improve fish passage and habitat on the Eel River **sufficient to support recovery of naturally reproducing, self-sustaining and harvestable native anadromous fish populations including migratory access upstream and downstream at current project dam locations;**(emphasis added)*

This explicit standard is both broader and more stringent than NMFS' volitional fish passage requirement for listed salmonids in several respects. It is not limited to ESA-listed salmonids, but includes lamprey, which are "native anadromous fish." It requires passage "sufficient to support recovery ... of harvestable ... populations," a benchmark far higher than the Endangered Species Act's recovery delisting requirement. And it clearly requires "migratory access upstream and downstream at current project dam locations," regardless of any uncertainty about the applicability of the Federal Power Act's Section 18 fish passage requirements to surrendered and/or decommissioned dams.

The Two Basin Principles also clearly state that we agreed to:

*Ensure that implementation of fish passage improvements in the Eel River basin happens **in parallel and ideally simultaneously** with water supply solutions in the Russian River basin. (emphasis added)*

The Huffman Ad Hoc group agreed to seek a Two Basin Solution under those principles, and set about doing much of the necessarily technical work FERC had eschewed. These included an analysis of Russian River water supplies by one technical working group, and an analysis of Scott Dam fish passage alternatives by another.

The working groups of experts convened by the ad hoc committee have secured informed consensus on key questions, including water supply, fish passage, sediment contamination, and dam removal. Just three years ago, FERC refused to require PG&E to address these issues. FERC appears to be repeating this mistake by refusing to require the PAG to analyze Cape Horn Dam removal in its proposed Study Plans.

The water supply working group found that Russian River water needs can be met with a wet-season diversion from the Eel River. The fish passage working group found that while fish ladders are technically feasible at Scott Dam, they would be extremely expensive to

construct and operate, would not resolve the serious challenges that the Lake Pillsbury reservoir would present especially to juvenile salmonids, and would significantly reduce the amount of water available for diversion to the Russian River, obviating the primary putative benefit of keeping Scott Dam in place. Thus, the working group concluded that removal of Scott Dam is the best option for fish passage.

Further work is needed to clarify how a sustainable diversion from the Eel to the Russian can best be constructed and operated, and how fish passage consistent with the promises of the Two Basin Principles will be provided at Cape Horn Dam. The Planning Agreement Group further analyzed these issues in their Feasibility Study. However, because this document still has not been released to the public and to partner agencies, its utility remains unfortunately limited.

**Refusal to analyze Cape Horn Dam Removal is a breach of the Two Basin Principles**

The benefits to fisheries of access to the habitat that has been locked behind Scott Dam would be sharply diminished if the problems presented by fish passage at Cape Horn Dam are not solved as well. Again, under the Two Basin Principles, Cape Horn Dam removal will be necessary unless fish passage can be provided at the Van Arsdale fishway “sufficient to support recovery of naturally reproducing, self-sustaining and harvestable native anadromous fish populations including migratory access upstream and downstream at current project dam locations.” Under federal law, such passage must be at least volitional for species listed under the ESA.

However, despite a series of reconstruction efforts over the last century, volitional passage has not yet been provided, and it appears increasingly likely that the location and construction of Cape Horn Dam are such that even volitional passage will be extraordinarily difficult to secure at that site.

As FOER explained in our comments on the FSR, we still need an integrated analysis of the Van Arsdale diversion works, the Cape Horn Dam, and the Van Arsdale fishway together. These questions are not afterthoughts which can be resolved following preparation of a draft license, but central issues that need to be fully analyzed and addressed in a comprehensive fashion if any future version of the PVP is to function sustainably for Eel River fisheries as well as Russian River water supplies.

The Planning Agreement Group’s FSR fails to acknowledge this fact. This failure, and their refusal to analyze Cape Horn Dam removal in their proposed Study Plans, are flatly inconsistent with the Two Basin Principles.

Evidence continues to accumulate that take of listed species in violation of the Endangered Species Act is occurring at the Van Arsdale fishway. FOER provided evidence to FERC that the fishway has been blocked repeatedly during steelhead migration by sediment and debris carried by high flows. FERC misclassified that problem as “inadequate maintenance” rather than the systemic problem it clearly is. The fact that PG&E is now rushing to install

doors apparently intended to keep sediment and debris out of the Fish Hotel structure on the fish ladder makes it very clear that the problem is not “inadequate maintenance.”

