

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

In Re: Notice of Application for Transfer of  
Licenses and Soliciting Comments, Motions  
to Intervene, and Protests

FERC Project No. 77-316

**MOTION TO INTERVENE AND COMMENTS BY FRIENDS OF THE EEL  
RIVER, TROUT UNLIMITED, CALIFORNIA TROUT, PACIFIC COAST  
FEDERATION OF FISHERMEN’S ASSOCIATIONS, AND INSTITUTE FOR  
FISHERIES RESOURCES REGARDING PACIFIC GAS AND ELECTRIC  
COMPANY’S APPLICATION FOR TRANSFER OF LICENSES.**

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**INTRODUCTION**

Pursuant to 18 C.F.R. § 385.214, Friends of the Eel River, Trout Unlimited,  
California Trout, Pacific Coast Federation of Fishermen’s Associations, and Institute for  
Fisheries Resources (collectively “Movant-Intervenors”) hereby move to intervene and

provide comments in response to the Commission’s June 13, 2023, Notice of Application for Transfer of Licenses and Soliciting Comments, Motions to Intervene, and Protests (“Notice”).<sup>1</sup> The Notice addresses Pacific Gas and Electric Company’s (“PG&E”) application to transfer the licenses for twenty-two (22) of its projects, including the Potter Valley Project No. 77 (“PVP”), to its newly formed subsidiary, Pacific Generation, LLC. Movant-Intervenors appreciate the Commission’s decision to provide notice and to allow intervention and public input before taking action in this matter. Movant-Intervenors request the Commission grant their motion to intervene and require PG&E to provide additional information to ensure transfer of the PVP to Pacific Generation is consistent with the public interest and will not interfere with decommissioning of the PVP.

**I. MOTION TO INTERVENE**

**A. MOVANT-INTERVENORS’ POSITION IN THIS PROCEEDING, AND THE BASIS IN LAW AND FACT FOR THAT POSITION (18 C.F.R. § 385.214(b)(1)).**

Movant-Intervenors’ position is that, before considering a license transfer, the Commission must require PG&E to submit more information to ensure that the transfer of the PVP is consistent with the public interest and will not interfere with the decommissioning of the PVP. The Commission must require PG&E to provide the information necessary to meet the higher standard of review applicable to license transfers relating to decommissioning, must ensure that the license transfer serves the

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<sup>1</sup> Doc. Accession No. 20230613-3042. Some of the entities joining in this motion to intervene also have joined in other motions filed in response to the Notice that are focused on other projects.

public interest, and must ensure that Pacific Generation has the “legal, technical, and financial capacity to accept the new license and to decommission and remove the developments, if authorized. *PacifiCorp*, 175 FERC ¶ 61,236. It is also Movant-Intervenors’ position that under the current Annual License, the Commission has violated and is violating section 7(a)(1) of the ESA, 16 U.S.C. § 1536(a)(1), by failing to ensure that operation of the Project is consistent with the conservation of California Coastal (CC) Chinook salmon and Northern California (NC) steelhead trout, both of which are listed as threatened under the ESA. It is also Movant-Intervenors’ position that the Commission violated and is violating section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to ensure that operation of the Project is not likely to jeopardize the continued existence of these listed species or destroy or adversely modify their critical habitat. It is also Movant-Intervenors’ position that FERC violated and is violating Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by issuing the Annual License without initiating or reinitiating consultation with the National Marine Fisheries Service (“NMFS”) regarding the Project’s effects on the listed species and their designated critical habitat, and that FERC violated and is violating Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), by authorizing an activity that harms, kills, and otherwise causes take of listed species.

In their Request and Petition for Rehearing, Reconsideration, and/or Discretionary Action filed on May 20, 2022 (“Request for Rehearing”),<sup>2</sup> Movant-Intervenors set forth

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<sup>2</sup> Friends of the Eel River, Pac. Coast Fed’n of Fishermen’s Ass’ns, Inst. for Fisheries Res., Trout Unlimited, Cal. Trout, *Motion to Intervene and Request and Petition for Rehearing, Reconsideration, and/or Discretionary Action* (May 20, 2022), Doc. Accession No. 20220520-5256 (hereinafter “Request for Rehearing”).

the legal and factual basis for each of these positions. In sum, the Commission issued the Annual License for continued operation of the Potter Valley Project under terms and conditions that harm, kill, or otherwise take ESA-listed salmonid species, including by delaying and impeding their migration and spawning and causing increased predation. This action is not consistent with the conservation of the listed species and is likely to jeopardize the continued existence of the listed species and adversely modify their designated critical habitat.

