

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Pacific Gas and Electric Company )

Project No. 77-314

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**PROTEST AND COMMENTS OF PACIFIC GAS AND  
ELECTRIC COMPANY OPPOSING PROCEEDING TO  
CONSIDER REOPENING LICENSE**

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In accordance with the Notice of Proceeding to Consider Reopening License and Soliciting Comments, Motions to Intervene, and Protests issued in the above-captioned proceeding on November 16, 2022 (Notice)<sup>1</sup> and Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission or FERC),<sup>2</sup> Pacific Gas and Electric Company (PG&E), owner and licensee of the Potter Valley Hydroelectric Project No. 77 (Project), files this protest and comment opposing the reopening of the Project's annual license under Article 15 to consider incorporation of interim measures proposed by the U.S. Department of Commerce, National Marine Fisheries Service (NMFS) on March 17 and October 17, 2022.<sup>3</sup> For the reasons described below, there is no "cause to reopen the annual license terms to require changes in the project works or operations that may be necessary to protect federally listed species."<sup>4</sup>

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<sup>1</sup> Notice of Proceeding to Consider Reopening License and Soliciting Comments, Motions to Intervene, and Protests, Project No. 77-314, Accession No. 20221116-3059 (issued Nov. 16, 2022) [hereinafter, Notice].

<sup>2</sup> 18 C.F.R. § 385.211.

<sup>3</sup> Letter from Alecia Van Atta, NMFS, to Kimberly D. Bose, FERC, Project No. 77-314, Accession No. 20220317-5064 (filed Mar. 17, 2022); Letter from Alecia Van Atta, NMFS, to Kimberly D. Bose, FERC, Project No. 77-314, Accession No. 20221017-5019 (filed Oc. 17, 2022).

<sup>4</sup> Notice ¶ 1, at p. 3.

## I. INTRODUCTION

The Project is not causing “‘unanticipated, serious impacts’ on fishery resources,”<sup>5</sup> and none of the reasons for reinitiating consultation under section 7 of the Endangered Species Act (ESA) are present.<sup>6</sup> Moreover, NMFS has not offered any evidence—much less any substantial evidence—to justify the initiation of a reopener proceeding.<sup>7</sup> While NMFS’ failure to provide any factual support alone requires the Commission to terminate this proceeding, PG&E is in the process of surrendering the license for this Project.<sup>8</sup> The surrender process will entail additional reviews and assessments by the Commission, NMFS, and other the resource agencies—and include opportunities to assess Project facilities and determine whether any changes are needed to protect species. It is simply premature to engage in such processes now, when the Project is operating pursuant to a biological opinion that includes adaptive management provisions that are being followed, and where there is no evidence of impacts on ESA-listed species. For these reasons, PG&E protests the Notice, and the Commission should take no action other than to terminate this proceeding.<sup>9</sup>

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<sup>5</sup> *Hoopa Valley Tribe v. FERC*, 629 F.3d 209, 211 (D.C. Cir. 2010) (quoting *PacifiCorp*, 126 FERC ¶ 61,236, at P 14 (2009)).

<sup>6</sup> 16 U.S.C. § 1536; *see* 50 C.F.R. § 402.16.

<sup>7</sup> 16 U.S.C. § 825l(b); *e.g.*, *PacifiCorp*, 126 FERC ¶ 61,236, at PP 11-12 (2009).

<sup>8</sup> Response to Request for Plan and Schedule for Surrender Application, Project No. 77-164, Accession No. 20220708-5267 (filed July 8, 2022).

<sup>9</sup> In the event the Commission decides to move forward with a reopener proceeding, PG&E has a right to notice and an opportunity for hearing before the Commission may impose any changes to the license. Standard Article 15, included in PG&E’s license for the Project. *See Pac. Gas & Elec. Co.*, 5 FERC ¶ 61,010, at p. 61,067 (1983) (“The license is also subject to Articles 1 through 37 set forth in Form L-5 (revised October 1975) [reported at 54 FPC 1832], entitled ‘Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States,’ hereby made part of the license.”). Given the significance and complexity of the resource issues involved, in the event the Commission moves forward with this reopener proceeding, PG&E may seek a formal hearing on these issues—and not simply a “paper” hearing. *Env’t Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) (explaining that FERC is required to hold hearings when the disputed issues may not be resolved through an examination of written

## II. THE FEDERAL POWER ACT AND COMMISSION PRECEDENT STRONGLY DISFAVOR LICENSE REOPENERS.

To protect a licensee’s significant capital investment in developing a hydropower project, Congress deliberately structured the Federal Power Act (FPA) to require long license terms and regulatory certainty during that license term. The FPA authorizes license terms of up to 50 years for original licenses, and for terms of 30 to 50 years upon relicensing.<sup>10</sup> With regard to regulatory certainty over the license term, FPA section 6 provides—simply but powerfully—that a license “may be altered . . . *only* upon mutual agreement between the licensee and the Commission after thirty days’ public notice.”<sup>11</sup> It is well-settled that section 6 serves the “purpose of promoting stable financial expectations among investors”<sup>12</sup> and to “provide licensees with certainty, thereby enabling them to attract private investors to finance development of the nation’s waterways.”<sup>13</sup>

While courts have sustained the Commission’s practice of reserving rights at the time of licensing to reopen the license at a later date,<sup>14</sup> even the Commission has

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submissions); *see also Conoco Inc. v. FERC*, 90 F.3d 536, 543 (D.C. Cir. 1996); *e.g., Turlock Irrigation Dist.*, 128 FERC ¶ 61,035 (2009).

