

SHUTE MIHALY  
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102  
T: (415) 552-7272 F: (415) 552-5816  
www.smwlaw.com

KEVIN P. BUNDY  
Attorney  
bundy@smwlaw.com

March 22, 2021

**Certified Mail Return Receipt Requested**

Kimberly Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Gina M. Raimondo  
Secretary  
U.S. Department of Commerce  
888 First Street, NE  
Washington, DC 20426  
E-Mail: secyraimondo@doc.gov

Pacific Gas and Electric Company  
Brian M. Wong  
Registered Agent for Service of Process  
77 Beale Street  
San Francisco, CA 94105

Re: Notice of Intent to Sue for Violation of Federal Endangered Species Act (16 U.S.C. § 1540(g)): Potter Valley Hydroelectric Project; Cape Horn Dam Fishway Winter Operation Plan

Dear Secretary Bose, Secretary Raimondo, and Mr. Wong:

This firm represents Friends of the Eel River with regard to ensuring that the Federal Energy Regulatory Commission (“FERC”), National Marine Fisheries Service (“NMFS”), and Pacific Gas & Electric Company (“PG&E”) comply with the Endangered Species Act (“ESA”) in their actions taken at the Cape Horn Dam and fishway facilities on the Eel River in Northern California. This letter constitutes formal 60-day notice of intent to initiate litigation under the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

We are writing on behalf of Friends of the Eel River to request that you take immediate action to remedy FERC’s and PG&E’s past and ongoing violations of the ESA. The ESA violations that are the subject of this notice letter are described in detail in Friends of the Eel River’s Motion to Intervene and Request for Rehearing (“Rehearing

Kimberly Bose  
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Request”), which is enclosed with this notice and incorporated by reference as if fully set forth herein.

As described in the Rehearing Request, FERC and/or PG&E failed to initiate or reinstate consultation with NMFS pursuant to Section 7 of the ESA prior to FERC’s approval of a Winter Operation Plan for recent modifications to the Cape Horn Dam fishway. *See* Order Modifying and Approving Fish Passage Facility Winter Operation Plan (“Order”), 174 F.E.R.C. ¶ 62,057 (January 28, 2021). As a result of and in addition to these failures, the Winter Operation Plan may be causing unauthorized take of listed salmonid species in violation of Section 9 of the ESA.

As of the date of this letter, FERC has not ruled on the Rehearing Request. The purpose of this letter is therefore to notify you that if all legal violations detailed in the Rehearing Request are not remedied within the next 60 days, Friends of the Eel River intends to file suit in federal court to enforce the ESA.

#### **IDENTITY OF ORGANIZATION GIVING NOTICE**

The name, address and phone number of the organization giving notice of intent to sue under the ESA is:

Friends of the Eel River  
PO Box 4945  
Arcata, CA 95518  
Tel: (707) 798-6345

#### **COUNSEL FOR ORGANIZATION GIVING NOTICE**

Counsel for the party giving notice is:

Kevin P. Bundy, Attorney  
Shute, Mihaly & Weinberger LLP  
396 Hayes Street  
San Francisco, CA 94102  
[bundy@smwlaw.com](mailto:bundy@smwlaw.com)  
Tel: (415) 552-7272

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Gina M. Raimondo  
Pacific Gas and Electric Company  
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Thank you for your prompt attention. Please contact me should you wish to discuss this matter further.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in black ink, appearing to read "Kevin P. Bundy", written over a light blue horizontal line.

Kevin P. Bundy

Encl.: Friends of the Eel River's Motion to Intervene; Request for Rehearing

1352997.1

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

In Re: Order Modifying and Approving Fish  
Passage Facility Winter Operation Plan;  
Potter Valley Hydroelectric Project

FERC Project No. 77-302

**FRIENDS OF THE EEL RIVER'S MOTION TO INTERVENE;  
REQUEST FOR REHEARING**

KEVIN P. BUNDY  
SHUTE, MIHALY & WEINBERGER LLP  
396 Hayes Street  
San Francisco, California 94102  
Telephone: (415) 552-7272  
Facsimile: (415) 552-5816  
bundy@smwlaw.com  
Attorneys for Friends of the Eel River

## **MOTION TO INTERVENE; REQUEST FOR REHEARING**

Pursuant to 18 C.F.R. sections 385.214 and 385.713, Friends of the Eel River (“FOER”) hereby moves to intervene and requests rehearing in the above-referenced matter. Commission Rule 214 allows for the filing of motions for intervention upon a showing of (1) the position taken by the movant and the basis in fact and law for that position; and (2) the movant’s interest in the matter. 18 C.F.R. § 385.214(b)(1)-(2). Commission Rule 713 requires that a request for rehearing state concisely the alleged error in the final order, include a statement of issues, and set forth the matters relied upon by the party requesting rehearing. 18 C.F.R. § 385.713(c)(1)-(3).

By way of this Motion to Intervene and Request for Rehearing, FOER seeks rehearing of the Commission’s January 28, 2021 Order Modifying and Approving Fish Passage Facility Winter Operation Plan (“Order”), 174 F.E.R.C. ¶ 62,057. The Order authorizes operation of a series of physical modifications to the fish passage facility at Cape Horn Dam, part of the Potter Valley Hydroelectric Project (FERC Project No. P-77).

As set forth more fully below, the Order and Winter Operation Plan may affect chinook salmon and steelhead trout in the Eel River. Both species are listed as “threatened” under the federal Endangered Species Act (“ESA”). Section 7 of the ESA requires federal agencies like the Commission to consult with federal wildlife agencies—here, the National Marine Fisheries Service (“NMFS”)—at the earliest possible opportunity to ensure their actions will not jeopardize the

continued existence of any listed species or result in the destruction or adverse modification of listed species' habitat. 16 U.S.C. § 1536(a)(2). The Commission failed to initiate (or, alternatively, to reinitiate) either formal or informal consultation with NMFS prior to issuing the Order and thus violated Section 7 of the ESA. The Commission's failure to follow Section 7's procedural requirements also threatens additional, substantive ESA violations, including violations of Section 9's prohibition against "take" of listed species.

Accordingly, FOER respectfully requests that the Commission grant its motion to intervene, grant its request for rehearing, set aside its issuance of the Order and approval of the Winter Operation Plan, and immediately initiate formal consultation with NMFS regarding the potential effects of the Winter Operation Plan on listed salmonids. FOER further requests that following consultation, the Commission order the Winter Operation Plan modified to incorporate NMFS' recommendations and to avoid adverse impacts to listed species.

To the extent the Commission declines to grant the requested relief or otherwise correct the violations detailed herein, this pleading constitutes written notice of those violations pursuant to 16 U.S.C. section 1540(g)(2).

