

April 15, 2022

Certified Mail Return Receipt Requested

Gina M. Raimondo
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

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 the Federal Endangered Species Act (16 U.S.C. § 1540(g)): Potter Valley Hydroelectric Project; Cape Horn Dam Fishway

Dear Secretary Raimondo and Mr. Wong:

This firm represents Friends of the Eel River with regard to ensuring that Pacific Gas and Electric Company (“PG&E”) complies with the Endangered Species Act (“ESA”)¹ in connection with PG&E’s operation of the Potter Valley Hydroelectric Project (“Potter Valley Project” or “Project”). California Trout (“CalTrout”), Trout Unlimited (“TU”), the Pacific Coast Federation of Fishermen’s Associations (“PCFFA”), and the Institute for Fisheries Resources (“IFR”) also join in this letter. This letter constitutes formal 60-day notice of intent to initiate litigation under the citizen suit provision of the ESA.²

¹ 16 U.S.C. § 1531 et seq.

² 16 U.S.C. § 1540(g).

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Friends of the Eel River 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. Since its inception, Friends of the Eel River has worked tirelessly to restore the Eel River and its tributaries to a state of natural abundance and to curtail practices that harm the Eel River watershed and its threatened salmon and steelhead fisheries.

CalTrout is a 501(c)(3) 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. Like Friends of the Eel River, CalTrout has participated actively in both formal and informal proceedings related to the Project for many years.

Trout Unlimited 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.

PCFFA is a nonprofit, membership-based fishing industry umbrella organization, established as a federation of many smaller local commercial fishing trade and vessel owner associations collectively serving fishing families on the west coast, from San Diego to Alaska. PCFFA has come to embody the working family fisherman—working men and women operating their vessels to bring the ocean's bounty to America's and the world's table. 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.

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

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members, most of whom are commercial salmon fishermen or women, also have personal interests in the restoration of salmon.

We are writing to request that you take immediate action to remedy PG&E's past and ongoing violations of the ESA resulting from the take of threatened fish species in the Eel River watershed. California Coastal (CC) Chinook salmon and Northern California (NC) steelhead are federally listed species protected under the ESA. Despite this fact, PG&E has operated and continues to operate the Potter Valley Project in a manner that causes death or injury to these fish.

The Potter Valley Project, which consists of Scott Dam and Lake Pillsbury, Cape Horn Dam and Van Arsdale Reservoir (including associated fish passage facilities), and a diversion tunnel and powerhouse located on the East Branch Russian River, functions as an interbasin transfer system, diverting water from the Upper Eel River into the Russian River across a natural divide.³ A Biological Opinion issued by the National Marine Fisheries Service ("NMFS" or "Service") in 2002 formerly provided incidental take authorization for some aspects of the Potter Valley Project (including its effects on instream flows). As NMFS recently notified the Federal Energy Regulatory Commission ("FERC"), however, incidental take authorization expired on April 14, 2022.⁴ Without this authorization, the entire Project, including Scott Dam, Cape Horn Dam, and the Cape Horn Dam fishway, is causing ongoing take of CC Chinook and NC steelhead.

The fishway at Cape Horn Dam—which NMFS' incidental take authorization never covered—in particular is causing ongoing take of ESA-listed fish. The fishway enables predation by river otters that position themselves on the lower stages of the fish ladder and kill or injure fish as they attempt to climb the ladder. The fishway's substandard design also requires its frequent closure during times when threatened fish

³ Nat'l Marine Fisheries Serv., *Biological Opinion for the Proposed License Amendment for the Potter Valley Project* (Federal Energy Regulatory Commission Project Number 77-110) ("2002 BiOp") 1 (Nov. 26, 2002).

⁴ See Nat'l Marine Fisheries Serv., Letter to FERC Re: Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act Consultations on the Potter Valley Project (P-77) on the Eel River, California (Mar. 16, 2022) ("NMFS March 2022 Letter to FERC") at 1 ("NMFS' 2002 Opinion on the amendment to the Project license identified [reasonable and prudent alternatives] and provided incidental take authorization for implementing the proposed action for a 20-year period, which elapses on April 14, 2022. ***The 20-year duration of the proposed action is a central component of the Opinion.***") (emphasis added).