As well, it is clear that predation – especially by otters – in the Van Arsdale fishway presents very serious problems both in terms of impacts on fish passage and the difficulty of preventing those impacts. In an exchange with NMFS staff, the ISR misstates those predation issues as being associated with predatory fish:

*(NMFS): Will the analysis of alternatives to improve passage at Cape Horn Dam consider the predation risks associated with different design options?*

*Yes, the analysis of fish passage in Study AQ 7 – Fish Passage that will inform Cape Horn Dam modification will be closely coordinated between the predatory fish technical working group and fish passage working group. In addition, to the extent fish entrainment into the area of the diversion will cause migration delay, that will be considered.*

As we have repeatedly emphasized, the chinook salmon and steelhead of the upper Eel River face extinction in the near term. Their actual peril is much greater than their listing as Threatened under the Endangered Species Act would suggest. The state of California’s recognition of North Coast summer steelhead as an Endangered population under the state’s Endangered Species Act underscores the fact that even small impacts – like otter predation in the fishway, or a two-week delay in the spring migration – can catastrophically affect the migration and reproduction of these invaluable creatures.

At this point, the technical burden of showing that passage consistent with the Two Basin Principles can be provided at the Cape Horn Dam location should be borne by those who would prefer to keep Cape Horn Dam in place. Thus, Cape Horn Dam removal must be analyzed to the extent necessary to provide for dam removal, if dam removal is required to achieve the Two Basin Principles. Cape Horn Dam removal and replacement of the diversion works are entirely consistent with a Two Basin Solution that will prove resilient and sustainable.

Nonetheless, both the Planning Agreement Group’s Feasibility Study Report and FERC’s SD3 reject our continued requests to analyze Cape Horn Dam removal. Similarly, the Initial Study Report makes it clear that the PAG are flatly refusing to study Cape Horn Dam removal:

*At this time, the NOI Parties are not proposing to remove Cape Horn Dam. They have included consideration of fish passage modifications at the dam to improve upstream and downstream fish passage. Modifications to the dam will also be considered relative to NMFS and CDFW fish passage design criteria. The intent is to develop upstream and downstream fish passage that meets NMFS and CDFW fish passage criteria at Cape Horn Dam.*

The PAG and FERC both appear to be proceeding on the assumption that the Van Arsdale fish ladder can, after a century of failed attempts, finally be sufficiently modified to provide either the volitional passage that NMFS will require under the Federal Power Act, or the still greater degree of passage that the PAG have agreed to under the Two Basin Principles, without the need to remove Cape Horn Dam. Neither the PAG nor FERC have provided evidence that modifications to the Van Arsdale fish ladder alone will provide adequate fish passage under either standard. Even if it is possible to rebuild the Van Arsdale ladder as the PAG appear to believe, the question of cost-effectiveness remains.

As the PAG noted in the ISR, in response to a query from the Mendocino Farm Bureau (which opposes Scott Dam removal and seeks to change the project to retain Scott Dam), ***Relicensing studies are intended to collect any information that is not otherwise available (i.e., close a data gap) so that the potential effects of the proposed Project can be assessed and to help inform proposed conditions to be included in a new license. An applicant for new license, such as the PAG Parties, may change its proposed Project up until it files its final application for new license, and has the opportunity to amend its application until FERC issues its Ready for Environmental Analysis notice. FERC, during its National Environmental Protection Act (NEPA) analysis that includes soliciting input from agencies, tribes, and other stakeholders, may modify the applicant's proposed Project and will include in its NEPA document a "FERC staff recommendation".*** (emphasis added)

Clearly, the PAG may define their project as including Scott Dam removal, yet still request a study plan analyzing Cape Horn Dam removal. Such a study is necessary to fill the data gaps which clearly exist concerning the costs and consequences of either removal or modification of Cape Horn Dam. Indeed, absent such an analysis it would appear impossible to fully evaluate the passage options at the nexus of Cape Horn Dam and the Van Arsdale fish ladder. Because the diversion works are just upstream from Cape Horn, these questions are also directly implicated in the still-unresolved question as to what diversion works might be more sustainable than the current installation. In sum, analysis of Cape Horn Dam removal is an indispensable piece of the larger analysis that must be conducted before decisions can be made about whether and how to move forward with the proposed project. Without an analysis of Cape Horn Dam removal, it will not be possible to fully specify the license conditions necessary to secure adequate fish passage.