### **MOTION TO INTERVENE**

#### **I. THE POSITION TAKEN BY FOER IN THIS PROCEEDING, AND THE BASIS IN LAW AND FACT FOR THAT POSITION (18 C.F.R. § 385.214(b)(1)).**

As more fully set forth in the Request for Rehearing below, FOER's position is that the Commission violated Section 7 of the ESA by failing to consult

with NMFS prior to issuing the Order. Because the Order and Winter Operation Plan clearly “may affect” listed salmonids, formal consultation was required. 50 C.F.R. § 402.14(a). The Commission cannot claim informal consultation rendered formal consultation unnecessary here because it also failed to initiate or undertake informal consultation; in particular, the record does not show either that the Commission made any determination that the Order is not likely to adversely affect listed species or that NMFS concurred in any such determination. 50 C.F.R. §§ 402.13(c), 402.14(b)(1). In addition, and in the alternative, the Commission failed to reinitiate consultation upon proposing to allow modifications to the operation of the fish passage facility that would have effects not considered in any previous biological opinion for the Potter Valley Project. 50 C.F.R. § 402.16(a)(3).

FOER’s motion for intervention should be granted. The Order works a material change in the plan of project development. It authorizes a plan for operation of physical modifications to the Cape Horn fish passage facility that could impede migration or otherwise directly harm listed salmonids by closing off the facility under specified conditions. Opening and closing the steel doors at the fish passage facility in accordance with the Winter Operation Plan will physically modify both the flow of water through the facility and the ability of listed fish to migrate past Cape Horn Dam. None of the adverse impacts that the Winter Operation Plan *itself* acknowledges may occur—as discussed in greater detail in the Request for Rehearing below—were examined in conjunction with the issuance of the Project license. Accordingly, the Order will have physical impacts

not previously discussed or contemplated in the Project license and should be considered “material.” *Cf. Erie Boulevard Hydropower, L.P.*, 131 F.E.R.C. ¶ 61,036, 61,225 (2010) (in license amendment context, “material” changes include those that “cause adverse environmental impacts not previously discussed in the original application”).

Even if the Order is not construed as a material change in the plan of project development, intervention should be allowed pursuant to Commission precedent permitting parties to intervene in specific aspects of ongoing proceedings in order to protect their demonstrable interests. For example, in *Central Maine Power Company*, 50 F.E.R.C. ¶ 61,131 (1990) the Commission permitted a coalition of organizations representing fishery conservation and recreational interests to intervene, and granted the coalition’s appeal, following the Commission’s approval of license amendments requiring submission of functional drawings for fish passage facilities and subsequent monitoring plans. *Id.* at 61,391-93; *see also, e.g., Kern & Tule Hydro LLC*, 174 F.E.R.C. ¶ 61,081 (2021) (allowing party representing recreational interests to intervene for purposes of commenting on plan for post-licensing construction at hydroelectric facility); *City of Tacoma, Washington*, 109 F.E.R.C. ¶ 61,318 (2004) (allowing party representing public interest to intervene and seek rehearing of public information plan).



**II. FOER's INTERESTS WILL BE DIRECTLY AFFECTED BY THE OUTCOME OF THE PROCEEDING AND ITS INTERVENTION IS IN THE PUBLIC INTEREST (18 C.F.R. § 385.214(b)(ii) & (iii)).**

FOER is a nonprofit citizens' group that advocates for policies and practices consistent with the protection and recovery of the Wild and Scenic Eel River's outstanding resource values, particularly the salmonid species protected under the federal Endangered Species Act as "threatened." Eel River salmonids, especially steelhead and chinook salmon, are affected by the operation of the Potter Valley Project dams in a variety of ways.

As detailed in the Request for Rehearing below, FOER has repeatedly raised serious concerns with the Commission regarding the inadequate design and operation of the Cape Horn Dam fish passage facility. Even if Scott Dam is eventually removed, as currently contemplated by the parties seeking to succeed to Pacific Gas & Electric Company's ("PG&E") license for this facility, the fishway at Cape Horn Dam will continue to pose a serious obstacle to upstream salmonid migration and a threat to the species' recovery. The Commission's failure to honor its clear obligations under the ESA, as set forth more fully in the Request for Rehearing below, directly and adversely affects FOER's long-standing interests in the conservation and recovery of native Eel River fisheries.

FOER's position also is in the public interest. FOER is a non-profit, tax-exempt corporation organized under the laws of California and headquartered in Eureka, California. Founded in 1998, FOER is a membership organization of thousands of concerned conservationists from Humboldt, Mendocino, Sonoma,

Marin and other counties dedicated to protecting and restoring the Eel River watershed and its dependent fish and wildlife. FOER advocates for policies and practices consistent with the protection and recovery of the Wild and Scenic Eel River's outstanding resource values, particularly the Eel River salmonid species protected under the federal Endangered Species Act. 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. FOER has actively participated in prior proceedings related to PG&E's license for operation of the Potter Valley Project. FOER continues to actively participate in the relicensing proceedings now underway, both in comments directly to FERC<sup>1</sup> and as part of the community of interests supporting the current relicensing proposal, as an expression of the intent of the ad-hoc group convened by Rep. Jared Huffman to seek a "Two-Basin Solution" to long-standing conflicts over diversions of Eel River water and impediments to salmonid recovery in the Eel River Watershed.

FOER's position is not adequately represented by current parties to the proceeding. No organization dedicated to the protection of fishery resources in the Eel River has thus far intervened in this aspect of the proceeding. In any event, FOER offers a unique perspective regarding the resources in the Eel River

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<sup>1</sup> See, e.g., Friends of the Eel River, Comments on Initial Study Report; Study Plan Disagreements and Requests for Amendments (Nov. 13, 2020), Doc. Accession No. 20201113-5201.

watershed. Therefore, FOER's interests represent issues that are not presented by other parties, but should be considered by the Commission.

### **III. CONTACT INFORMATION**

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

Kevin P. Bundy  
Shute, Mihaly & Weinberger LLP  
396 Hayes Street  
San Francisco, CA 94102  
Telephone: (415) 552-7272  
Facsimile: (415) 552-5816  
E-mail: bundy@smwlaw.com

### **IV. CONCLUSION**

For the foregoing reasons, Friends of the Eel River respectfully requests that its Motion for Intervention be granted.

\* \* \*

### **REQUEST FOR REHEARING**

For the following reasons, FOER respectfully requests that the Commission grant rehearing of its January 28, 2021 Order Modifying and Approving Fish Passage Facility Winter Operation Plan.

#### **I. STATEMENT OF ALLEGED ERROR (18 C.F.R. § 385.713(c)(1))**

FERC failed to comply with Section 7(a)(2) of the ESA prior to issuing the Order. The ESA requires the Commission to consult with federal wildlife agencies before taking any "action" that "may affect" listed species. 50 C.F.R. §§ 402.03, 402.14(a). The Order at issue here was an "action" under applicable law.

Moreover, it is undeniable that the Winter Operation Plan “may affect” listed species. Yet the Commission failed to engage in either formal or informal consultation as required under the ESA’s implementing regulations.

Because the Order “may affect” listed species, formal consultation was required unless informal consultation showed formal consultation was unnecessary. It is indisputable that formal consultation did not occur here. Moreover, the Commission’s failure to comply with Section 7’s procedural requirements may expose both the Commission and PG&E to liability for substantive ESA violations, including violations of Section 9’s prohibition against “take” of listed species.

