



Via Electronic Filing

July 11, 2022

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Potter Valley Hydroelectric Project, Project No. 77
Pacific Gas and Electric Company's Response to FERC's May 11, 2022 Letter
Pertaining to NMFS' March 17, 2022 Filing

Dear Secretary Bose:

Pacific Gas and Electric Company ("PG&E") is the owner and licensee of the Potter Valley Hydroelectric Project No. 77 ("Project" or "Potter Valley"). This letter responds to the portion of a May 11, 2022 letter from the Federal Energy Regulatory Commission ("FERC" or "Commission")¹ seeking a response to a March 17, 2022 letter from the National Marine Fisheries Service ("NMFS")² requesting reinitiation of consultation under the Endangered Species Act ("ESA") and Magnuson-Stevens Fishery Conservation Act ("MSA") and suggesting the existing license for the Project should be reopened to include certain "interim measures." In particular, the Commission requests PG&E's position as to whether it is willing to voluntarily adopt NMFS' proposed interim measures so that the Commission can consider whether to initiate a proceeding to reopen and amend the license to require the measures, if they are supported by substantial evidence in the record.

As relevant background, a license for the Project was issued in 1983. The licensed Project included Scott Dam, Cape Horn Dam and its infrastructure, including a long-existing fish ladder. The license included Article 39, which required PG&E to develop and implement a ten-year monitoring program to evaluate the effects of Project operations (flow release schedule) on downstream fishery resources, report on the monitoring, and a reopener provision to allow the Commission to reopen the license to address any needed changes. Subsequent to the issuance of the license in 1983 and the ten-year study, three species of fish were listed as threatened under the ESA, including Southern Oregon/Northern California coho salmon (*Oncorhynchus kisutch*), California Coastal Chinook salmon (*O. tshawytscha*), and Northern California steelhead (*O. mykiss*). As a result, PG&E agreed to initiate an amendment proceeding to modify flows to address these species. As a result of this interim license proceeding and after FERC had consulted with NMFS pursuant to section 7 of the ESA, NMFS issued a Biological Opinion

¹ Accession No. 20220511-3004.

² Accession No. 20220317-5064.

(“BiOp”) for the Project in 2002, and the Commission incorporated the reasonable and prudent alternative (“RPA”), reasonable and prudent measures (“RPM”), and incidental take statement (“ITS”) implementing terms and conditions into the license. No entity challenged FERC’s inclusion of these elements of the BiOp into the FERC license. Since issuance of the BiOp, NMFS has never alleged the take described in the ITS has been exceeded and has never requested reinitiation of consultation, until submission of its March 17, 2022 letter, which failed to include any of the voluminous monitoring record covered by over 20 years of monitoring of Project operations.

On January 25, 2019, PG&E notified FERC it would not relicense the Project and withdrew its Notice of Intent and Pre-Application Document, resulting in the Project becoming an orphaned project. No entity successfully followed the FERC process to take over the Project, which resulted in a surrender of the license as the only remaining option for disposition of the Project. In a separate response to FERC’s May 11, 2022 letter filed on July 8, 2022, PG&E provided FERC with its plan and schedule for submitting an application to surrender its license. Until surrender of the license is approved and decommissioning activities are completed, PG&E is obligated to continue to comply with its license and all license terms, including the components of the RPA, RPM, and ITS terms and conditions from the NMFS BiOp that FERC incorporated into the license.

This letter responds to FERC’s letter and NMFS’ unsupported assertions regarding Project operations. The NMFS letter contains legal and factual inaccuracies. Part I of this response outlines the legal framework that applies and corrects the factual record, demonstrating that there is no basis for reinitiating consultation or reopening the license. Part II of this letter also responds to the specific proposed “interim” measures suggested in the NMFS letter. As noted above, PG&E continues to operate its Project consistent with the existing license pending approval of license surrender and decommissioning activities.

I. Correction of the Factual Record and Legal Framework

A. The Biological Opinion and Incidental Take Statement Apply for the Term of the License

The NMFS 2002 BiOp and ITS³ do not have a 20-year term or any other expiration date, as NMFS alleges. This is consistent with both the ESA and the Federal Power Act (“FPA”), as well as the provisions of the BiOp and ITS.

1. Statutory Framework

The ESA requires independent federal agencies, such as the Commission, ensure that any discretionary federal action is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.⁴ If listed species

³ Accession No. 20021202-0257 (“BiOp”).

⁴ 16 U.S.C. § 1536(a)(2).

may be present and affected by a given project, federal agencies must consult with NMFS to assess those impacts.⁵ If, through this consultation process, NMFS determines that incidental take of a listed species may occur, NMFS may provide a written ITS.⁶

When required, the ESA consultation process relates to the discretionary agency action, and the resulting BiOp assesses the impacts and, where necessary, provides coverage through an ITS for incidental take associated with that agency action. The BiOp and ITS provide coverage for the duration of the agency action.