<sup>10</sup> 16 U.S.C. §§ 799, 808(e).

<sup>11</sup> 16 U.S.C. § 799 (emphasis added).

<sup>12</sup> *Nat’l Parks Conservation Ass’n v. FERC*, 6 F.4th 1044, 1058-59 (9th Cir. 2021).

<sup>13</sup> *U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 547-48 (D.C. Cir. 1992).

<sup>14</sup> *E.g., California v. FPC*, 345 F.2d 917, 925 (9th Cir. 1965) (“When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees’ rights to test the validity of any future action taken.”); *Wis. Pub. Serv. Corp.*, 62 FERC ¶ 61,095, at p. 61,685 (1993) (“Such a reservation of authority to deal with conditions that may occur in the future has been found by courts to be legitimate and not in conflict with Section 6 of the FPA”); *see also Pub. Serv. Co. of Co.*, 98 FERC ¶ 62,203, at p. 64,366 (2002).

recognized that this power must be exercised sparingly.<sup>15</sup> Moreover, in the rare instances in which the Commission elects to reopen a license, the licensee's due process rights must be protected.<sup>16</sup> Thus, the Commission can exercise its authority to reopen the license only after notice and an opportunity for a hearing.<sup>17</sup>

In this case, the Project's license includes the Commission's standard Article 15, which reserves Commission authority to reopen the license to impose conditions protective of fish and wildlife resources:

The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.<sup>18</sup>

The purpose of standard Article 15 is to reserve to the Commission authority *to direct* modifications to Project operations for the conservation of fish and wildlife resources.<sup>19</sup> Such reopeners, however, do not "establish a legal standard that, if met, *must*

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<sup>15</sup> *PacifiCorp*, 126 FERC ¶ 61,236, at PP 11-12 (2009) ("Although Congress sought to ensure that increased attention be given to environmental concerns in issuing licenses, there is no basis for inferring an intention to have us routinely amend licenses . . .").

<sup>16</sup> *Mont. Power Co.*, 51 FERC ¶ 61,374, at p. 62,270 (1990) (explaining that "the fundamental due process rights to notice and opportunity for hearing are inherent in all license conditions for which there has been no final determination of an issue").

<sup>17</sup> *Wis. Valley Improvement Co.*, 62 FERC ¶ 61,095, at p. 61,688 (1993); *Ohio Power Co.*, 71 FERC ¶ 61,092, at p. 61,314 & n.43 (1995); *Pub. Serv. Co. of Co.*, 98 FERC ¶ 62,203, at p. 64,366 (2002).

<sup>18</sup> Standard Article 15, included in PG&E's license for the Project. See *Pacific Gas and Electric Co.*, 5 FERC ¶ 61,010, at p. 61,067 (1983) ("The license is also subject to Articles 1 through 37 set forth in Form L-5 (revised October 1975) [reported at 54 FPC 1832], entitled 'Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States,' hereby made part of the license.").

<sup>19</sup> *PacifiCorp*, 126 FERC ¶ 61,236, at PP 11-12 (2009) (emphasis added) (discussing a license article that contains similar language to Article 15 at issue here, providing that the licensee: "shall for the conservation and development of fish and wildlife resources . . . comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission . . . after notice and opportunity for hearing and upon findings based on substantial evidence that such . . . modifications are necessary and desirable,

result in the adoption of such modifications.”<sup>20</sup> In other words, reopeners do not mandate that the Commission adopt requested changes.<sup>21</sup> The reopener provisions only reserve the Commission’s authority to decide, after due investigation and upon making of certain findings discussed immediately below, whether or not to require the licensee to comply with the requested measures.<sup>22</sup> The Commission retains discretion to determine not to reopen the license,<sup>23</sup> and any decision by the Commission to reopen the license must be supported by substantial evidence and cannot be arbitrary, capricious, or an abuse of discretion.<sup>24</sup>

### **III. THE COMMISSION HAS ESTABLISHED A DEMANDING STANDARD TO JUSTIFY LICENSE REOPENER.**

To protect the FPA’s foundational requirements of fixed license obligations and regulatory certainty over a long license term, the Commission has established a high standard to justify license reopener.<sup>25</sup> The Commission exercises this authority only when it determines that a project is “having ‘unanticipated, serious impacts’ on fishery

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reasonably consistent with the primary purpose of the project, and consistent with the provisions of the [FPA]”).