Agencies may forgo formal consultation if informal consultation shows their actions are “not likely to adversely affect” listed species. *See* 50 C.F.R. § 402.13(c). However, the Commission cannot rely on the informal consultation exception here because neither FERC nor PG&E determined on the record, and obtained NMFS’ written concurrence on the record, that the Order was “not likely to adversely affect” listed species. *Id.* Finally, FERC unlawfully failed to reinstitute consultation. Reinitiation of consultation was required here because the Order authorized modifications to the operation of the Cape Horn fishway that will cause effects on listed species not considered in any prior biological opinion for the project license. *See* 50 C.F.R. § 402.16(a)(3).

## II. STATEMENT OF ISSUES

**1. Did FERC unlawfully fail to initiate either formal or informal consultation under Section 7(a)(2) of the ESA prior to issuing the Order?**

### Statutes

16 U.S.C. § 1536(a)(2)

### Regulations

50 C.F.R. § 402.03

50 C.F.R. § 402.13

50 C.F.R. § 402.14

### Court Decisions

*Karuk Tribe of California v. U.S. Forest Service* (9th Cir. 2012) 681 F.3d 1006 (en banc).

**2. Did FERC unlawfully fail to reinstitute consultation under Section 7(a)(2) of the ESA prior to issuing the Order?**

### Regulations

50 C.F.R. § 402.16(a)(3)

## III. STATEMENT REGARDING MATTERS RELIED ON BY THE PARTY REQUESTING REHEARING

All matters relied on in this Request for Rehearing were available to the Commission at the time of the final order and appear in the Commission's docket for this proceeding, with the exception of the following, which are attached as exhibits hereto:

Ex. A: Email from Andrew Anderson Re: VAFS Through 22Nov2020 (Nov. 24, 2020).

Ex. B: Memorandum from R. Wantuck and S. Thomas to R. Coey and J. Fuller, NMFS, Re: Site Visit to Cape Horn Dam, March 19, 2019 (March 22, 2019).

#### **IV. FACTUAL BACKGROUND**

##### **A. The Potter Valley Project**

The Potter Valley Project (“Project”) includes two dams, Scott and Cape Horn, spaced roughly twelve miles apart on the upper Eel River. The lower dam, Cape Horn, was finished in 1908. Just upstream, within the relatively tiny Van Arsdale reservoir, a diversion works turns water from the upper Eel River into a system of tunnels, conduits, and penstocks which lead to a powerhouse on the upper East Branch of the Russian River. These elements of the Potter Valley Project are in Mendocino County.

After the Van Arsdale reservoir behind Cape Horn Dam rapidly filled with sediment, sharply reducing its storage capacity, Scott Dam was constructed in 1920-22 to store water for release and diversion to the East Branch Russian River.<sup>2</sup> PG&E has owned and held the license to operate both Potter Valley Project dams since 1930.<sup>3</sup> Scott Dam and its Lake Pillsbury reservoir are in Lake County, where the project occupies federal lands within the Mendocino National

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<sup>2</sup> PG&E, Notice of Intent to File Application for New License and Pre-Application Document at 5-264 (April 6, 2017), Doc. Accession No. 20170406-5314 (hereafter “PAD”).

<sup>3</sup> *Id.* at 4-2.

Forest, as well as private lands owned by PG&E.<sup>4</sup> Scott Dam was constructed without any provision for fish passage.<sup>5</sup>

Though built first to supply hydroelectric power to the city of Ukiah in the era before large-distance alternating current transmission lines became feasible, by providing an abundant supply of nearly free “abandoned” water in a dry but fertile valley, the Project promoted the development of lucrative agricultural holdings in Potter Valley. For most of the 20th century, the Project operated under FERC license to maximize both electrical generation and irrigation diversions, with little regard for impacts on Eel River and its fisheries.<sup>6</sup>

Because agricultural demands for water are highest in the summer, Scott Dam releases water in the summer for diversion to Potter Valley and the East Branch Russian River. Through most of the 20th century, PG&E operated the Project so as to divert nearly all of the upper Eel River’s flow to the East Branch Russian River, often leaving the mainstem Eel River below the project dry or nearly so.

In 1983, when PG&E relicensed the Project after its initial 50-year license, the Commission issued a license which allowed PG&E to continue to divert nearly

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<sup>4</sup> *Id.* at 5-215.

<sup>5</sup> *Id.* at 1-1.

<sup>6</sup> *See id.* at 5-10 (Table 5.1-4) (showing extremely low minimum flows in Eel River below Cape Horn Dam from 1915-1978).

all of the upper Eel River's summer flows to the Russian River.<sup>7</sup> Article 40 of the 1983 License specifically addressed the fish passage facility at Cape Horn Dam:

The Licensee shall, within 6 months from the date of issuance of this license, file for Commission approval functional design drawings of the modifications to the existing upstream fish passage facility at Cape Horn Dam, to include a construction schedule and cost estimates prepared in consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the California Department of Fish and Game. Letters of comment on the proposed modifications from the above agencies shall be attached to the filing. Further, Licensee shall file "as-built" drawings with the Commission within 6 months after completion of modifications to the fish passage facility.<sup>8</sup>

By 2000, both chinook salmon and steelhead populations in the Upper Eel River had been listed as "threatened" under the federal ESA. *See* 65 Fed. Reg. 36,074 (June 7, 2000) (listing Northern California steelhead); 64 Fed. Reg. 50,394 (Sept. 16, 1999) (listing California Coastal Chinook).

Following a 10-year study of the effects of flow regimes authorized by the 1983 License, PG&E proposed license amendments to adjust water releases and flows. The Commission prepared an environmental impact statement evaluating various alternative flow schedules. During Section 7 consultation on the proposed license amendments, NMFS issued a Biological Opinion determining that the Commission's preferred flow schedule would likely jeopardize the continued

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<sup>7</sup> Opinion No. 187; *Opinion and Order Denying Appeal, Approving Settlement, and Issuing New License (Major)*, Project No. 77-000, 25 F.E.R.C. ¶ 61,010 (1983) (hereafter "1983 License").

<sup>8</sup> *Id.* at 61,070.



existence of coho salmon, chinook salmon, and steelhead.<sup>9</sup> Pursuant to NMFS' authority under Section 18 of the Federal Power Act, the Commission was required to adopt NMFS' Reasonable and Prudent Alternative ("RPA") as a license condition for the Project. In 2004, the Commission issued an Order Amending License to PG&E which incorporated the terms of NMFS' RPA.<sup>10</sup> The order required PG&E to dramatically revise Project operations, providing flows in the upper Eel River approximating natural flows.

However, NMFS's 2002 Biological Opinion did not result in issuance of incidental take authority for the fishway at Cape Horn Dam.<sup>11</sup> Though owned by PG&E, the Van Arsdale Fisheries Station through which the fish ladder passes was operated at the time by what was then the California Department of Fish and Game. PG&E contractors recently took over operations of the Fisheries Station and fish ladder from the California Department of Fish and Wildlife.<sup>12</sup>

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<sup>9</sup> National Marine Fisheries Service, *Biological Opinion for the proposed license amendment for the Potter Valley Project (Federal Energy Regulatory Commission Project Number 77-110)* (Nov. 29, 2002), Doc. Accession No. 20021202-0257 (hereafter "2002 Biological Opinion").