While the Commission issues new hydropower licenses for a term of between 30 and 50 years,⁷ the FPA requires the Commission to issue annual licenses “under the terms and conditions of the existing license” while an application for renewal or surrender is pending.⁸ Annual licenses are renewed automatically without further order of the Commission.⁹ This happens with regularity, given the lengthy processes associated with relicensing or license surrender. The issuance of the annual license is not discretionary; it is a requirement of federal law.

The discretionary granting of a license is the federal agency action that requires consultation; the Commission’s issuance of annual licenses pursuant to FPA section 15(a)(1) is not a discretionary federal action and does not trigger a requirement to consult.¹⁰

2. Factual Record

The Commission issued a license for the Project in 1983.¹¹ That license was amended in 2004, with approximately 18 years of the original license term remaining.¹² That license amendment incorporated the RPA and RPMs from the BiOp and ITS issued by NMFS in 2002.¹³ By operation of law, the Commission issued notice of an annual license for the Project on April 21, 2022.¹⁴ Thus, the terms and conditions of the Project’s 1983 license, as amended in 2004 to incorporate the RPA and RPMs, remain in effect,¹⁵ and new or additional ESA consultation was not required for the issuance of the annual license.

The BiOp and ITS did not include an expiration date, nor was one specified in the RPA and RPMs. Rather, the BiOp and ITS repeatedly reference that they apply for the “life” or “term” of the FERC license. The BiOp and ITS also reference the potential extension of the

⁵ *Id.* § 1536(a)(3).

⁶ *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(h).

⁷ 16 U.S.C. § 808(3).

⁸ *Id.* § 808(a)(1).

⁹ 18 C.F.R. § 16.18(c).

¹⁰ 16 U.S.C. § 808(a)(1); *see Cal. Sportfishing Prot. Alliance v. FERC*, 472 F.3d 593 (9th Cir. 2006).

¹¹ *Pac. Gas & Elec. Co.*, 25 FERC ¶ 61,010 (1983).

¹² *Pac. Gas & Elec. Co.*, 106 FERC ¶ 61,065 (2004).

¹³ *Id.*

¹⁴ Accession No. 20220421-3034.

¹⁵ *Pac. Gas & Elec. Co.*, 25 FERC ¶ 61,010 (1983).

license term, and that these extensions are included within the term “life of the license.” For example, NMFS states that it “anticipates that incidental take . . . may occur as a result of the implementation of the identified reasonable and prudent alternative for *the remaining life of the FERC license.*”¹⁶ NMFS further provides that FERC shall “ensure that each year for the *remaining term of the license, including any extensions or annual licenses which may be issued by the FERC, PG&E will file a pikeminnow suppression operations plan with NMFS.*”¹⁷ Finally, with respect to the pikeminnow suppression measure, NMFS provides that “[o]n January 1 of each year thereafter PG&E shall credit an additional \$60,000 to the Fund *for the remaining term of the license, including any annual license(s) which may be issued after license expiration or license surrender.*”¹⁸

Thus, NMFS’ BiOp and ITS remain in effect for the life of the license, whether that be 20 years or longer due to the operation of annual licenses as directed by the FPA. NMFS explicitly recognizes the likelihood of the license extending beyond 20 years by referencing the annual license scenario in the BiOp and ITS.

To the extent NMFS intended there to be some reevaluation or assessment after twenty years, it could have said so in the BiOp. In fact, the BiOp does require periodic adaptive management reviews. For example, NMFS required a review of the summer flow component of the RPA after 10 years of monitoring.¹⁹ Similarly, the interactions of the pikeminnow population and salmonids were required to be reassessed after 5 years.²⁰ Those reviews occurred, and no changes were determined to be necessary.²¹ There is no similar provision associated with NMFS’ alleged overall 20-year term of the BiOp.

The terms of the RPA and RPMs from the BiOp and ITS were incorporated into the license by the Commission, and did not include any expiration date or other time limitation.²² If NMFS did not agree with the RPA and RPMs as incorporated into the license, or wanted to add or clarify that the RPA and RPMs were for a specific time period, NMFS could have requested rehearing of the 2004 amendment order to add it. While NMFS filed for rehearing on other issues, its rehearing request did not seek to limit the term of the BiOp.²³ Thus, there is no expiration date for the RPA and RPM conditions incorporated into the license, or for the BiOp and ITS. They continue throughout the term of the license, including any annual licenses.

¹⁶ BiOp at pg. 105.

¹⁷ *Id.* at pg. 106.

¹⁸ *Id.* at pg. 94 (provision F.2); pg. 106, item 4.

¹⁹ *Id.* at p. 97.

²⁰ *Id.* at p. 100.