**B. MOVANT-INTERVENORS' INTERESTS WILL BE DIRECTLY AFFECTED BY THE OUTCOME OF THE PROCEEDING AND THEIR INTERVENTION IS IN THE PUBLIC INTEREST (18 C.F.R. § 385.214(b)(2)(ii) & (iii)).**

All the Movant-Intervenors are non-profit groups with an interest in protecting salmonid fishery resources in the Eel River. The PVP and operation of it pursuant to the terms and conditions of the annual license issued to PG&E on April 21, 2022 (“Annual License”)<sup>3</sup> adversely impact Eel River salmonids that are listed as “threatened” under the ESA in a variety of ways. As fully detailed in Movant-Intervenor’s Request for Rehearing, the PVP is harming and killing salmonids, and the Commission has failed and is failing to ensure that continued operation of the Project is consistent with conservation of listed species and is not likely to jeopardize their continued existence or destroy or adversely modify their designated critical habitat.

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<sup>3</sup> FERC, *Notice of Authorization for Continued Project Operation* (April 21, 2022), Doc. Accession No. 20220421-3034 (hereinafter “Annual License”).

To remedy these failures, it is Movant-Intervenors' position that Scott Dam should be removed to restore access to the headwaters of the mainstream Eel River to help restore severely depleted runs of mainstem Eel River salmon and steelhead. It is also Movant-Intervenors' position that Cape Horn Dam should be removed due to its negative impacts on fish passage. Both actions should be included as part of the decommissioning of the PVP.

The proposed transaction could potentially affect Movant-Intervenor's ongoing interests in the conservation and recovery of native Eel River fisheries, as well as the public's interest in recovery of ESA-listed species. Ensuring that the PVP is decommissioned and the Eel River dams are removed expeditiously, is in both Movant-Intervenors' interest and the public interest.

Movant-Intervenors' position is not adequately represented by current parties to the proceeding because they are the only parties to have taken action against the Commission in federal court regarding the Annual License. They also offer unique perspectives regarding the resources in the Eel River watershed. The specific interests of each Petitioner are discussed below.

### **1. Friends of the Eel River**

Friends of the Eel River ("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 and California ESAs. Founded in 1998 and headquartered in Eureka, California, FOER is a membership organization of thousands of concerned

conservationists from Humboldt, Mendocino, Sonoma, Marin and other counties who are dedicated to protecting and restoring the Eel River watershed and its dependent fish and wildlife. 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, and FOER has repeatedly raised serious concerns with the Commission regarding the project's ongoing impacts to listed salmonids.

## **2. Trout Unlimited**

Trout Unlimited ("TU") is North America's leading coldwater fisheries conservation organization, dedicated to the conservation, protection and restoration of trout and salmon fisheries and their watersheds. TU's vision is that trout and salmon will be restored throughout their native range so that the next generation can enjoy healthy fisheries in their home waters. To accomplish this vision, TU works to protect, reconnect, and restore fish populations and their habitat, and to sustain this work by building a diverse movement of businesses, people, and communities dedicated to its mission. The Eel River is one of TU's highest priorities. TU's staff and partners have invested close to \$10 million dollars in habitat restoration throughout the Eel River basin, through dozens of separate fisheries restoration projects.

## **3. California Trout**

California Trout ("CalTrout") is a nonprofit organization that works to ensure healthy waters and resilient wild fish for a better California by driving innovative,

science-based solutions that work for the diverse interests of fish, farms, commerce, and people; building partnerships in key geographies where wild fish influence the community; and using project successes to establish precedent and influence statewide policy. CalTrout has participated actively in both formal and informal proceedings related to the Potter Valley Project for many years.

#### **4. Pacific Coast Federation of Fishermen's Associations**

Pacific Coast Federation of Fishermen's Associations ("PCFFA") is a California nonprofit organization and the west coast's largest trade organization for commercial fishing vessel owners and family commercial fishing operations. Collectively, PCFFA's members represent nearly 800 commercial fishing families, most of whom are small and mid-sized commercial fishing boat owners and operators. Many commercial salmon harvests along the West Coast are influenced or managed in accordance with Eel River-origin salmon run abundance levels and thus the livelihoods of PCFFA's members who rely on ocean harvest of Pacific salmon are greatly affected by the health and abundance (or lack thereof) of once numerous Eel River-origin salmon. For over thirty years, PCFFA has advocated to ensure the rights of individual fishermen and to fight for the long-term survival of commercial fishing as a livelihood and way of life. PCFFA has actively participated in the Potter Valley Project's licensing process at various levels, including reviewing and providing written comments on major scoping, draft and final NEPA documents, and providing economic and socioeconomic information.