<sup>10</sup> *Order Amending License*, Project No. 77-110, 106 F.E.R.C. ¶ 61,065 (2004).

<sup>11</sup> See 2002 Biological Opinion at 105 (providing that incidental take statement applies only to activities "pursuant to the RPA described in this opinion," and "does not cover activities that are not described and assessed within this opinion.")

<sup>12</sup> See email from Andrew Anderson Re: VAFS Through 22Nov2020 (Nov. 24, 2020) (attached as Exhibit A).

## **B. Chronic Deficiencies at the Van Arsdale Fishway**

Cape Horn Dam is surmounted by a fish ladder 434 feet in length and forty feet in height.<sup>13</sup> The fishway has been modified many times since its construction. PG&E's 2017 Pre Application Document briefly notes some of the most recent and consequential changes to the fish ladder:

Modifications to the Cape Horn Dam Fish Ladder were made in 1987, the most notable of which were changes to the ladder entrance, introduction of attraction flows, and construction of a weir to facilitate ladder entry and prevent fish from moving upstream past the ladder entrance, as had been previously documented (SEC 1988).<sup>14</sup>

Nonetheless, the Cape Horn fishway still fails to provide effective passage for Chinook salmon and steelhead listed under the federal and California Endangered Species Acts, as well as for native fish like Pacific lamprey (*Entosphenus tridentatus*) and suckers (*Catostomus occidentalis*).

One especially glaring aspect of the fish ladder's inadequacies has been that it becomes completely unusable after high winter flows. High flows fill the fish ladder and its appurtenant structures with gravel, debris, and even fairly large diameter rock, as well as finer sediments, which must be removed before the ladder can begin to function again.

On March 7, 2019, FOER wrote to the Commission's Division of Hydropower Administration and Compliance regarding a series of apparent

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<sup>13</sup> PAD at 4-30.

<sup>14</sup> *Id.*

violations of license conditions at the Cape Horn dam fish ladder and potential unpermitted take of listed species in violation of the ESA. We noted “apparent chronic violations of license conditions at the Cape Horn Dam . . . where the fish passage facilities have repeatedly been rendered non-functional by high flows.”<sup>15</sup>

FOER noted that “[f]or the fourth time in the last three years, the fish ladder at Cape Horn Dam and Van Arsdale Reservoir has been rendered nonoperational for an extended period by sediment and debris carried by high winter flows on the upper Eel River. The ladder has been closed twice this year, and now will apparently remain closed for several weeks in the middle of steelhead migration.”<sup>16</sup> FOER noted apparent violations of the ESA’s Section 7 requirement that federal agencies avoid causing jeopardy and its Section 9 requirement prohibiting unpermitted take.<sup>17</sup>

FOER requested that

FERC investigate PG&E’s failure to provide reliable fish passage at Cape Horn Dam under the procedures outlined in the FERC Division of Hydropower Administration and Compliance’s *Compliance Handbook* (Office of Energy Projects 2015). If violations are confirmed, we urge FERC require PG&E to *quickly* adopt measures to provide alternative fish passage options in the short term, and to prepare plans to reconstruct and/or redesign the structures in question ‘so as to minimize the likelihood such violations will recur’ in future years, as the *Handbook* provides.<sup>18</sup>

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<sup>15</sup> Friends of the Eel River, Letter Re: Potter Valley Project P-77; Apparent violation of license conditions at Cape Horn Dam fish ladder; Potential take of listed species at 1 (March 7, 2019), Doc. Accession No. 20190312-5133.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3-5.

<sup>18</sup> *Id.* at 1.

FOER closed its March 2019 letter by imploring FERC to require that PG&E prepare a plan to redesign and/or reconstruct the fish passage facilities at Cape Horn Dam to minimize the likelihood such violations would recur.<sup>19</sup>

FERC did not investigate PG&E's failure to provide reliable fish passage as its *Compliance Handbook* seems to require. FERC did not respond to FOER's assertions that license conditions were being violated. Nor did it respond to FOER's warnings that the Van Arsdale fishway appeared to be operating in violation of both the federal Endangered Species Act's Section 7 command to consult with NMFS to avoid jeopardy and its Section 9 prohibitions on take. Rather, FERC interpreted FOER's letter as a mere complaint of "substandard fishway maintenance."<sup>20</sup>

NMFS met with California Department of Fish and Wildlife ("CDFW") personnel on March 13, 2019, as memorialized in a March 22 NMFS internal memo, to "to consider short term and long term concepts to minimize or eliminate fish ladder shut downs due to sediment accumulation in the future."<sup>21</sup> The NMFS memo describes four options, including "Fishway Entrance Closure Panels: Bulkheads or gates could be added to the hotel to seal all openings in the structure when high river flows are forecast." However, it then notes:

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<sup>19</sup> *Id.* at 5.

<sup>20</sup> FERC, Letter to Debbie Powell, PG&E, Re: Allegations of Substandard Fishway Maintenance (March 26, 2019), Doc. Accession No. 20190326-3043.

<sup>21</sup> Memorandum from R. Wantuck and S. Thomas to R. Coey and J. Fuller, NMFS, Re: Site Visit to Cape Horn Dam, March 19, 2019 (March 22, 2019) (attached as Exhibit B).

The participants agreed that options listed above could improve fish passage efficiency using the existing fish ladder, but **even with improvements the fish ladder would be vulnerable and inefficient for operations and maintenance**. Completely replacing the existing fish ladder with a design that would prevent the river from overtopping the lower pools should be considered. A new, efficient fish ladder would be designed to meet current design guidelines for pool size and hydraulics for salmonids and lamprey, and include features to aid in operations and maintenance.<sup>22</sup>

### C. PG&E's Proposed Fishway Modifications

In late summer 2020, PG&E sent a series of three letters to the Commission regarding "Cape Horn Fish Hotel Preventive Maintenance." Together, this correspondence shows PG&E responding to FERC's command to develop a plan to prevent future blockages of the fish passage facilities at Cape Horn Dam. All three letters included enclosures marked as critical energy infrastructure information ("CEII"); this information is not publicly reviewable.

The first letter in the series, dated August 28, states that "[t]he purpose of this maintenance is to prevent forced outages at the Fish Hotel due to sedimentation during high flow events by allowing temporary closures of the openings of the Fish Hotel."<sup>23</sup>

The letter notes:

PG&E developed this preventive maintenance in collaboration with the Round Valley Indian Tribes (RVIT) and numerous regulatory agencies including the National Marine Fisheries Service, California Department of Fish and Wildlife, and U.S. Department of Fish and Wildlife. Meetings to discuss the designs were held on August 27,

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<sup>22</sup> *Id.* at 2 (emphasis added).

<sup>23</sup> PG&E Co., Letter to FERC Re: Cape Horn Fish Hotel Preventive Maintenance (August 28, 2020), Doc. Accession No. 20200828-5169.