²¹ NMFS receives copies of all reports and studies generated by PG&E. PG&E regularly confers with NMFS regarding the operation of the Project and the status the salmonid species. NMFS has never, prior to this letter, indicated any concern that changes to the Project were needed, that consultation should be reinitiated, or that the BiOp and ITS had a limited term.

²² FERC included the RPA (Appendix A of the 2004 amendment order) and the RPMs (Appendix B of the 2004 amendment order). *See Pac. Gas & Elec. Co.*, 106 FERC ¶ 61,065 (2004). The 2004 amendment order did not include a special reopener or a directive to the licensee to reopen the license after 20 years.

²³ Accession No. 20040227-5010.

B. The BiOp Evaluated Effects Associated with the Cape Horn Fish Ladder/Hotel

The Cape Horn fish ladder and fish hotel were considered throughout this process, consistent with the applicable statutory framework and as documented in the record.

1. Statutory Framework

The purpose of the ESA consultation process is to ensure that an agency action will not jeopardize the existence of a listed species or adversely modify its habitat.²⁴ In assessing whether an action will cause jeopardy, NMFS must evaluate the current status of the species, the environmental baseline, the effects of the action, and the cumulative effects.²⁵ This evaluation is conducted for the “action area,” which is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”²⁶ Thus, NMFS must evaluate all effects of a given project, for all areas in which the project may have an effect. For purposes of this analysis, the effects of an existing project may be analyzed either as part of the baseline or part of the proposed action; it does not make a practical difference with respect to the outcome of the assessment.²⁷ As FERC explained in the context of the 2004 license amendment for the Project, NMFS is required “to ensure that its environmental analysis identifies past and present activities that have contributed to current environmental conditions.”²⁸ Thus, “[i]t is clear from the regulations that the environmental baseline for ESA purposes includes past as well as present impacts of human activities in the action area.”²⁹

2. Factual Record

The factual record demonstrates that: (1) the 2002 ESA consultation was the completion of the consultation for the relicensing that occurred in 1983; and (2) the NMFS evaluation included consideration of the Cape Horn fish passage facilities.

During the initial licensing of the Project in 1983, none of the salmonid species were listed under the ESA. However, it was recognized that those species were declining as a result of many factors, and that the Project *may* adversely affect those species. Specific studies were required by Article 39 of the license to determine the effects of the flow release schedule for the Project, as well as the temperature regime of the Eel River downstream of Scott Dam. Based on that study, PG&E and the relevant agencies were to make “recommendations for modification in the flow release schedule *or project structures* and operations necessary to protect and maintain the fishery resources.”³⁰

²⁴ 16 U.S.C. § 1536.

²⁵ ESA Handbook at p. 4-37.

²⁶ 50 C.F.R. § 402.02.

²⁷ See, e.g., *KEI (Me.) Power Mgmt. (III) LLC*, 173 FERC ¶ 61,069, at PP 27-28 (2020).

²⁸ 107 FERC ¶ 61,232 at P. 21.

²⁹ *Id.*

³⁰ *Pac. Gas & Elec. Co.*, 106 FERC ¶ 61,065, Article 39 (emphasis added).

It was understood that the ESA consultation process would be completed after those studies were conducted, and that amendments to the license would be proposed in the future to protect aquatic species. NMFS was actively involved in reviewing the study design and results, as well as the options for addressing species impacts. As explained by NMFS, the purpose of the consultation was to determine “whether future operations of the Potter Valley Project are likely to appreciably reduce the likelihood of the survival and recovery of the listed species,” and that the proposed action was analyzed “in consideration of the fact that this license modification is a deferred phase of the re-licensing proceedings.”³¹

Upon completion of the required studies, PG&E filed a license amendment application to implement changes in Project operations to address impacts to salmonid species. As part of the license amendment process, an Environmental Impact Statement (“EIS”) was prepared in accordance with the National Environmental Policy Act (“NEPA”). The EIS described the existing Project facilities and operations, including the upstream and downstream fish passage facilities at Cape Horn Dam.³² The EIS also outlined the various alternatives proposed by stakeholders, including NMFS, based on the study results. Those alternatives involved various flow release schedules, but also included non-flow related actions. For example, the Round Valley Indian Tribe’s (“RVIT”) proposed alternative included nonflow actions such as improvement of the fishway and fish handling facilities at Cape Horn Dam.³³ NMFS itself included predation control actions and related studies as part of its RPA.

NMFS was aware of and reviewed the various alternatives.³⁴ It was understood that changes to Project structures and operations were also under consideration as part of the amendment process. NMFS explained, “[t]he purpose of the proposed action is to modify the temporary Article 38 flow regime *and Project structures* ‘for the protection and maintenance of salmonid fishery resources in the Eel and Russian rivers’ (Article 39) to achieve a flow regime and *operational system* which meets the Project’s purposes and complies with Section 10 of the Federal Power Act.”³⁵

During the consultation process, NMFS determined that the alternative selected by the Commission would jeopardize the listed salmonid species. NMFS developed an RPA that included a different flow release regime, as well as nonflow-related requirements. NMFS did not propose changes to the Cape Horn fish passage facilities. This is due to the fact that the factors identified by NMFS as having the greatest impact on salmonid species (flow levels, temperature and predators) did not include impacts associated with fish passage or the Cape Horn fish passage facilities.

