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November 2, 2017

VIA ELECTRONIC MAIL (Nathan.Fisch@waterboards.ca.gov)

Mr. Nathan Fisch
State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Response to Comments on Mitigated Negative Declaration for Pacific Gas and Electric Company's Poe Hydroelectric Project, FERC Project No. 2107

Dear Mr. Fisch:

Pacific Gas and Electric Company ("PG&E") appreciates the opportunity to submit responses to the comments submitted by other entities on the September 8, 2017 Initial Study Document/CEQA Checklist/Proposed Mitigated Negative Declaration ("MND") issued by the State Water Resources Control Board ("SWB") for PG&E's Poe Hydroelectric Project, FERC Project No. 2107 ("Poe" or "Project"). The four entities submitting comments were Butte County, California ("Butte"), the United States Forest Service ("USFS"), the United States Fish and Wildlife Service ("USFWS"), and the California Department of Fish and Wildlife ("CDFW").[1] PG&E's responses to these entities' comments are set out below.

RESPONSE TO COMMENTS

Butte

Butte's comments reiterate positions and requests it previously made to – but were rejected by – the Federal Energy Regulatory Commission ("FERC") in the relicensing proceeding for Poe. Further, Butte's comments are inconsistent with both federal and California law.

Review of FERC's March 2007 Final Environmental Assessment ("FEA") for the relicensing of Poe reveals that FERC considered, and rejected or did not adopt, the requests included in Butte's October 11, 2017 letter commenting on the MND (at pp. 2, 3-4). *See generally* FEA at pp. 149-183 and pp. 251-256. *See also* pp. 160-163, 256 (finding without merit Butte's requests as to Bardee's Bar Road), 163-165, 252 (rejecting Butte's request for a

[1] PG&E submitted comments on the MND on October 10, 2017.

new trail between Bardee's Bar and Poe Beach), 174-175, 252-254 (rejecting Butte's request that PG&E be required to fund law enforcement activities), 182-183, 252-254 (rejecting Butte's request for a North Fork Feather Enhancement Fund), and 177-182, 252, 254-255 (rejecting Butte's recreational flow release proposal). Butte has not presented any justification for the SWB to act any differently than FERC with respect to the positions and requests advanced by Butte on these matters. Similarly, Butte has not presented any justification for its contention (Butte letter at pp. 3-4) that the 6,000 acre-feet of water per year required to be released for recreational boating purposes as specified by Condition 6 of the SWB's June 14, 2017 Clean Water Act Section 401 draft water quality certification (and by Condition 27 of the USFS' May 28, 2007 Final Section 4(e) Conditions) is inadequate.

With respect to inconsistency with federal law, Butte's request that a licensee like PG&E be required to fund law enforcement activities has been found to be inconsistent with the Federal Power Act by both FERC and the courts. *See, e.g., County of Butte, California v. California Department of Water Resources*, 128 FERC ¶ 61,068 (2009), *reh'g denied*, 129 FERC ¶ 61,133 (2009), *appeal denied sub. nom County of Butte, California v. FERC*, 445 Fed. Appx. 928 (9th Cir. 2011) (unpublished). Similarly, Butte's position on what constitutes an appropriate environmental baseline against which to measure impacts (Butte letter at pp. 2-3) is contrary to federal law. *See American Rivers v. FERC*, 201 F.3d 1186, 1195-99 (9th Cir. 1999), affirming FERC's decision to use current conditions as the environmental baseline, not a pre-project baseline as requested by Butte here. *Accord*: *Conservation Law Foundation v. FERC*, 216 F.3d 41, 45-46 (D.C. Cir. 2000).

Butte's position on the environmental baseline issue fares no better under California law. As explained below, the SWB has employed a baseline consistent with the above in its review under the California Environmental Quality Act ("CEQA").

To assess the potential impacts of a project, CEQA requires a lead agency to determine the existing environmental conditions from which to measure those impacts, commonly referred to as the environmental "baseline." Section 15125 (a) of the Guidelines for Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, §§ 15000 ("CEQA Guidelines") provides that "the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced" . . . "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."

The California Supreme Court has repeatedly confirmed this basic rule. *See, e.g., Communities for a Better Environment v. South Coast Air Quality Management District,* 48 Cal.4th 310, 321-323 (2010) (*"CBE v. South Coast")* (baseline must be based upon actual physical conditions rather than conditions allowed by a plan or regulatory framework); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority,* 57 Cal.4th 439, 448 (2013) (departure from the existing-conditions rule would be allowed only "when necessary to prevent misinforming or misleading the public and decision makers").

In a case directly analogous to the license renewal involved here, *Citizens for East Shore Parks v. State Lands Commission*, 202 Cal.App.4th 549 (2011), the State Lands Commission ("SLC") approved a lease renewal to allow an oil company to continue operating a marine terminal. The plaintiff asserted that the proper baseline for environmental review should exclude current operating conditions, since the approving agency could eliminate them by not renewing the lease. Citing extensively from the California Supreme Court's ruling in *CBE v. South Coast*, the appellate court rejected the idea that the baseline "should reflect conditions that have not existed at the locale for more than a century." Instead, the court approved the SLC's use of a baseline that "reflected 'what was actually happening' at the site of the proposed project [*CBE v. South Coast*, at 322]--that is, an operating marine terminal." 202 Cal.App.4th at 560-61. Here, the SWB in its MND properly adopted a baseline that includes the existing operating hydroelectric facilities and other conditions as they currently exist.