2019 and June 25, 2020. On August 5, 2020, PG&E held an additional meeting with these groups to review the 90% design drawings. Enclosure B includes the 100% design drawings that addressed comments received from the agencies during the August 5 meeting. On August 24, 2020, PG&E emailed the 100% design drawings to these groups for review and comment. PG&E will submit to FERC any additional comments received. PG&E plans to continue to meet with the agencies and RVIT to develop an operational protocol for the temporary closure of the Fish Hotel when high flows are forecast.

In order to complete this work prior to the winter run of anadromous fish which typically begins in November, the installation of the access platform will need to occur during the routine, annual fish hotel outage between August 17 and September 30 per the FERC approved Van Arsdale Fish Screen Operations Plan. All other work activity can occur while the Fish Hotel is in service.<sup>24</sup>

PG&E sent a second letter on September 17.<sup>25</sup> It states “The two purposes of this letter are to request FERC approval to update the functional design drawings for the Fish Hotel and to provide the agency consultation record for the Fish Hotel maintenance.” Both the functional design drawings *and* the record of “agency consultation” were marked CEII and not publicly disclosed.<sup>26</sup>

On September 22, 2020, the Commission issued an order approving PG&E’s proposed modifications and updates to the functional design drawings for the Cape Horn facility.<sup>27</sup> As described in the order, the modifications would install improvements to its fish passage facilities by installing retractable doors over the opening to the fish ladder. The licensee

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<sup>24</sup> *Id.*

<sup>25</sup> PG&E, Letter to FERC Re: Cape Horn Fish Hotel Preventive Maintenance (Sept. 17, 2020), Doc. Accession No. 20200917-5161.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> Order Modifying and Approving Revised Fish Passage Facilities, Project No. 77-302, 172 F.E.R.C. ¶ 62,160 (September 22, 2020).

explains that the purpose of the alterations is to prevent forced fish passage facility closures due to sediment deposition at the ladder entrance during high flow events. The installation of the sediment exclusion facilities would function by allowing licensee staff to temporarily close the retractable doors, while allowing the fish passage facilities to re-open once high flows and sediment loads have subsided.<sup>28</sup>

The order stated that PG&E had developed the modifications “in consultation with the Round Valley Tribe, NMFS, FWS, and California DFW.”<sup>29</sup>

The Commission further ordered PG&E to

file an operational closure plan for the sediment exclusion doors with the Commission for approval. The plan must include an operational protocol for closing and reopening the retractable doors to the fish ladder as it relates to high flow events in the Eel River. The plan must be developed in consultation with the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and California Department of Fish and Wildlife, and must include resource agency comments and the licensee’s response to any comments received.<sup>30</sup>

PG&E’s third letter, dated September 25, conveyed a “Quality Plan for Potter Valley Cape Horn Dam Fish Hotel Improvements including final plans and specifications, dated September 15, 2020,” which again was restricted as CEII material.<sup>31</sup> The letter noted that in order “to complete this work prior to the winter migration of anadromous fish, the work must commence the week of October 5,

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<sup>28</sup> *Id.* at ¶ 3.

<sup>29</sup> *Id.* at ¶ 5.

<sup>30</sup> *Id.* at ordering paragraph (B).

<sup>31</sup> PG&E, Letter to FERC Re: Cape Horn Fish Hotel Preventive Maintenance (Sept. 25, 2020), Doc. Accession No. 20200925-5148.

2020.”<sup>32</sup> The Commission issued a letter authorizing immediate construction on September 29, 2020.<sup>33</sup>

#### **D. PG&E’s Winter Operation Plan**

On November 13, 2020, PG&E submitted its proposed Winter Operation Plan (formally entitled the “Cape Horn Dam Fish Passage Facility Winter Operation Procedure”) for the Commission’s review.<sup>34</sup> According to the Winter Operation Plan, the newly installed steel doors would be fully closed in advance of a forecasted “extreme flow event” (>10,000 cfs), and partially closed when flows are forecasted to exceed 2,500 cfs but not to exceed 10,000 cfs.<sup>35</sup> The Plan also notes that the existing Van Arsdale Fisheries Station Operating Manual provides that the fish ladder will be shut down when flows are at 6,000 cfs. According to the Plan, the steel doors must be closed before flows reach 2,500 cfs, and cannot be reopened until flows recede to less than 2,500 cfs. The Plan further notes that “[t]he flow thresholds and other assumptions described . . . will be refined as needed over time based on on-site experience, observations (hydraulics, sedimentation, debris loading, fish behavior), and agency consultation.”<sup>36</sup>

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<sup>32</sup> *Id.* at 2.

<sup>33</sup> FERC, Letter to PG&E Re: Cape Horn Dam – Installation of Fish Hotel Doors (Sept. 29, 2020), Doc. Accession No. 20200929-3102.

<sup>34</sup> PG&E, *Cape Horn Dam Fish Passage Facility Winter Operation Procedure* (Nov. 10, 2020), attached as Enclosure 1 to Letter to FERC Re: Cape Horn Dam Winter Operating Protocol (Nov. 13, 2020), Doc. Accession No. 20221113-5148. The Winter Operating Plan is unpaginated; page citations are to the page of the PDF containing the plan.

<sup>35</sup> *Id.* (PDF p. 4).

<sup>36</sup> *Id.* (PDF p. 5).



The Winter Operation Plan acknowledges several “Potential Negative Outcomes” of its implementation.<sup>37</sup> For example, PG&E may need to “deploy and reopen steel doors multiple times during the winter,” each time resulting in barriers to migration. The fish hotel also “could be fully closed . . . for extended periods under extreme flow event[s],” as well as in situations where forecasted flows require full closure of the steel gates but “never materialize” or remain over 2,500 cfs for a long period. In these situations, a “prolonged closure” could result, and “[f]ish passage [would be] blocked until flows recede below 2,500 cfs,” at which point the gates could be reopened. The Plan also notes the potential for “fish stranding in [the] ladder during a full hotel and ladder closure.” Once flows drop below 6,000 cfs, fish potentially could be returned to the Eel River below the ladder, but upstream migration would remain blocked until the steel gates were reopened.

The Winter Operating Plan also attaches several emails between PG&E and personnel at NMFS, the Round Valley Indian Tribes, and CDFW.<sup>38</sup> The emails reflect that the agencies and the Tribe participated in review of the Plan. The email from NMFS indicates that “NMFS agrees with this current protocol, but does anticipate potential modifications to this version as these operational procedures are implemented and new information is realized during future high flow

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<sup>37</sup> *Id.* (PDF p. 7).

<sup>38</sup> *Id.* (PDF pp. 40-46)

scenarios.”<sup>39</sup> None of the emails reflects any determination by the Commission or PG&E that the Winter Operation Plan is not likely to adversely affect listed species. Nor does the email from NMFS reflect that the agency concurred in any such determination.

The Commission issued its Order approving the Winter Operation Plan on January 28, 2021. The Order stated that PG&E “developed its plan in consultation with” NMFS and other agencies; according to the Order, “NMFS stated that it agrees with the operational protocol, but anticipates further revisions based on lesson [*sic*] learned during plan implementation.”<sup>40</sup> The Order further stated that it “constitutes final agency action.”<sup>41</sup>

## **V. FERC’S ISSUANCE OF THE ORDER VIOLATED SECTION 7 OF THE ESA.**

### **A. Legal Background**

The Ninth Circuit has “described Section 7 as the ‘heart of the ESA.’”

*Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1019-20 (9th Cir. 2012) (en banc) (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011)). Under Section 7,

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species

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<sup>39</sup> Id. (PDF p. 40).

<sup>40</sup> Order at ¶ 4.

<sup>41</sup> Id. at ordering paragraph (B).

which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C § 1536(a)(2).

Section 7 “imposes on all agencies a duty to consult with either the Fish and Wildlife Service or the NOAA Fisheries Service before engaging in any discretionary action that may affect a listed species or critical habitat. . . . The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.” *Karuk Tribe*, 681 F.3d at 1020 (citing *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003)).

To this end, the ESA’s implementing regulations require that “[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). If the agency determines its actions “may affect” listed species or critical habitat, “formal consultation is required” unless a specific exception applies. *Id.* One such exception is for “informal consultation,” by which the “agency determines, with the written concurrence of the [federal wildlife agency], that the proposed action is not likely to adversely affect any listed species or

critical habitat,” thus rendering formal consultation unnecessary. 50 C.F.R. § 402.14(b)(1); *see also* 50 C.F.R. § 402.13(c) (describing informal consultation).

**B. The Commission Violated Section 7 of the ESA by Failing to Initiate Consultation with NMFS Concerning the Effects of the Winter Operations Plan.**

The Commission’s Order approving the Winter Operation Plan was a discretionary agency action that plainly “may affect” listed species. Because the Commission failed to initiate either formal or informal consultation with NMFS, the Order’s issuance was unlawful.

**1. The Order Was an “Agency Action” Requiring Consultation.**

The Commission’s Order approving the Winter Operation Plan was an affirmative, discretionary “agency action” that triggered an obligation to consult under Section 7. The Ninth Circuit’s “‘agency action’ inquiry is two-fold. First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species.” *Karuk Tribe*, 681 F.3d at 1021.

The ESA’s implementing regulations define “action” as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02. Examples include “actions intended to conserve listed species or their habitat,” the “granting of licenses, contracts, leases, easements, rights-of-way, permits, or

grants-in-aid,” and “actions directly or indirectly causing modifications to the land, water, or air.” *Id.*

This language leaves “little doubt” that “Congress intended agency action to have a broad definition in the ESA.” *Karuk Tribe*, 681 F.3d at 1020 (internal quotation omitted). The Order here falls within at least three of the example definitions of an “action” set forth in 50 C.F.R. section 402.02. First, by dictating when and how the steel doors recently installed on the fish hotel will be opened and closed, the Winter Operation Plan will directly cause “modifications to . . . water” as it flows through the Cape Horn fish ladder. Second, by authorizing a plan of operations intended to minimize damage to the Cape Horn fishway from high flows, the Order can be construed as an action intended to conserve listed species. Third, the Order expressly grants permission to PG&E to operate the fish passage facility in accordance with the Winter Operation Plan. By the plain text of the regulations, the Order is an “action.” Indeed, the Order by its own terms states that it “constitutes final agency action.”<sup>42</sup>

The Order also is an “affirmative act or authorization” as described in *Karuk Tribe*, 681 F.3d at 1021. PG&E could not have implemented the Winter Operation Plan as a purely private matter; on the contrary, the Commission in its September 22, 2020 order approving the fish hotel modifications affirmatively

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<sup>42</sup> Order at ordering paragraph (B).

required PG&E to “file *for Commission approval*, its final operational plan.”<sup>43</sup>

Article 40 of the 1983 License similarly contemplates that plans for and modifications to the Cape Horn fish passage facility must be “file[d] for Commission approval.”<sup>44</sup> PG&E could not implement the Winter Operation Plan on its own pursuant to the terms of the amended license for the Potter Valley Project. Rather, PG&E was required by the terms of that license and the Commission’s own orders to seek affirmative authorization for the Winter Operation Plan. Like the suction dredge mining operations discussed in *Karuk Tribe*, 681 F.3d at 1021-24, which required affirmative agency approval, the Winter Operation Plan could not be carried out without federal agency authorization. Accordingly, the Order is an “affirmative act” authorizing operations that otherwise could not occur.

Furthermore, the Order represents an exercise of Commission discretion that at least potentially could inure to the benefit of protected species. *See Karuk Tribe*, 681 F.3d at 1024-25; 50 C.F.R. § 402.03 (Section 7 applies to actions “in which there is discretionary Federal involvement or control”). Although the Commission ultimately did not alter or condition PG&E’s Winter Operation Plan in the Order, there is little question that it *could* have sought changes necessary to

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<sup>43</sup> Order Modifying and Approving Revised Fish Passage Facilities, Project No. 77-302, 172 F.E.R.C. ¶ 62,160 at ¶ 7 (September 22, 2020) (emphasis added); *see also id.* at ordering paragraph (B) (“the licensee must file an operational closure plan for the sediment exclusion doors with the Commission for approval”).

<sup>44</sup> 1983 License, 25 F.E.R.C. ¶ 61,010 at 61,070.

protect migrating salmonids had it so desired. Put another way, nothing in the Federal Power Act, regulations, or the terms of the amended license *required* the Commission to approve whatever operations plan PG&E submitted; rather, the Commission retained authority to grant—or withhold—“approval” of any such plan. “The relevant question is whether the agency *could* influence a private activity to benefit a listed species, not whether it *must* do so.” *Karuk Tribe*, 681 F.3d at 1025 (emphasis in original).

Accordingly, the Order approving the Winter Operation Plan was discretionary “action” that triggered the Commission’s Section 7 consultation obligations.

## **2. The Order and Winter Operation Plan “May Affect” Listed Species.**

It is indisputable that the Order and Winter Operation Plan “may affect” listed salmonid species using the fish passage facility at Cape Horn Dam. Any possible effect, whether “beneficial, benign, adverse or of an undetermined character,” is sufficient to trigger consultation requirements. *Karuk Tribe*, 681 F.3d at 1027 (internal quotations omitted). Here, the Winter Operation Plan purports to have a beneficial effect on listed species by preventing sediment intrusion into the fish passage facility during high flows. The Winter Operation Plan also acknowledges that adverse effects may result from closure of the steel doors, including extended periods during which migration through the fish passage facility will be blocked and fish may be stranded or trapped.

The Order and Winer Operation Plan thus plainly meet the “may affect” threshold. Formal consultation under Section 7 was therefore required. 50 C.F.R. § 402.14(a). Formal consultation involves a series of procedural steps and requirements for documentation and study, using the best available scientific and commercial data, that typically results in a biological opinion and incidental take authorization including specific measures to protect listed species. *See generally* 50 C.F.R. § 402.14(c)-(l). Nothing in the record establishes that any of these steps were taken or requirements met here.