³¹ Accession No. 20001128-0360.

³² Accession No. 20000705-0168 at p. 2-6.

³³ *Id.* at p. 2-33.

³⁴ Accession No. 20021202-0257 at p. 82-83.

³⁵ *Id.* at 83 (emphasis added).

The BiOp reflects that it assessed the Project in its entirety, continuing the consultation process from the 1983 licensing process. For example, the BiOp includes the following language confirming that consultation related to the amendment was a continuation of the original relicensing proceeding:

- Under Description of the Proposed Action: “Although the purpose is to amend the license to satisfy Article 39, this amendment is a continuation of the process of bring the original re-licensing proceeding to a closure.”³⁶
- Under Effects of the Proposed Action, NMFS describes its scope of review as follows:³⁷

The scope of the proposed action is a proposal for a flow regime in the Eel River designed to meet PG&Es hydropower needs while protecting and maintaining the fishery resources in the river. This proceeding is an extension of the re-licensing proceeding which concluded in 1983 with instructions to PG&E to operate under a specific flow regime (Article 38) while investigating whether a different flow regime would be necessary protect and maintain the fisheries (Article 39).

The BiOp also reflects that the effects associated with the Cape Horn fish passage facilities were evaluated. They were included in the environmental baseline.³⁸ The following language from the BiOp shows that NMFS assessed the impacts of the Cape Horn fish ladder and hotel.

- Footnote 1 of the BiOp references the fish ladder, the poor design, and the 1962/1987 modifications to the ladder. The fish ladder always has been a component of the Project.³⁹
- In discussing “Potter Valley Project Impacts,” NMFS states that “[a]n inadequate fish ladder at Cape Horn Dam and an unscreened tunnel diversion impacted fishery resources of the Eel River.”⁴⁰

³⁶ BiOp at pg. 9.

³⁷ *Id.* at pg. 62.

³⁸ PG&E requested rehearing of the license. One of the issues PG&E raised was the definition of environmental baseline, asserting that NMFS had inappropriately used pre-project conditions as the baseline, rather than current conditions. Accession No 20040302-0055. At base, PG&E was asserting that NMFS jeopardy determination was predicated on “the initial construction of Potter Valley and how that action impacted pre-project impaired flows, rather than the added impacts (or benefits in this case) of the PVID Alternative over the existing license conditions.” *Id.* at p. 20. FERC rejected this argument, deferring to NMFS’ assessment of all Project effects. FERC explained that the ESA regulations require consideration of all effects, including past and present. 107 FERC ¶ 61,232 at P. 21. Thus, the entirety of the Project, including the Cape Horn fish passage facilities, was assessed in the BiOp, not just the change in the flow regime.

³⁹ BiOp at pg. 28, fn 1.

⁴⁰ *Id.* at pg. 34.

- “CDFG conducts a “stock rescue” program which removes wild Chinook salmon and, until 1997, wild steelhead from the mainstem Eel River at the Cape Horn Dam fish ladder”⁴¹
- The “environmental baseline” is defined to include the Cape Horn fish passage facilities: “The Potter Valley Project construction and operations have occurred for over 90 years and are thus, part of the environmental baseline. Therefore, NMFS will treat all effects that occurred during the life of the Project *to this point* as part of the environmental baseline for this biological opinion. The “Effects of the Proposed Action” section will consider the expected effects of the proposed Project operations (Article 38 flows as amended by the implementation of the PVID proposal) *into the future.*”⁴²
- In its cover letter to the draft biological opinion,⁴³ NMFS responds to a comment about why the existence and operation of the Potter Valley Project was included in the environmental baseline by explaining as follows:

During section 7 consultation, NMFS reviews the status of the species and the environmental baseline of the affected area in order to analyze the proposed action within the context of the factors that have led to the decline of the species and the species’ chances for survival and recovery in the face of on-going threats. The existence and past operations of the Potter Valley Project are a part of the environmental baseline and NMFS has reviewed them as such. However, for purposes of determining whether future operations of the Potter Valley Project are likely to appreciably reduce the likelihood of the survival and recovery of the listed species, NMFS has analyzed the proposed action in consideration of the fact that this license modification is a deferred phase of the re-licensing proceedings.

C. Incidental Take Coverage is Provided for the Cape Horn Fish Ladder and Fish Hotel

The ITS provisions incorporated into the license govern all take associated with Project operation.