## 5. Institute for Fisheries Resources

The Institute for Fisheries Resources (“IFR”), which was originally founded by PCFFA in 1992, is separate from but still closely affiliated with PCFFA, and is a nonprofit public interest marine resources protection and conservation organization dedicated to protecting the natural resources and seafood bounty of the Pacific Ocean along the western seaboard of North America. IFR also runs an active salmon watershed protection and restoration program, and its members, most of whom are commercial salmon fishermen or women, also have personal interests in the restoration of salmon. Along with PCFFA, IFR has actively participated in the Project’s licensing process at various levels, including reviewing and providing written comments on major scoping, draft and final NEPA documents, and providing economic and socioeconomic information.

## II. COMMENTS

Before considering the transfer of the PVP from PG&E to Pacific Generation, the Commission should require PG&E to submit more information detailing whether the transfer will interfere with the timely decommissioning of the PVP, specifically pertaining to whether Pacific Generation “will have the legal, technical, and financial capacity to safely remove the project facilities and adequately restore project lands.”<sup>4</sup>

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<sup>4</sup> See *PacifiCorp*, 175 FERC ¶ 61,236, 62,365.



**A. PG&E has initiated the decommissioning of the PVP**

The Potter Valley Project in Mendocino and Lake Counties, California is a more than century old hydroelectric project that formerly had the capacity to generate up to 9.2 megawatts of power with water diverted from the upper mainstem Eel River to the East Branch of the Russian River via Potter Valley. At Cape Horn dam, water is conveyed south by a series of tunnels, conduits, and penstocks that traverse two ridges to deliver water to the Potter Valley Powerhouse, less than two miles from the point of diversion.

Cape Horn Dam impounds the small (~340 acre-foot) Van Arsdale Reservoir. There is a fish ladder on Cape Horn Dam, though high flow events frequently render it inoperable for extended periods due to blockage by sediment and woody debris. The diversion has two fish screens.

Scott Dam, located seven miles upstream of the Van Arsdale Diversion, impounds Lake Pillsbury, a storage reservoir on the Eel River with a potential capacity of approximately 66,000 acre feet. Scott Dam is a complete barrier to fish passage.

In 2017, PG&E issued a Notice of Intent to relicense the project.<sup>5</sup> However, on January 25, 2019, PG&E wrote to FERC withdrawing its Notice of Intent to relicense the project, stating:

Potter Valley has long been recognized by PG&E as uneconomic for PG&E's ratepayers (i.e., the cost of production exceeding the cost of alternative sources of renewable power on the open market). Regrettably, continued declining energy markets, potential increased costs associated with anticipated new license conditions, and challenging financial

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<sup>5</sup> Doc. Accession No. 20170406-5314 (April 6, 2017).

circumstances have caused PG&E to conclude that it cannot justify further expenditures to its ratepayers associated with the Project.<sup>6</sup>

Since at least July of 2021, the transformer at the Potter Valley powerhouse has been inoperable. As a result, the project has not generated any power or revenue since that time.<sup>7</sup> On March 23, 2023, PG&E filed a letter with FERC stating: “PG&E no longer intends to replace the Potter Valley transformer.”<sup>8</sup> Thus, the Potter Valley Project is no longer an operational hydroelectric project, and has ceased to generate even minimal revenues to offset its operational and maintenance expenses.

The FERC license for the PVP expired in April 2022.<sup>9</sup> On July 8, 2022, PG&E announced a plan and schedule to submit to FERC an application to decommission the project.<sup>10</sup> On July 27, 2022, FERC accepted PG&E’s plan and schedule to submit a license surrender application in anticipation of decommissioning.<sup>11</sup>

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<sup>6</sup> Doc. Accession No. 20190125-5100.

<sup>7</sup> See PG&E Statement of Gross Generation FY 2022, Doc. Accession No. 20221020-5106.

<sup>8</sup> See PG&E Transformer Replacement Follow-Up, Doc. Accession No. 20230323-5013.

<sup>9</sup> PG&E remains subject to the terms and conditions of the expired license that FERC administratively applies pursuant to the Federal Power Act. See FERC Notice of Authorization for Continued Project Operation (April 21, 2022), Doc. Accession No. 20220421-3034.