Indeed, the Winter Operation Plan not only “may affect” listed species within the meaning of Section 7, but may also “take” listed species in violation of Section 9 of the ESA. *See* 16 U.S.C. § 1538(a)(1)(B) (prohibiting “take” of listed species); *see also* 16 U.S.C. § 1532(19) (defining “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”); 50 C.F.R. § 17.3 (defining “harm” and “harass” as including killing or injuring wildlife or disrupting normal behavioral patterns such as breeding, feeding, and sheltering). The 2002 Biological Opinion does not authorize incidental take in connection with the Cape Horn Dam fish passage facility. Without further consultation, a new biological opinion, and incidental take authorization regarding the Winter Operation Plan, take of listed species in connection with fishway operations will remain unauthorized. Absent compliance with the ESA’s procedural requirements, the Commission cannot ensure that a substantive violation of the ESA will not occur. *See Thomas v. Peterson*, 753 F.2d



754, 763 (9th Cir. 1985), *abrogated on other grounds as recognized by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090-91 (9th Cir. 2015). The Commission's failure to engage in Section 7 consultation here thus exposes both PG&E and the Commission to Section 9 liability.

In sum, the Commission plainly violated Section 7, and thus has failed to ensure that its actions are not likely to jeopardize the continued existence of listed species. Furthermore, as a result of the Commission's failure to initiate and conduct formal consultation on the Order and Winter Operating Plan, both the Commission and PG&E also may be liable for violations of Section 9.

**3. Any "Consultation" that Occurred on the Winter Operating Plan Was Not "Consultation" Under Section 7.**

Section 7 requires formal consultation unless informal consultation establishes that an action is "not likely to adversely affect" listed species. 50 C.F.R. § 402.14(a), (b)(1). Here, the Winter Operating Plan itself admits that closure of the steel gates may strand listed fish or block migration for extended periods of time. In the face of this evidence, any finding that the Winter Operation Plan is "not likely to adversely affect" listed species would be arbitrary, capricious, and without factual support.

In any event, nothing in the record reflects that informal consultation occurred here. PG&E's communications with NMFS in developing the Cape Horn fish passage facility modifications and the Winter Operating Plan—although

denominated “consultation” in Article 40 of the amended license and in the Commission’s September 22, 2020 order—did not satisfy Section 7.

Although the informal consultation process may encompass a range of communications between the action agency and the wildlife agencies, there are nonetheless three formal requirements: (1) the action agency must make a determination that the action is not likely to adversely affect listed species or critical habitat; (2) the action agency must seek the wildlife agency’s written concurrence in that determination (based on a written request that includes essential supporting information); and (3) the wildlife agency must provide “written concurrence or non-concurrence” with the action agency’s determination.” 50 C.F.R. § 402.13(c)(1), (2). Only through this process can the purpose of informal consultation—“to assist the [action] agency in determining whether formal consultation . . . is required,” 50 C.F.R. § 402.13(a)—be fulfilled.

The exchange of emails appended to the Winter Operating Plan shows no evidence of informal consultation as defined in the ESA regulations.

First, there is no evidence in the Winter Operating Plan or elsewhere in the public docket for this proceeding that the Commission ever made a determination that the Order and Winter Operating Plan are not likely to adversely affect listed species. The public record also is devoid of evidence that the Commission sought NMFS’ written concurrence in any such determination, that the Commission provided the information necessary to support such a determination, or that NMFS provided any written concurrence in such a determination. Indeed, the emails

appended to the Winter Operation Plan do not show any communication at all between the Commission and NMFS.

Second, even if PG&E were authorized to conduct Section 7 consultation in the Commission's stead as a "non-Federal representative,"<sup>45</sup> any "consultation" that occurred here fell far short of Section 7's standards. Indeed, all of the critical elements of informal consultation remain missing: nowhere did PG&E (1) make a determination that the Winter Operation Plan is not likely to adversely affect listed species, (2) seek NMFS' written concurrence in any such determination or provide the information necessary to support concurrence, or (3) actually obtain NMFS' written concurrence. None of the emails appended to the Winter Operation Plan even contains the words "not likely to adversely affect."

Neither the Commission nor PG&E can establish on this record that either formal or informal consultation occurred. The Commission's issuance of the Order plainly violated Section 7.

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<sup>45</sup> An agency may designate a "non-federal representative" to conduct informal consultation under certain circumstances. 50 C.F.R. § 402.08. However, the agency must give written notice of its designation to the wildlife agencies and must independently review and evaluate any biological assessment resulting from the consultation. The agency also bears "ultimate responsibility for compliance with section 7" notwithstanding the delegation. *Id.* The record here does not demonstrate that either the Commission or PG&E fulfilled all of these responsibilities.

**C. The Commission Violated Section 7 of the ESA by Failing to Reinitiate Consultation in Light of Project Modifications**

In addition, and in the alternative, the Commission violated Section 7 by failing to reinitiate consultation. “Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: . . . (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence.” 50 C.F.R. § 402.16(a).

Accordingly, where consultation has previously occurred on an action, but the action is subsequently modified in a manner not anticipated in the prior consultation, reinitiation is required.

The Commission and NMFS engaged in formal consultation in connection with issuance of the amended license; that consultation resulted in the 2002 Biological Opinion, the RPA, and an incidental take statement governing the Potter Valley Project’s flow regime. The Commission also retained discretionary control over the design and operation of the Cape Horn fish passage facility through Article 40 of the 1983 License. The 2002 Biological Opinion, however, did not address the design or operation of the fish passage facility. The Order and Winter Operating Plan therefore “cause[] an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16(a)(3).

Reinitiation of consultation was therefore required prior to issuance of the Order. As shown above, the consultation required by law did not occur.

## **VI. CONCLUSION**

The Commission failed to comply with Section 7 of the ESA prior to issuing the Order approving the Winter Operation Plan. FOER respectfully requests that the Commission grant rehearing, set aside the Order, and immediately initiate the consultation Section 7 requires.

DATED: February 26, 2021

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Kevin P. Bundy

KEVIN P. BUNDY

Attorneys for Friends of the Eel River

# **EXHIBIT A**

**From:** "Anderson, Andrew" <[A5AK@pge.com](mailto:A5AK@pge.com)>  
**Subject:** VAFS Through 22Nov2020  
**Date:** November 24, 2020 at 6:01:16 PM PST  
**To:** "Anderson, Andrew" <[A5AK@pge.com](mailto:A5AK@pge.com)>

Hello All,

In the wake of Scott Harris's retirement, PG&E assumed responsibility for the fish counts at the Van Arsdale Fisheries Station (VAFS) located at Cape Horn Dam, PG&E's Potter Valley Hydroelectric Project (FERC No. 77). In November 2019, PG&E hired Garcia and Associates (now Kleinfelder) to assist with the transition from CDFW to PG&E. PG&E and the Garcia and Associates/Kleinfelder team worked closely with CDFW through the 2019/2020 fish migration season and much was learned from Scott and his vast knowledge of the fish passage facility.

Beginning today and continuing through the salmonid migration season, I will send out a weekly update of fish counts made at VAFS by the Garcia and Associates/Kleinfelder team. I borrowed Scott's distribution list from last year, so if you prefer not to receive these email updates any longer or know of others who want to be added to the list, please reply back to this email. Note that Shaun Thompson (CDFW) will provide updates on the counts from Noyo ECS.

VAFS Updated through 22NOV2020 – The first Chinook arrived on November 18, 2020. The Chinook count stands at one (Male 0, Female 0, Jack 1, Unk 0).