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attempt to reach their spawning habitat above Cape Horn Dam. The fishway often becomes clogged with debris after periods of high flow, and the fish hotel structure at the base of the ladder effectively stops functioning when flows exceed 2000 cubic feet per second (cfs), rendering the fishway unusable.

Through its operation of the Project, PG&E is liable for the unlawful take of CC Chinook salmon and NC steelhead in violation of ESA section 9. PG&E must take immediate action to correct and eliminate this illegal take.

IDENTITY OF ORGANIZATIONS GIVING NOTICE

The names, addresses, and phone numbers of the organizations giving notice of intent to sue under the ESA are:

Friends of the Eel River

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BACKGROUND

California Coastal (CC) Chinook Salmon (*Oncorhynchus tshawytscha*)

Chinook salmon historically ranged throughout much of the North American and northeast Asian Pacific coast—from the Ventura River in southern California north to Point Hope, Alaska, and in Asia from Hokkaido, Japan to the Anadyr River in Russia.⁵ Today, however, Chinook salmon are the least abundant Pacific salmon in North America, and since 1988, no viable populations exist south of San Francisco, California.⁶

Chinook salmon are the largest member of genus *Oncorhynchus*, with some adults weighing more than 120 pounds.⁷ Chinook are anadromous.⁸ There are two types of Chinook—ocean-type fish and river-type fish—reflecting their two main life history strategies.⁹ The Chinook salmon in the Eel River are ocean-type fish, “typically ... fall- or winter-run fish that spawn shortly after entering freshwater and whose offspring emigrate shortly after emergence from the redd.”¹⁰ The fish in the CC Chinook evolutionarily significant unit (“ESU”) on the Eel River are considered a fall-run population; the spring-run or river-type life history strategy has been lost throughout the ESU and represents a key source of genetic diversity loss.¹¹ Though the timing can vary, adult Chinook salmon enter the Eel River as early as August, with spawning occurring from October through February.¹²

CC Chinook population numbers have “declined to levels that are well below recovery targets and high-risk depensation thresholds [(i.e., reductions in egg survival

⁵ 2002 BiOp at 16.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Peter B. Moyle et al., *State of Salmonids: Status of California’s Emblematic Fishes 2017* (“2017 State of Salmonids Report”) 27 (Aug. 2017), https://watershed.ucdavis.edu/files/content/news/SOS%20II_Final.pdf.

¹² 2002 BiOp at 17.

and productivity)] due to shrinking effective spawning populations.”¹³ Their shrinking population has made the fish vulnerable to earthquakes, landslides, droughts, or flooding, resulting in reductions in genetic diversity, altered breeding structure, and shifts in population dynamics.¹⁴ A 2010 study estimated that abundance of CC Chinook has decreased by more than 90% from historical numbers.¹⁵ Historically, Eel River runs of Chinook salmon numbered as many as 800,000 fish per year, declining to approximately 1,000 fish per year in the 1990s and 2000s.¹⁶

When the Department of Commerce first proposed extending ESA section 9 protections to CC Chinook in 2001, it cited over-fishing, past and ongoing freshwater and estuarine habitat destruction, and hydropower development, among other causes, as primary sources of population depletion.¹⁷ Anthropogenic watershed disturbances—including disturbances caused by water diversions and dam building—have contributed to the loss and degradation of CC Chinook essential habitat.¹⁸ And this loss of habitat is a major cause of the decline of CC Chinook salmon in the watershed.¹⁹ A 2017 report observed that Sacramento pikeminnow, which were introduced illegally into the Eel River in 1979 and spread throughout much of the watershed, also have suppressed CC Chinook salmon populations through predation on emigrating juveniles.²⁰

¹³ 2017 State of Salmonids Report at 31.

¹⁴ *Id.*

¹⁵ *Id.* (citing Ronald M. Yoshiyama & Peter B. Moyle, *Historical Review of Eel River Anadromous Salmonids, with Emphasis on Chinook Salmon, Coho Salmon And Steelhead* (Feb. 1, 2010), <https://watershed.ucdavis.edu/files/biblio/Eel%20River%20Final%20Report%202010%20Feb%201%281%29.pdf>).

¹⁶ *Id.* at 42.