<sup>10</sup> See PG&E Response to May 11, 2022 Request Re Plan and Schedule for the Surrender Application for the Potter Valley Hydroelectric Project, Doc. Accession No. 20220708-5267.

<sup>11</sup> See FERC, Schedule for Filing Surrender Application and Designation of Non-Federal Representative for Consultation, Doc. Accession No. 20220729-3016.

On March 17, 2023, PG&E filed a Dam Safety Report with FERC regarding an updated seismic stability analysis for Scott Dam.<sup>12</sup> The analysis is presented in a memorandum which is restricted from public view as CEII. From PG&E’s description, we understand that the memorandum presents the results of a simplified, two-dimensional seismic stability analysis of Scott Dam prepared by engineering consultant Gannett Fleming, Inc. (Gannett).<sup>13</sup> PG&E noted in its report to FERC that,

(a)s described in the memorandum, results of the analysis suggest that the dam may become structurally unstable when subjected to seismic loading from the updated (December 2021) ground motions, which are estimated to have a return period of approximately 850 years. Results of the analysis also show that the potential for seismic instability is lower when the water level in the reservoir is at or below the spillway crest elevation.<sup>14</sup>

Further, PG&E announced significant changes in project operations to reduce seismic risks to Scott Dam:

Based on the results of Gannett’s analysis, PG&E believes that proactive steps to limit the potential for seismic instability of Scott Dam are necessary at this time. As an interim risk-reduction measure, PG&E has established a 10-foot restriction on the maximum reservoir operating level. Instead of closing the spillway gates to store additional water during the spring and summer months, PG&E will leave the gates open year-round to maintain the water level in Lake Pillsbury at or below the spillway crest elevation.<sup>15</sup>

An April 12, 2023 letter from the California Division of Safety of Dams (DSOD) to PG&E’s Chief Dam Safety Engineer, David Ritzman, clarifies that the Gannett “study

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<sup>12</sup> See PG&E, results of Simplified Seismic Stability Analysis and Proposed Interim Risk-Reduction Measure for the Scott Dam of the Potter Valley Hydroelectric Project, Doc. Accession No. 20230317-5114 (“Scott Dam Seismic Update Letter”).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *Id.*

is part of Pacific Gas and Electric Company’s (PG&E) ongoing reevaluation of the dam that was initiated in response to DSOD’s letter dated January 22, 2021, to address potential dam safety concerns.” DSOD then explains that it has barred PG&E from operating Scott Dam with the spillway gates raised:

Based on dam safety, DSOD concurs with PG&E’s proposed 10-foot reservoir restriction as an interim risk reduction measure. Therefore, DSOD is restricting the year-round operation of the reservoir of Scott Dam to Elevation 1900.00, the spillway crest, which is 24.58 feet below the dam crest. This reservoir restriction may be revisited as conditions warrant and will remain in effect until PG&E receives DSOD’s written approval authorizing a different level of reservoir storage.<sup>16</sup>

In addition to this restriction on reservoir level, NMFS has informed FERC that a suite of Interim Protective Measures (IPMs) are necessary to protect ESA-listed Eel River salmon and steelhead pending dam removal.<sup>17</sup> Among other things, these measures would require PG&E to “ensure suitable summer rearing temperatures and physical habitat conditions for salmonids below Scott Dam” and to “implement[] a reservoir-storage based coldwater pool management strategy for Lake Pillsbury,” to ensure a supply of cooler water through the hot, dry summer and early fall.<sup>18</sup> In PG&E’s 2022 variance, a

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<sup>16</sup> See Letter from Sharon K. Tapia, P.E., California Department of Water Resources, Division of Safety of Dams, to Jan Nimick, PG&E, Re: Scott Dam, No. 97-101 at 1 (April 12, 2023).

<sup>17</sup> See Nat. Marine Fisheries Svc., Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act Consultations on the Potter Valley Project (P-77) on the Eel River, California, Doc. Accession No. 202203017-5064.

<sup>18</sup> *Id.* at 4.

minimum of 30,000 acre feet was maintained in the Lake Pillsbury reservoir in an attempt to preserve cooler water temperatures later into the summer.<sup>19</sup>

In summary, the Potter Valley Project has become entirely uneconomic, has failed as a hydroelectric project, and PG&E is seeking to surrender its license for the Project and decommission it. PG&E has stated that it intends to remove both Scott and Cape Horn dams as part of decommissioning. Serious and rising seismic safety issues at Scott Dam suggest that dam removal may come sooner rather than later. The combination of seismic safety restrictions on reservoir height and restrictions on reservoir operations to protect ESA-listed salmon and steelhead mean that project diversions to the Russian River will be significantly reduced.