Again, we note that the Two Basin Principles incorporated in the Planning Agreement Group include a commitment to "(e)nsure that implementation of fish passage improvements in the Eel River basin happens in parallel and ideally simultaneously with water supply solutions in the Russian River basin." Partial or incremental fish passage improvements at Cape Horn Dam are not consistent with the agreement. Adequate fish passage is a coequal goal with a continued diversion.

As noted in our comments on the FSR, Cape Horn Dam removal must be studied in all of the same ways that Scott Dam removal needs to be analyzed prior to removal. Of particular importance is estimating the cost of removal, and if necessary to provide an alternative structure to permit continued diversion during the wet season. Without reliable cost

estimates, we cannot meaningfully compare the various options for fish passage and water diversion.

Under federal law, unless effective fish passage that does not subject ESA-listed salmon and steelhead to take can be designed and implemented more cheaply than Cape Horn Dam can be removed and an alternative diversion mechanism provided, Cape Horn Dam must and will be removed. We might as well get started on the necessary technical work.

### **Conclusion**

The PAG parties' proposed project faces extremely serious challenges. It has no funding for the proposed study plans and the remainder of the relicensing effort. Relicensing is already a year behind schedule because of PG&E's delays. But the refusal to analyze Cape Horn Dam removal may now be the greatest obstacle to realization of a Two Basin Solution.

The PAG parties' refusal to analyze Cape Horn Dam removal in the study plans undermines the broad stakeholder agreement on the Two Basin Principles under which the proposed project nominally proceeds. We have agreed to support continued diversion of Eel River waters to the Russian River in return for a rapid resolution of relicensing which provides truly adequate fish passage at both dam sites and a sustainable method of diversion.

It appears at least some members of the Planning Agreement Group do not wish to uphold that agreement. FOER will vigorously oppose any proposed project that fails to provide adequate fish passage at both Cape Horn and Scott Dams as provided by the Two Basin Principles.

If the path outlined in the FSR is not tenable under FERC's new framework for dam removal, the relicensing process should not be delayed. Indeed, PG&E's license to operate the PVP expires in April of 2022 as a matter of law.

Assuming a deal between the Planning Agreement Group parties and PG&E is not in the offing, the best way forward would appear to be for the PAG to withdraw its relicensing application. There would seem little purpose in delay if the relicensing deadline could not be met. Indeed, such delay would be contrary to the purpose of the Two Basin Principles, to achieve a rapid resolution of the crisis the Eel River Dams are creating. FOER will not support stringing this process along without resolution of the urgent questions at hand.

Once the PAG withdraws its relicensing application, FERC would direct PG&E to begin the surrender process for the PVP. The Planning Agreement Group can and should seek consideration of modifications to the PVP consistent with the Two Basin Principles as a settlement with PG&E in that process. But full decommissioning and removal of all PVP facilities will need to be considered as well. Such an analysis can help to establish an equitable value for the portions of the PVP which may be necessary to continue a diversion to the Russian River. The PAG can maintain a diversion as a FERC-licensed hydroelectric facility or not, as economics dictate. But as FERC's Klamath decision now appears to require, PG&E will remain a co-licensee and will continue to bear liability for dam removal.

FOER remains hopeful that a solution in keeping with the Two Basin Principles can yet be achieved. To that end, we are clear in our understanding that we must achieve a solution which provides Eel River fisheries the unimpeded passage at both Eel River dam sites that is so urgently necessary.

Thank you for your careful consideration of these comments.

Sincerely,

s/  
Scott Greacen  
Conservation Director

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas & Electric Company  
Potter Valley Project

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Project No. P-77-298

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served, by first class mail or electronic mail, a letter to Secretary Bose, Federal Energy Regulatory Commission, containing Friends of the Eel River's comments on the Initial Study Report, Study Plan Disagreements and Requests for Amendments, Potter Valley Project, P-77-298. This Certificate of Service is served upon each person designated on the official P-77-298 Service List compiled by the Commission in the above-captioned proceedings.

Dated this 13th day of November, 2020.



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David Weibel  
Legal Secretary  
Shute, Mihaly & Weinberger LLP