1. Statutory Framework

An ITS authorizes the take of listed species expected to occur as a result of agency action.⁴⁴ The agency action identified here is the amendment of the license for the Potter Valley

⁴¹ *Id.* at pg. 42.

⁴² *Id.* at pg. 28.

⁴³ Accession No. 20001128-0360.

⁴⁴ 16 U.S.C. § 1536.

Project. However, the consultation that took place was a continuation of the consultation for the 1983 relicensing.⁴⁵

2. Factual Record

The factual record reflects that NMFS determined jeopardy would result if the Project was operated in accordance with the Commission's chosen alternative. The RPA imposed by NMFS was designed to ensure that the Project's future operation would not cause jeopardy.⁴⁶ The ITS then authorized incidental take that would occur as a result of Project operations in accordance with the RPA. The ITS provides as follows:

- “This incidental take statement is applicable to *all activities* related to the PG&E Potter Valley Project (P-77-110) pursuant to the RPA described in this opinion. Unless modified, this incidental take statement does not cover activities that are not described and assessed within this opinion.”⁴⁷
- NMFS explains that incidental take is likely to occur “in the form of delayed or blocked migration, dewatering of redds, reduced survival due to unfavorable conditions, and predation on juvenile fish.”⁴⁸ This reference to delayed or blocked migration encompasses the impacts of the Cape Horn fish passage facilities.
- The RPMs minimize the likelihood of take “resulting from the *operation of the Project* under the Reasonable and Prudent Alternative.”⁴⁹
- “By monitoring escapements, FERC, NMFS and the licensee will be able to detect overall trends in salmonid abundance and variability. Information concerning compliance with the reasonable and prudent alternative may be developed from PG&E surveys or other sources.”⁵⁰ This monitoring requirement, focused on salmonid abundance, demonstrates that the ITS was contemplating global impacts from Project operations, and not solely the change in flow.
- One of the RPMs is that NMFS must review and approve operations of the fish screen at Van Arsdale diversion dam. This RPM relates to Project operations outside of the flow regime, reflecting the fact that the ITS applies to the entire Project.⁵¹

⁴⁵ See Cover Letter to NMFS Draft Biological Opinion, November 22, 2000, Accession No. 20001128-0360.

⁴⁶ *Id.*

⁴⁷ BiOp at pg. 105 (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.* at pg. 106.

⁵⁰ *Id.* at pg. 106, fn 11.

⁵¹ *Id.* at pg. 107.

D. There is No Basis for Reinitiation of Consultation

1. Statutory Framework

Reinitiation of consultation is triggered when: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered; or (4) a new species is listed or critical habitat designated that may be affected by the action.⁵² None of those circumstances exist here.

The mere existence of new information does not trigger reinitiation of consultation.⁵³ Rather, a finding that “the new information reveals effects” not previously considered is the impetus for an agency to reinitiate consultation.⁵⁴ Here, neither situation has occurred. The existence and impacts of the Cape Horn fish passage facilities have been known and understood for decades.⁵⁵

Finally, a BiOp/ITS is not self-implementing. It can be effectuated only through the action agency and by their inclusion of the RPA/RPMs in the license. If NMFS disagrees with the part of the BiOp included (or omitted) from a license, this must be challenged on rehearing. Here, no obligation to reinitiate consultation outside of the statutory requirements was included in the license. Thus, reinitiation of consultation can occur only in the specified circumstances (none of which exist here) and at the Commission’s discretion.

Similarly, the Commission lacks authority to reopen a license unless and until “a federal or state fish and wildlife agency or other entity provides information that warrants the Commission’s further consideration of the issue.”⁵⁶ That information cannot be conclusory statements. Rather, a request must be filed and “supported by a prima facie showing that the environment will not be adequately protected under the terms of the existing license.”⁵⁷ The impacts asserted in such a request must be unanticipated and serious.⁵⁸

2. Factual Record

As explained above, the Cape Horn Dam fish passage facilities and their impacts were encompassed within the BiOp and ITS. The BiOp and ITS were not of limited duration. Thus,

⁵² 50 C.F.R. § 402.16; *see also* Accession No. 20021202-0257 at p. 112.

⁵³ *Alliance v. Martin*, 2021 U.S. Dist. LEXIS 153274, *40 (D. Mont. 2021) (citing *Alliance for the Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1204 (D. Mont. 2019)).

⁵⁴ *Id.* at 1204 (citing 50 C.F.R. § 402.16(b)).

⁵⁵ *See, e.g.*, Article 52(b) Annual Performance Reports. 2005-2020.

⁵⁶ *Pub. Serv. Co.*, 98 FERC ¶ 62,203 at 64,366.

⁵⁷ *Boise-Kuna Irr. Dist.*, 106 FERC ¶ 61,089 at P. 19.

⁵⁸ *Pacificorp*, 126 FERC ¶ 61,235 at PP. 13-14.

the only basis for reinitiating consultation would be if one of the statutory criteria are met. They are not.