¹⁷ Endangered and Threatened Species; Proposed Rule Governing Take of Four Threatened Evolutionarily Significant Units (ESUs) of West Coast Salmonids: California Central Valley Spring-run Chinook; California Coastal Chinook; Northern California Steelhead; Central California Coast Coho, 66 Fed. Reg. 43150, 43151 (Aug. 17, 2001).

¹⁸ 2002 BiOp at 23.

¹⁹ *Id.*

²⁰ 2017 State of Salmonids Report at 39.

Climate change also continues to stress this species. A 2012 study rated CC Chinook as “highly vulnerable” to climate change.²¹ The biggest challenge facing the species is adjusting to changes in flow timing and variability.²² And variability in the timing and amount of precipitation likely will increase under the most likely climate change scenarios.²³ Natural flows, unimpeded by dams, remain *the major requirement* for embryo and juvenile survival.²⁴

Northern California (NC) steelhead (*Oncorhynchus mykiss*)

In North America, steelhead are found in coastal streams from Alaska south to northwestern Mexico and are divided into two reproductive ecotypes.²⁵ Stream maturing steelhead require several months to mature and spawn after they enter fresh water.²⁶ Ocean maturing steelhead enter fresh water in a sexually mature state and spawn shortly after river entry.²⁷ These two types of steelhead are more commonly referred to by their season of freshwater entry—summer (stream maturing) and winter steelhead (ocean maturing).²⁸

Studies have shown that summer steelhead “enter the Eel River in considerable numbers as early as August and hold in the mainstem until November.”²⁹ One study has observed that as many as 20 percent of South Fork Eel steelhead had not spawned before March of the following spring.³⁰ Likewise, winter steelhead can enter the Eel River as

²¹ *Id.* at 40 (citing Peter B. Moyle et al., *Projected Effects of Future Climates on Freshwater Fishes of California* (July 2012), <https://escholarship.org/content/qt72p7049g/qt72p7049g.pdf>).

²² *Id.* at 41.

²³ *Id.*

²⁴ *Id.*

²⁵ 2002 BiOp at 19.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

early as August; most spawning occurs in the winter between December and early April.³¹

The Eel River is the most important river for NC steelhead in the region and historically supported between 100,000 and 150,000 winter and summer steelhead.³² The Middle Fork Eel once was home to the largest run of summer steelhead left in the basin.³³ Both summer and winter steelhead have seen strong declines in the watershed since the 1970s.³⁴ In the upper reaches of the Eel River, the fish have seen drastic declines since the 1980s.³⁵

The Potter Valley Project prevents access to considerable steelhead rearing and spawning habitat and has historically harmed these fish. NMFS noted in 2002, for example, that the “inadequate fish ladder at Cape Horn Dam” has historically “impacted fishery resources on the Eel River.”³⁶ And as detailed further below, this fish ladder continues to cause injury and death to these protected fish. Likewise, Scott Dam blocks more than 99% of available NC steelhead spawning habitat in the upper mainstem Eel River above Soda Creek.³⁷ A recent study suggested that potential steelhead habitat upstream of Scott Dam ranges from 291 to 463 kilometers.³⁸

Similar to CC Chinook salmon, climate change presents a major threat to the continued persistence of both summer and winter NC steelhead.³⁹ Persistence of these populations will require increased protection and stream restoration.⁴⁰

³¹ *Id.*

³² 2017 State of Salmonids Report at 279.

³³ *Id.* at 279-80.

³⁴ 2002 BiOp at 22.

³⁵ *Id.*

³⁶ *Id.* at 34.

³⁷ 2017 State of Salmonids Report at 281.

³⁸ *Id.* (citing Emily Jeane Cooper, *An Estimation of Potential Salmonid Habitat Capacity in the Upper Mainstem Eel River, California* (May 2017), <https://digitalcommons.humboldt.edu/cgi/viewcontent.cgi?article=1059&context=etd>).

³⁹ *Id.* at 285-86, 309.

⁴⁰ *Id.* at 286.