Thus, with the proposed transfer of the Potter Valley Project, Pacific Generation seems very likely to be faced in short order with the full range of costs and demands associated with “safely remov(ing) ... project facilities and adequately restor(ing) project lands.” Before the transfer is approved, FERC must ensure Pacific Generation has the “legal, technical, and financial capacity” sufficient not only to meet those requirements, but to do so in the compressed timeframe which both dam safety and fisheries concerns suggest will be necessary for Potter Valley Project decommissioning.

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<sup>19</sup> See PG&E, Supplemental Information supporting the 2022 Flow Variance Request Due to Limited Water Availability for the Potter Valley Hydroelectric Project, Doc. Accession No. 20220610-5222.

**B. The standard of review for a license transfer is higher if the project is going to be decommissioned.**

Under the Federal Power Act (FPA), 16 U.S.C. § 801, a licensee may transfer its license only upon written approval of the Commission:

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter...

“[T]he Commission has held that a transfer may be approved on a showing that the transferee is qualified to hold the license and operate the project, and that a transfer is in the public interest. Section 9.2 of the Commission’s regulations requires applicants to ‘set forth in appropriate detail the qualifications of the transferee to hold such license and to operate the property under license.’”<sup>20</sup> Final decisions must be supported by substantial evidence and reasoned explanation. 16 U.S.C. § 825l(b), 5 U.S.C. § 706(2)(A).

Further, “[t]ransferring 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

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<sup>20</sup> *PacifiCorp*, 175 FERC ¶ 61,236, 62,368.

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.”<sup>21</sup>

**C. PG&E has not submitted the information necessary to allow the Commission to determine whether a transfer of the PVP to Pacific Generation is in the public interest.**

**1. The Potter Valley Project is likely to require accelerated decommissioning.**

As outlined above, the combination of dam safety issues at Scott Dam and significant, ongoing harm to ESA-listed salmon and steelhead by project facilities and operations appears likely to require accelerated project decommissioning and dam removal in the relatively near term.

**2. Projected costs and technical burdens of dam removal and remediation for the Potter Valley Project must be provided for in any transfer.**

Thus, the Commission must ensure that Pacific Generation has the financial and technical means to fully discharge PG&E’s liabilities and responsibilities with respect to decommissioning, dam removal, and restoration of the Potter Valley Project in the near future. At a minimum, to approve the proposed transfer, PG&E and FERC must **ensure that** Pacific Generation has sufficient assets to fully cover PVP decommissioning in the near term, in addition to the pending and probable decommissioning of other generation assets PG&E is proposing to transfer to Pacific Generation.

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<sup>21</sup> *PacifiCorp*, 175 FERC ¶ 61,236, 62,368.

Given the significant complexity and potential liabilities attendant on the impending project decommissioning, if the Commission does approve the proposed transfer of the PVP to Pacific Generation, it would seem appropriate to require PG&E to remain on the project license as a co-licensee, just as the Commission required PacifiCorp to remain a co-licensee in approving transfer of the Klamath dams in 2020.<sup>22</sup>

## **CONTACT INFORMATION**

Pursuant to FERC Rule 203(b), Movant-Intervenors request that all communications and service in this matter be directed to:

For Friends of the Eel River, Trout Unlimited, and California Trout:

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<sup>22</sup> See Order Approving Partial Transfer of License, Lifting Stay of Order Amending License, and Denying Motion for Clarification and Motion to Dismiss (Dkt. P-14803, July 16, 2020), Doc. Accession No. 20200716-3051.





UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

In Re: Notice of Application for Transfer of  
Licenses and Soliciting Comments, Motions  
to Intervene, and Protests

Project No. P-77-316

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served, by first class mail or electronic mail, the **Motion to Intervene and Comments by Friends of the Eel River, Trout Unlimited, California Trout, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources Regarding Pacific Gas and Electric Company's Application for Transfer of Licenses.** This document is served upon each person designated on the official P-77-000 Service List compiled by the Commission in the above-captioned proceedings.

Dated this 13th day of July, 2023.



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David Weibel  
Legal Secretary  
Shute, Mihaly & Weinberger LLP