The ITS does not include a specific take number. Rather, the ITS specifies that “incidental take may be measured through successful compliance with the reasonable and prudent alternative.”⁵⁹ Compliance with the RPA is to be determined based on not only measurements of the flow volumes, but also on the fish counts. The fish counts determine the broad impacts of the Project on the salmonid populations, not only the change in flows.⁶⁰

NMFS has not offered any evidence to support the assertion that take has exceeded the ITS or that conditions have resulted that require the Commission to reinitiate consultation. There is no new information that indicates the RPA has not been met, or that the Project operations, contrasted with other factors, are having a greater impact on salmonid species than expected.

Finally, there have been no modifications to the Project.⁶¹

Similarly, NMFS has offered no evidence, beyond conclusory statements, demonstrating a need for the Commission to reopen the license. As discussed above, the Cape Horn fish passage facilities have been in existence throughout the life of the Project. The effects of the fish passage facilities were understood and considered in the BiOp and ITS; they are not unanticipated or more serious than expected. Accordingly, there is not substantial evidence in the record to justify a reopening of the license by the Commission.

Based on the above: (1) PG&E’s operation of the Project complies with the terms of the RPA in the BiOp; (2) all Project activities are encompassed within the BiOp and ITS; (3) reinitiation of consultation is not necessary or appropriate, particularly given that a new license will not be issued for the Project; and (4) the record does not include substantial evidence to support reopening the license.

II. Response to NMFS’ Proposed Interim Measures

NMFS’ March 17, 2022 letter includes eight purported “interim protective measures” to be added to the existing license pending reinitiation of ESA section 7 consultation by the Commission regarding listed species. As described above, PG&E’s operations are consistent with the existing RPA included in the license and NMFS has not provided any evidence to support its conclusory assertions that Project operations are jeopardizing the existence of any listed species. NMFS explains that the interim measures are justified because of the “procedural complexities associated with the impending license expiration and uncertainty regarding the

⁵⁹ BiOp at p. 105.

⁶⁰ *Id.* at p. 106, fn 11.

⁶¹ While PG&E has sought variances periodically to adjust the applicable flow regime, those variances related to the classification of the status of the Eel River based on naturally occurring conditions. PG&E has, at all times, complied with the applicable release requirements in the RPA based on the approved classification of the Eel River status.

status of a future license proceeding may delay such consultation.”⁶² Thus, NMFS requests the eight measures “pending a final determination ordered by the Commission regarding the future of the Potter Valley Project and completion of a subsequent ESA and MSA consultation.”⁶³

As an initial matter, NMFS’ rationale for requesting interim measures is incorrect. While uncertainty existed related to whether the Project would be relicensed or surrendered during the pendency of the orphan project process, that process has concluded and no timely license applications were filed for a new license for the Project. Accordingly, the Commission will not be making a determination regarding the future licensing of the Project and there will be no future ESA consultation for a license. Rather, the existing license will be surrendered and any ESA consultation will be limited to temporary impacts to listed species associated with any proposed construction activities approved in a surrender order.

Notwithstanding PG&E’s position regarding the lack of evidentiary support provided by NMFS and the inaccuracies regarding NMFS’ legal position, PG&E addresses each of NMFS’ proposed interim measures below.

A. Cape Horn Dam Fish Passage Facility Winter Operations Plan (Measure 1)

NMFS’ first requested measure is for full implementation of the Cape Horn Dam Fish Passage Facility Winter Operations Procedure, dated November 13, 2020 (“Winter Operations Plan”), and continuation of the Commission Order Approving Temporary Operation of the Sediment Exclusion Doors, issued December 13, 2021 (“Temporary Order”).⁶⁴

PG&E supports expeditious approval of the Winter Operations Plan but opposes any section 7 consultation associated with purported omission of the fish ladder from the BiOp (as described above). PG&E submitted for Commission approval the Winter Operations Plan in November 2020 after consultation with NMFS, in which NMFS agreed with the proposed procedure for operating the gates at the entrance to the fish ladder during winter flows.⁶⁵ FERC’s Temporary Order determined that the temporary proposal would “avoid adverse impacts to federally-listed species...” and that the “proposal would also avoid damages to project infrastructure and lamprey passage facilities in the event of high flows.” The Temporary Order goes on to state “the licensee’s proposal was coordinated with, and supported by resources agencies.”⁶⁶ PG&E continues to support expeditious, long-term approval of the Winter Operations Plan filed by PG&E in November 2020.

However, as described above, the Cape Horn Dam fish passage facility is not required to be addressed by the Winter Operations Plan. The fish passage facility has been an integral part of NMFS’ assessments of the Project for listed and non-listed fish since the license proceeding

⁶² NMFS March 17, 2022 Letter, pg. 4.

⁶³ *Id.* at pg. 5.