STATUTORY FRAMEWORK

Except as provided, section 9 of the ESA makes it unlawful for any person to “take” a federally-listed endangered fish species within the United States.⁴¹ The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁴²

Department of Commerce (“DOC”) regulations define “harm” as “an act which actually kills or injures fish or wildlife,” including “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.”⁴³ The Department of the Interior (“DOI”) defines “harm” similarly.⁴⁴

The U.S. Supreme Court concluded in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*⁴⁵ that harm may be direct or indirect and need not be purposeful.⁴⁶ Significant habitat modification also may constitute harm if it actually

⁴¹ 16 U.S.C. § 1538(a)(1)(B). By its terms, the prohibition against take applies only to species listed as endangered and not to species listed as threatened. However, the Secretary of Commerce (“Secretary”) may issue rules regarding threatened species, and any violation of those rules is prohibited. 16 U.S.C. § 1538(a)(1)(G). The species at issue here—CC Chinook salmon and NC steelhead—are listed as threatened by the National Marine Fisheries Service. 50 C.F.R. § 222.102. In 2002, the Secretary issued a rule extending ESA section 9 take prohibitions to threatened CC Chinook salmon and NC steelhead. Endangered and Threatened Species; Final Rule Governing Take of Four Threatened Evolutionarily Significant Units (ESUs) of West Coast Salmonids (“Section 9 Prohibitions for CC Chinook Salmon and NC Steelhead”), 67 Fed. Reg. 1116 (Jan. 9, 2002).

⁴² 16 U.S.C. § 1532(19) (emphasis added).

⁴³ 50 C.F.R. § 222.102.

⁴⁴ The DOC’s definition extends the DOI’s definition to marine species: it applies to both fish and wildlife, and the non-exclusive list of essential behavior patterns includes spawning, rearing, and migrating, in addition to the behavior patterns included the DOI definition. Other than that, the two definitions are identical. *Compare* 50 C.F.R. § 222.102 (DOC), *with* 50 C.F.R. § 17.3 (DOI).

⁴⁵ 515 U.S. 687 (1995).

⁴⁶ *Id.* at 704.

results in death or injury to wildlife.⁴⁷ Though the Supreme Court considered the DOI's definition of "harm" in *Sweet Home*, the DOC has noted that its definition "is consistent" with the Court's decision.⁴⁸ The DOC's final rule on the definition of "harm" presents a non-exclusive list of habitat-modifying activities that could fall within the definition.⁴⁹ These activities include "[c]onstructing or maintaining barriers that eliminate or impede a listed species' access to habitat or ability to migrate" and "[c]onstructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species' habitat."⁵⁰

DOC regulations do not define "harass," but the Department has issued guidance on the term.⁵¹ This guidance defines "harass" to mean "[c]reate the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."⁵² Injury is "likely" if there is "a reasonable connection between the 'annoyance' (taking into account its magnitude, duration, frequency, and scope) and the behavioral response on the part of the animal(s) exposed to the disturbance that would be expected to result in the creation or increased risk of injury to that animal."⁵³ And to qualify as a "significant disruption" the annoyance must cause "a change in the animal's behavior (breeding, feeding, sheltering, resting, migrating, etc.) that could reasonably be expected, alone or in concert with other factors, to create or increase the risk of injury to an ESA-listed animal when added to the condition of the exposed animal before the disruption occurred."⁵⁴

The District Court for the Eastern District of California explained the difference between "harm" and "harass" as follows: " 'Harm' ... 'may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly

⁴⁷ *Id.* at 708.

⁴⁸ *See* Endangered and Threatened Wildlife and Plants; Definition of "Harm" ("DOC Final Rule Defining Harm"), 64 Fed. Reg. 60727, 60729 (Nov. 8, 1999).

⁴⁹ *Id.* at 60730.

⁵⁰ *Id.*

⁵¹ Nat'l Marine Fisheries Serv., 02-110-19, *Interim Guidance on the Endangered Species Act Term "Harass"* ("NMFS Guidance on 'Harass'") (Dec. 21, 2016).

⁵² *Id.* at 2.

⁵³ *Id.*

⁵⁴ *Id.*

impairing essential behavioral patterns' ” Harassment on the other hand occurs when an act annoys fish to the point where they significantly modify their behavior.”⁵⁵ Thus, while both harm and harassment include significant disruption or impairment of behavior patterns such as breeding or migrating, harm requires the disruption to cause reasonably certain death or injury, while harassment requires only that the disruption create or increase the risk of injury to the animal.