Butte also incorrectly states that the SWB has a "substantive duty under CEQA" to select an alternative that would "enhance baseline conditions." (Butte letter at p. 1.) In *In re Bay-Delta*, the California Supreme Court rejected this theory, finding that CEQA could not be used to "more effectively address the Bay-Delta's existing environmental problems" because such problems were part of the existing environmental baseline. *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings,* 43 Cal.4th 1143, 1167-1168 (2008) ("*In re Bay-Delta*") (existing problems are part of the environmental baseline rather than impacts to be addressed by the project).

Butte also asserts (Butte letter at p. 2) that contact and non-contact recreation are designated beneficial uses of the North Fork Feather River that must be protected from water diversion for power generation. However, Butte fails to acknowledge that hydroelectric power generation is also a designated beneficial use for the North Fork. *See* Porter-Cologne Water Quality Control Act, § § 13000 *et seq.*, at §13050 (f). To date, FERC and the SWB have carefully balanced all relevant beneficial uses under their respective statutes.

In short, Butte's comments do not provide substantial evidence of any impact that was not considered by the SWB stemming from PG&E's applications to renew its federal hydroelectric license for Poe and the associated Section 401 water quality certification.

USFS

The USFS lists a number of minor edits to the MND. PG&E does not object to most of these edits; however, it has concerns with respect to the last edit suggested by the USFS.

In its last edit, the USFS recommends that the SWB consider broadening required monitoring to include aquatic invasive species, and references a parasite of salmon (*M. cerebralis* or whirling disease), which it states is known to occur within the North Fork Feather River watershed.[2] While PG&E knows that this disease is found in the upper watershed, it has

[2] The USFS states that it attached to its comments an article on whirling disease; however, PG&E was not able to access it.

no information indicating that this disease is present at the Poe site; nor is PG&E aware of any evidence indicating that Project operations can facilitate the spread of this disease. As PG&E indicated in the Exhibit E (Environmental Report) of its December 2003 application for new license for Poe (at p. E3.1-173), "there is no indication at this point that the current operation of the Poe Project contributes to the presence of whirling disease in project-affected waters." Indeed, PG&E indicated further therein (at p. E3.1-170) that "the Big Bend Dam may provide some benefit [with respect to whirling disease and other fish diseases] by reducing the spread of fish-born disease by preventing movement from Lake Oroville into the Poe Reach of the North Fork." Further, PG&E is not responsible for the presence of this disease in the watershed, as this disease was initially spread through the introduction of German brown trout and exposed hatchery rainbow trout that were planted by the CDFW. As pointed out above, existing environmental problems are part of the environmental baseline, not impacts properly addressed by the Project. *See In re Bay-Delta,* 43 Cal.4th at 1167-1168. Given these considerations, PG&E believes that it would be inappropriate to expand the monitoring requirement to include whirling disease.

Finally, PG&E notes that the USFS' request that monitoring be expanded to include "aquatic invasive species" in general is far too broad and open-ended and thus very problematic. Specifically, the USFS identifies neither the disease to be monitored for (other than whirling disease) nor the monitoring techniques required. There are a multitude of screening and confirmation tests for "aquatic invasive species" and many of these can be incredibly complex, time consuming, and expensive. Relative to *M. cerebralis*, the USFWS/AFS-FHS "Blue Book" (Standard Procedures for Aquatic Animal Health Inspections) identifies the following screening and confirmation detection procedures:

> Screening for *M. cerebralis* is by examination for spores in cranial cartilage processed by pepsin-trypsin digest. Confirmation of *M. cerebralis* is by identification of parasite stages in histological sections of cartilage tissues, or by amplification of parasite DNA by the polymerase chain reaction (PCR).

Clearly, the USFS' request to broaden monitoring to include aquatic invasive species is inappropriate.

USFWS

In its comments, the USFWS requests that it be included in any communications regarding species listed under the federal Endangered Species Act ("ESA"). PG&E has no objection to this request. However, the USFWS' subsequent statement regarding consultation with the USFWS under the ESA when work is anticipated to occur or where species may be affected by flows is incorrect. The ESA only requires federal agencies like FERC, not private parties like PG&E, to consult with the USFWS. Further, consultation with the USFWS under the ESA is required only when a federal agency is taking an "action" (*e.g.*, when FERC will be issuing a new license for a hydroelectric project). Indeed, FERC is not required to consult with an ESA agency even when a new species is listed under the ESA if there is no federal action. *See California Sportfishing Protection Alliance v. FERC*, 472 F.3d 593 (9th Cir. 2006).

CDFW

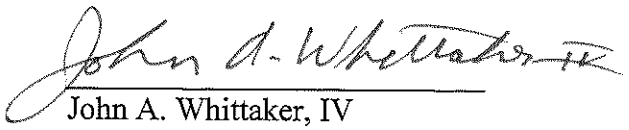
The CDFW in its comments includes extensive discussion of the California Endangered Species Act ("CESA") and its requirement to obtain Incidental Take Permits ("ITP") in certain cases. CDFW also discusses the requirements of Section 1602 of the California Fish and Game Code. PG&E notes that it will obtain an ITP under CESA and comply with the provisions of Section 1602 when warranted by Project activities, to the extent consistent with federal law.

PG&E notes that on p. 2 of its comments the CDFW includes a reference to the American Peregrine Falcon that may be confusing. To clarify, this species is not listed under the CESA, as it was delisted under that statute.

CONCLUSION

PG&E again thanks the SWB for the opportunity to submit responses to the comments on the MND submitted by other entities. If you have any questions regarding these responses and/or would like to schedule a meeting to discuss them, please contact Annette Faraglia at arf3@pge.com or (415) 973-7145 or John Klobas at john.klobas@pge.com or (530) 335-5653.

Respectfully submitted,



John A. Whittaker, IV

Attorney for Pacific Gas & Electric Company

cc: John Klobas
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