⁶⁴ *Pacific Gas and Elec. Co.*, 177 FERC ¶ 62,136 (2021).

⁶⁵ Accession No. 20201113-5148.

⁶⁶ *Pacific Gas and Elec. Co.*, 177 FERC ¶ 62,136, at P 10 (2021).

for the existing license began in the 1970s. NMFS has not provided any evidence to support reinitiation of consultation or inadequacies in the BiOp, or the components of the BiOp incorporated into the license, that would support the need to reinitiate consultation regarding the Project facilities, including the fish passage facility. Accordingly, PG&E does not support reinitiating consultation regarding the fish passage facility but does support FERC's expeditious approval of the Winter Operations Plan (as did NMFS when it was consulted on the Winter Operations Plan).

B. RPA Revisions to Address Summer Temperatures (Measures 2-5)

NMFS' second, third, fourth, and fifth requested measures all appear to be related to attempts to address concerns with seasonal water temperatures, especially summer temperatures in the Eel River. Interim measure 2 requests that PG&E prepare a water temperature management plan. Interim measure 3 requests that the summer flow component of NMFS's RPA be revised to ensure suitable summer rearing temperatures for salmonids below Scott Dam. Interim measure 4 requests that Operating Rule E.5, which is a component of NMFS' RPA, be revised to implement a reservoir storage-based cold water pool management strategy to target summer water temperatures for salmonids below Scott Dam. Interim measure 5 requests revision of the water year classifications set forth in NMFS' RPA.

As described above, PG&E does not agree it is necessary to reinitiate ESA section 7 consultation related to the BiOp and its RPA because NMFS has not demonstrated that the legal standard for reinitiating consultation has been satisfied. Further, NMFS has not provided substantial evidence (or any evidence) to support reopening the license that would demonstrate the Project is adversely affecting listed or any other species. Even so, PG&E recognizes that the RPA poorly addresses drought years, in particular, and does not result in optimum releases of stored water during appropriate times of the year, which results in the need to obtain variances to the RPA that generally are supported by most, if not all, stakeholders. While PG&E does not agree to reopen the license, PG&E is willing to discuss with NMFS and stakeholders a long-term variance of the RPA for Commission approval to address more optimum implementation of the existing RPA.

With respect to the specific measures 2 through 5 proposed by NMFS, each are addressed below. Regarding proposed measure 2, PG&E does not agree to reopen the license to require a water temperature management plan. License articles 52 and 57 and RPM 8 required PG&E to develop a Summer Water Temperature Monitoring Plan to monitor temperatures in the Eel River above and below Project facilities from May through October. On November 9, 2005, the Commission approved PG&E's plan and PG&E has been implementing the plan and annually filing the required results since 2006.⁶⁷ The most recent report was filed on June 29, 2022.⁶⁸ The report shows that from May through mid-August inflows into Lake Pillsbury are consistently *warmer* than measurements at the first gage below Scott Dam, demonstrating that

⁶⁷ *Pacific Gas and Elec. Co.*, 113 FERC ¶ 62,122 (2005).

⁶⁸ Accession No. 20220629-5148.

the Project provides a beneficial effect on water temperature when the region often experiences peak ambient temperatures.

Regarding proposed measures 3, 4, and 5, NMFS proposes revisions to its RPA to include dry season reservoir storage targets in Lake Pillsbury and to operate water releases to ensure suitable summer rearing temperatures (measure 3), to modify Operating Rule E.5 for the same purpose (measure 4), and to modify the water year classifications to address extreme dry years. As noted above, PG&E is willing to discuss with agencies and stakeholders a long-term variance of these RPA requirements for approval by the Commission. However, any such variance must reflect the Project's beneficial contribution of cold water to the system, the operational limits of Lake Pillsbury and Scott Dam, and applicable water rights. Further, PG&E does not agree that the legal standard for reinitiating consultation in the BiOp or for reopening the license have been satisfied related to these proposed temperature measures because, as demonstrated by decades of monitoring, Lake Pillsbury beneficially impacts temperatures in the most critical months and therefore the Project's impact on temperature is *benefiting*, not adversely affecting, listed species.

C. Adult Salmonid Escapement Monitoring Plan (Measure 6)

NMFS' sixth requested measure is to require PG&E to develop and implement an adult escapement monitoring plan for salmonids in the Eel River "upstream of the South Fork Eel River, including watershed within this geographic area."⁶⁹

PG&E is willing to discuss potential revisions to the existing escapement monitoring plan so long as any revisions reflect the same level of effort and funding as is currently required under the FERC-approved escapement monitoring plan. License article 53 and RPM 4, incorporated into the existing license, require PG&E to fund annual Chinook salmon carcass surveys to monitor escapement. FERC approved PG&E's Salmon Carcass Surveys and Stock Rescue Program Funding and Implementation Plan on March 3, 2005.⁷⁰ Pursuant to the plan, PG&E has conducted annual Chinook salmon carcass surveys at one index section in the upper mainstem Eel River and five sections in the Tomki Creek drainage. These sites were selected based on previously-established survey results. Carcass surveys are initiated in the fall of each year soon after the first indication of salmon arriving in the Eel River at or below Cape Horn Dam and are conducted on a weekly basis, flow conditions permitting, for a period of approximately 10 weeks. Surveys are conducted on foot by teams of two biologists.