Section 9’s prohibitions on the take of endangered and threatened species are subject to specific exemptions. For example, as part of the section 7 consultation process, the Secretary may issue an incidental take statement (ITS) upon finding that a proposed agency action or a “reasonable and prudent alternative” will not likely jeopardize the continued existence of a threatened species.⁵⁶ Notwithstanding section 9, “any taking that is in compliance with the terms and conditions specified in a written [ITS]” is exempted.⁵⁷ Consistent with this exemption, the DOC has stated that “[a]ctivities conducted in accordance with an existing ESA incidental take authorization” will not violate section 9 take prohibitions with respect to CC Chinook and NC steelhead.⁵⁸

The ESA has a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person ... who is alleged to be in violation of any provision of [the ESA].”⁵⁹ A plaintiff can seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in take.⁶⁰

NOTICE OF VIOLATION

PG&E is committing an illegal, ongoing take of CC Chinook salmon and NC steelhead, in violation of ESA section 9, through its operation of the Potter Valley Project.

⁵⁵ *Westlands Water Dist. v. U.S. Dept. of Int.*, 275 F. Supp. 2d 1157, 1225 (E.D. Cal. 2002), *rev’d in part on other grounds and remanded*, 376 F.3d 853 (9th Cir. 2004).

⁵⁶ 16 U.S.C. § 1536(b)(4).

⁵⁷ 16 U.S.C. § 1536(o)(2).

⁵⁸ Section 9 Prohibitions for CC Chinook Salmon and NC Steelhead, 67 Fed. Reg. at 1117.

⁵⁹ 16 U.S.C. § 1540(g).

⁶⁰ *See Natl. Wildlife Fedn. v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994).

Scott Dam lacks any fish passage facilities and thus completely blocks access to hundreds of miles of high quality habitat above the dam.⁶¹ Similarly, Cape Horn Dam hinders natural fish passage to critical spawning habitat between Cape Horn and Scott Dam, providing only a narrow migration corridor through the fishway. To the extent that the ITS issued in conjunction with NMFS's 2002 Biological Opinion authorized the incidental take of threatened fish caused by PG&E's operation of these two dams, NMFS has informed FERC that this authorization has now expired.⁶² Absent such authorization, the dams themselves continually and unlawfully harm and harass CC Chinook salmon and NC steelhead. They harm the fish by impeding access to critical spawning habitat, significantly impairing their essential spawning, migrating, and breeding behavior.⁶³ They harass the fish by impeding or blocking access to this habitat, which increases risk of injury to the fish through predation and other stochastic events.⁶⁴ Access to this critical habitat is "essential" to the species' conservation as a matter of law.⁶⁵

The Cape Horn fishway in particular also harms and harasses the listed fish species in three ways. First, the fishway enables predation by river otters as CC Chinook and NC steelhead attempt to climb the ladder. Indeed, the forced passage of these fish through a narrow corridor, combined with an easily accessible fishing platform, makes it easier for river otters to prey on the fish than it would be if there were no fish ladder

⁶¹ See 2017 State of Salmonids Report at 281.

⁶² See NMFS March 2022 Letter to FERC at 1.

⁶³ See 50 C.F.R. § 222.102; DOC Final Rule Defining Harm, 64 Fed. Reg. at 60730.

⁶⁴ See NMFS Guidance on "Harass" at 2; *Westlands Water Dist.*, 275 F. Supp. 2d at 1225.

⁶⁵ See 16 U.S.C. § 1532(5)(A)(i)(I) (defining "critical habitat" as those areas that have physical or biological features ... "essential to the conservation of the species"). The NMFS has formally designated the Eel River above Cape Horn Dam as "critical habitat" for both CC Chinook and NC steelhead. Endangered and Threatened Species; Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon and Steelhead in California ("Final Rule Designating Critical Habitat"), 70 Fed. Reg. 52488 (Sept. 2, 2005); 50 C.F.R. § 226.211(f)(5)(xiv). This designation carries with it numerous additional requirements, including formal consultation under ESA section 7 to ensure that federal agency actions are not likely to destroy or adversely modify this habitat. 16 U.S.C. § 1536(a)(2). The designation also affects private activity to the extent that private activity directly or indirectly links to affected federal activity. See Final Rule Designating Critical Habitat, 70 Fed. Reg. at 52533.

present at all. Second, due to the fishway's substandard design, the fish ladder and fish hotel often become clogged with debris after periods of high flow. This requires the fishway's repeated closure during periods when threatened fish are migrating to their spawning habitat above Cape Horn Dam. Third, when flows exceed 2000 cfs, the fish hotel structure at the base of the fish ladder becomes unusable, as fish are no longer able to find the entrance to the ladder. The fish ladder also must be routinely closed when flows exceed 3000 cfs. When the fishway is blocked with debris or simply stops functioning because it was not designed to work at flows greater than 2000 cfs, migration upstream to critical spawning habitat ceases.