**Data is preliminary and subject to future QA/QC.**

Thank you,

**Andrew J. Anderson**

PG&E | Aquatic Biologist

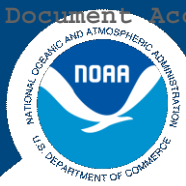
Environmental Management – Energy Supply

350 Salem Street, Chico, CA 95928

[Andrew.Anderson@pge.com](mailto:Andrew.Anderson@pge.com) | 530-531-7004



# **EXHIBIT B**



# NOAA FISHERIES

March 22, 2019

## West Coast Region California Coastal Area Office

MEMORANDUM FOR:	Robert Coey, Chief, NMFS-WCR-CCO North Coast Branch, and Josh Fuller, biologist, project lead for NMFS
FROM:	Richard Wantuck, Chief, NMFS-WCR-CCO Environmental Services Branch, and Steven Thomas, P.E., engineer
SUBJECT:	Site visit to Cape Horn Dam, March 13, 2019

The purpose of the site visit was to observe crews cleaning sediment that accumulated in the fish ladder and “fish hotel” during recent high flow events, and to consider short term and long term concepts to minimize or eliminate fish ladder shut downs due to sediment accumulation in the future. This memo documents our observations and conclusions.

We met with Jon Mann, senior engineer with CDFW, and Scott Harris, biologist with CDFW on site. We were unable to gain access to the fish hotel but observed the work crews from a short distance and walked the upper portions of the fish ladder which had been shut down since the high flow event. Workers used a small excavator to remove debris from the lower pools of the fish ladder. The excavator was able to access the lower pools of the fish ladder by driving over the bed rock areas between the fish ladder and the river’s edge (Figure 1). A separate company used suction equipment to remove sediment from the hotel. The suction equipment included a large vacuum truck, suction dredging techniques utilizing a large diesel pump applied by commercial divers, and heavy equipment for support. A trailer-mounted water pump was also used to jet material from the hotel. The effort to reopen the fish ladder came at a substantial cost to mobilize the site so quickly.

Scott Harris noted that in the past the hotel and ladder have been cleaned of sediment in 1-3 days but crews must wait for river flows to fall below 3,000 cfs to access the hotel. Scott was less concerned about debris in the lower pools since they can be accessed relatively quickly and are easier to clean out. Deposits in the hotel are the prime concern for delaying fish passage. (Follow up to site visit: the fish ladder was opened on Friday, March 15 and the ladder was opened the following day. Within a few hours of reopening four steelhead ascended the fish ladder.) Figure 2 below includes two photos of the first fish ladder pools inside the hotel, one with the ladder clean and dewatered taken August, 2018, and one with the ladder clogged with debris in March, 2019.

The four participants in this site visit discussed four options that could potentially improve fish passage opportunities after high flow events by minimizing or preventing sediment from accumulating in the hotel or by bypassing the lower end of the fish ladder if/when the fish ladder becomes impassable.

1. Ladder Extension: This option uses a Denil fish ladder to bypass the lower fish ladder pools and fish hotel when those areas are impacted by debris. The Denil fish ladder would be connected to an existing fish ladder pool to route fish ladder flow to the river downstream of the rock outcrop. One pool of the existing fish ladder would need to be modified to accept the Denil ladder and to temporarily cut off flow to the lower (clogged) fish ladder pools. A conceptual image is below.

2. **Hotel Roof Modification:** An awning-like extension of the hotel roof over the fish ladder entrance of the hotel could eliminate the plunging flow that causes the recirculating current that draws debris into the hotel. The roof could be designed to shunt flow, suspended sediment, and floating debris towards the center of the river channel to move material downstream and away from fish passage facilities. Modeling would be required to achieve an effective design.
3. **Barrier Wall:** Stream flow plunging over the top of the hotel likely contributes to sediment becoming entrained into the hotel. By providing a barrier wall immediately upstream of the hotel water and debris would be confined to the main river channel. Such a barrier wall would have to be high enough to prevent over-topping during a design flood event, and structurally strong enough to withstand the forces generated by flood events. A physical model would likely be required to understand if such a wall would be effective.
4. **Fishway Entrance Closure Panels:** Bulkheads or gates could be added to the hotel to seal all openings in the structure when high river flows are forecast. The closure system would need to be self-contained and deployable remotely without the need for heavy equipment or exposing staff to dangerous conditions. There would be no means for fish passage while the closure gates are in use; however, it is likely that the gates would only be used when river flows are so high that fish are not actively moving upstream due to high velocities and turbidity. Implementing this option without additional modifications to deflect debris away from the fish ladder entrance may result in sediment deposition in front of the hotel thus requiring dredging before the fish ladder could be opened.

The above options are consistent with the FERC relicensing revised study plan (January, 2018) for fish passage (AQ7) which includes proposals for reviewing and characterizing adult anadromous salmonid passage at Cape Horn Dam. The list of actions includes, "Identify conceptual level options for rectifying identified upstream passage deficiencies in collaboration with the fish passage technical working group. These conceptual level options would be considered as potential PM&E measures during PM&E discussions."

In addition to the concepts noted above, Scott Harris expressed a need for an automated trash rack cleaner at the fish ladder exit. The fish ladder currently has a coarse trash rack at its exit at Van Arsdale Reservoir. Woody debris often clogs the trash rack which can impede fish passage and restrict flow into the fish ladder. Currently debris captured on the trash rack is removed manually, but manually removing debris frequently enough to keep the ladder functioning as needed is not practical.

The participants agreed that options listed above could improve fish passage efficiency using the existing fish ladder, but even with improvements the fish ladder would be vulnerable and inefficient for operations and maintenance. Completely replacing the existing fish ladder with a design that would prevent the river from overtopping the lower pools should be considered. A new, efficient fish ladder would be designed to meet current design guidelines for pool size and hydraulics for salmonids and lamprey, and include features to aid in operations and maintenance.



*Figure 1. Panoramic photo of Cape Horn Dam and the lowest portions of the fish ladder taken during the site visit on March 13, 2019. The river flow was 1,700 cfs. The vacuum truck is out of view to the left.*



*Figure 2. Three views of the first pools of the fish ladder inside the hotel. The upper photo was taken in 2006 and provided by Gene Geary (PG&E). The lower left photo was taken August 23, 2018 by Steve Thomas. The lower right photo was taken on March X, 2019 by Scott Harris (CDFW).*





*Figure 3. Sketch of one possible layout for a Denil fish ladder that could be used to bypass the lower pools of the existing fish ladder. The concept includes adding two concrete fish ladder pools on the bypass spur and a 25 ft. long Denil fishway. The background photo shows the river at low conditions. The river level would be much higher when the fishway bypass is needed.*

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served, by first class mail or electronic mail, Friends of the Eel River's Motion to Intervene and Request for Rehearing, Potter Valley Project, P-77-302. This Certificate of Service is served upon each person designated on the official P-77 Service List compiled by the Commission in the above-captioned proceedings.

Executed at Tampa, FL on February 26, 2021.

\_\_\_\_\_  
/s/ Mike Burton  
Mike Burton

Document Content(s)

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