PG&E has been conducting these surveys annually since 2005, providing the results to agencies, and submitting the reports to FERC. The most recent report was filed on June 28, 2022.⁷¹ At one point, agencies proposed and discussed with PG&E the possibility of surveying other anadromous fish in the Eel River; however, NMFS, CDFW, and RVIT agreed that most of

⁶⁹ NMFS March 17, 2022 Letter, at pg. 5.

⁷⁰ *Pacific Gas and Elec. Co.*, 110 FERC ¶ 62,205 (2005).

⁷¹ Accession No. 20220628-5012.

this data was already being reported directly to the agencies from other sources, including salmonid arrivals at Van Arsdale Fisheries Station located within the Cape Horn Fish Ladder.⁷²

NMFS' request for an interim measure to monitor escapement is redundant of existing escapement monitoring through the Chinook Salmon Carcass Surveys. As noted with respect to all measures proposed by NMFS, NMFS' request for a revised escapement monitoring plan was not accompanied by any evidence to support the need for such a modification. Notwithstanding, PG&E is willing to discuss revisions to the FERC-approved plan required by Article 53 and NMFS RPM 4 to address modifications to the existing escapement monitoring so long as the level of effort and cost to PG&E customers is similar to current levels. In particular, monitoring as far downstream as the South Fork Eel River, as suggested by NMFS, is far outside the area of potential effect of Project operations and likely would increase significantly the cost of the escapement monitoring plan. While PG&E is willing to discuss revisions to the FERC-approved plan that reflect a similar level of monitoring effort and potentially file an amended plan, PG&E believes escapement monitoring efforts have been sufficient since 2005.

D. Sacramento Pikeminnow Suppression Plan (Measure 7)

NMFS' seventh requested measure is to require PG&E to implement the annual Sacramento Pikeminnow Suppression Plan. This is a curious "interim measure" request since the Commission has already approved and PG&E annually implements this plan.⁷³ Further, NMFS has not provided any evidence to support a need to modify this plan. As with all of its existing license conditions, PG&E intends to continue to comply with this plan until FERC approves a surrender of the license. Accordingly, PG&E opposes any revisions to this plan or additional requirements beyond those required by the FERC-approved plan.

E. Stream Gaging Plan (Measure 8)

NMFS' eighth requested measure is to require PG&E to develop and implement a stream gaging plan to monitor cumulative inflow into Lake Pillsbury, above Scott Dam and Tomki Creek.

PG&E objects to this proposed measure because it would not provide significant additional information, there is no link between the value of the information and the impact on listed salmonids, and PG&E's existing methods to calculate storage in Lake Pillsbury are sufficient and accurate.

PG&E calculates inflow in order to determine storage in Lake Pillsbury using a mass balance equation that is sufficiently accurate to calculate and plan for water releases required by the Project license, including the RPA incorporated into the license. Additional information about inflow is unnecessary to perform the mass balance calculation and therefore the costs associated with additional gaging in a very remote location for a license that will be surrendered

⁷² *Id.* at pg. 1.

⁷³ *Pacific Gas and Elec. Co.*, 113 FERC ¶ 62,149 (2005).

are unnecessary. NMFS has not provided any information or justification to support the need for additional inflow information nor has NMFS provided any evidence to link information related to incremental inflow information and Project effects on listed salmonids. Accordingly, PG&E objects to this measure and does not agree to reopen the license or modify any plan to provide for such additional monitoring.

III. Conclusion

As described in Part I, NMFS' legal and factual bases are inaccurate and incorrect for its assertion that there is a need to reinitiate ESA section 7 consultation for the Project license or for the Commission to reopen the Project license to include additional measures related to listed species. Notwithstanding, as described in Part II, PG&E does not oppose Commission approval of PG&E's proposed Winter Operations Plan (Measure 1), limited revision of the existing FERC-approved escapement plan (Measure 6), continuation of the existing Pikeminnow Suppression Plan (Measure 7), and long-term variances, as needed pending license surrender and Project decommissioning, to allow PG&E to schedule releases of existing water allocations during dry years at times of the year that are anticipated to result in additional beneficial effects on fish (Measures 2 through 5). PG&E does not agree to develop a gaging plan to monitor cumulative inflow into Lake Pillsbury (Measure 8).

If you have any questions, please contact the undersigned.

Respectfully submitted,

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