The ITS never covered PG&E's operation of the Cape Horn fishway. As NMFS recently explained:

[T]he *Incidental Take Statement* (ITS) explicitly excludes coverage for activities not described in the Opinion. ***Cape Horn Dam, the associated infrastructure, fishway maintenance, and flow operations to achieve fish passage at the passage facility*** are neither described within the Description of the Proposed Action, nor are their effects to listed species assessed within the Opinion. Consequently, we did not authorize incidental take resulting from these effects (e.g., delayed or blocked migration and predation of ESA-listed salmonids caused by the configuration and full operation of the Cape Horn Dam fish passage facility).⁶⁶

According to NMFS, the Potter Valley Project "is causing take of ESA-listed salmonids in a manner not anticipated in the Opinion and from activities not described in the Opinion."⁶⁷

PG&E's operation of the Potter Valley Project both harms and harasses listed fish and thus constitutes unlawful take. PG&E harms the fish by operating a fishway that directly causes their death or injury when river otters prey on the fish as they attempt to climb the ladder.⁶⁸ PG&E also harms the fish by maintaining and operating dams and a

⁶⁶ NMFS March 2022 Letter to FERC at 3 (emphasis added).

⁶⁷ *Id.* at 1.

⁶⁸ See DOC Final Rule Defining Harm, 64 Fed. Reg. at 60730 (noting that "operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species' habitat" constitutes "harm").

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fishway that prevent CC Chinook salmon and NC steelhead from reaching critical spawning habitat that is “essential” to their survival as a species.⁶⁹

PG&E’s actions also harass the fish. Scott Dam, Cape Horn Dam, and the Cape Horn Dam fishway directly disrupt essential breeding, spawning, and migrating behaviors by blocking passage to critical habitat.⁷⁰ The fishway also enables river otters to disrupt migrating behavior as the fish attempt to climb the ladder.⁷¹

CONCLUSION

The Potter Valley Project is causing an unlawful take of CC Chinook salmon and NC steelhead. We are hopeful that PG&E will remedy the ongoing take of these threatened species and ensure that no similar take occurs in the future. We ask that PG&E take immediate action to modify the Project to eliminate the conditions causing take. Please contact us if you wish to discuss this letter further.

COUNSEL FOR ORGANIZATION GIVING NOTICE

Counsel for Friends of the Eel River are:

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⁶⁹ *See id.* (noting that “maintaining barriers that eliminate or impede a listed species’ access to habitat or ability to migrate” constitutes “harm”); 50 C.F.R. § 226.211(f)(5)(xiv) (designating reaches of the Eel River above Cape Horn Dam as “critical habitat” for CC Chinook salmon and NC steelhead).

⁷⁰ *See* NMFS Guidance on “Harass” at 2 (defining “harass” to include annoyances that cause a change in breeding or migrating behavior that reasonably can be expected to increase risk of injury).

⁷¹ *See id.*

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Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



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Glen Spain
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Institute for Fisheries Resources

cc: Alecia Van Atta, Assistant Regional Director, National Marine Fisheries Service
Kimberly Bose, Secretary, Federal Energy Regulatory Commission
Service List for Potter Valley Project, FERC Project No. 77

1485234.10

SHUTE, MIHALY
& WEINBERGER LLP

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas & Electric Company
Potter Valley Project

Project No. P-77-000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by first class mail or electronic mail, a letter to Secretary Raimondo, U.S. Department of Commerce, and Brian Wong, Agent for Service for Pacific Gas and Electric Company, Re: Notice of Intent to Sue for Violation of the Federal Endangered Species Act (16 U.S.C. § 1540(g)): Potter Valley Hydroelectric Project; Cape Horn Dam Fishway. This Certificate of Service 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 15th day of April, 2022.



David Weibel
Legal Secretary
Shute, Mihaly & Weinberger LLP