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Cal. Sportfishing Protection Alliance v. FERC*, 472 F.3d 593, 599 (2006) (explaining that “the reopener provisions do no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing”).

<sup>22</sup> *Id.* (emphasis added) (“While, under Article 58, any modifications that the Commission may direct must be based on substantial evidence that they are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the FPA, this language simply ensures that the licensee will not be required to modify project operations *in the absence of these findings.*”).

<sup>23</sup> *Pub. Serv. Co. of Co.*, 98 FERC ¶ 62,203, at p. 64,366 (2002).

<sup>24</sup> *See* 5 U.S.C. § 706(2); 16 U.S.C. § 825l(b).

<sup>25</sup> Because the FPA requires that annual licenses be issued “under the terms and conditions of the existing license,” this same standard applies to a license that is operating under an annual license. *PacifiCorp*, 126 FERC ¶ 61,236, at PP 11-12 (2009).

resources.”<sup>26</sup> Only when the Commission finds, based on substantial evidence,<sup>27</sup> that such serious circumstances exist will it then initiate a license reopener proceeding to determine “what, if any, additional mitigation measures are required in the public interest, after notice and opportunity for hearing.”<sup>28</sup>

Thus, before imposing any changes to the license, the Commission adheres to a two-step process. First, the Commission determines whether “unanticipated, serious impacts” exist and whether the requested interim measures are needed in the public interest to address such impacts.<sup>29</sup> If the Commission during this initial step determines the presence of unanticipated, serious impacts in which the public interest requires a response, then—and only then—can it proceed to formally reopen a license to decide whether to impose the changes. As part of the reopener proceeding, the licensee has the right to test the validity of any future action it will be required to take through a hearing before the Commission.<sup>30</sup>

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<sup>26</sup> *Hoopa Valley Tribe v. FERC*, 629 F.3d 209, 211(D.C. Cir. 2010) (quoting *PacifiCorp*, 126 FERC ¶ 61,236, at P 14 (2009)); accord *Wis. Valley Improvement Co.*, 80 FERC ¶ 61,054, at p. 61,166 & n.40 (1997); *Ohio Power Co.*, 71 FERC ¶ 61,092, at p. 61,314 & n.43 (1995); *Turlock Irrigation Dist.*, 139 FERC ¶ 61,045, at p. 61,213 (2012).

<sup>27</sup> In a proceeding involving Toledo Bend Project, the Commission was asked to reopen the license, under a similarly worded Article 43, which reserved to the Commission the right to require changes to the project (*i.e.*, changes to required reservoir elevations) to the extent such changes are economically sound and in the public interest, after notice and opportunity for hearing. In that case, the Commission determined not to reopen the license on the basis that the request lacked sufficient evidence. Letter from J. Mark Robinson, FERC, Project No. 2305-016, Accession No. 20020712-3058 (issued July 12, 2002); see also *U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 547-48 (D.C. Cir. 1992) (reviewing the Commission’s decision to include a reopener condition into a license on the basis of whether it was based on substantial evidence).

<sup>28</sup> *Ohio Power Co.*, 71 FERC ¶ 61,092, at p. 61,314 & n.43 (1995) (emphasis added).

<sup>29</sup> *Wis. Pub. Serv. Corp.*, 62 FERC ¶ 61095, at p. 61685-86 (1993).

<sup>30</sup> *Id.*

#### **IV. NMFS HAS FAILED TO DEMONSTRATE UNANTICIPATED, SERIOUS IMPACTS ON FISHERY RESOURCES AT THE PROJECT.**

The Commission's Notice cites to NMFS' proposed interim measures as the basis for assessing whether "to reopen the annual license terms to require changes in the project works or operations that may be necessary to protect federally listed species."<sup>31</sup> However, the proposed interim measures in and of themselves are not sufficient to meet the established standard for reopening the license. Rather, there must be substantial evidence of unanticipated, serious impacts on aquatic resources. Here, there is no evidence in the record demonstrating that the Project is impacting fishery resources at the Project beyond what was evaluated in the biological assessment and accounted for in the Project's biological opinion. There certainly is no showing of unanticipated, serious impacts as required to justify a reopener proceeding.<sup>32</sup> In fact, NMFS' proposed interim conditions are not even aimed at addressing any alleged adverse effects of the Project on ESA-listed species, but rather are aimed primarily at seeking the collection of additional data and information. Moreover, much of this data collection is already underway in conjunction with variance requests and/or study tradeoffs established as part of the ongoing collaborative management of the water system. The nature of the remedies sought by NMFS demonstrate that the Project is not causing the type of serious, unanticipated impacts that warrant a license reopener proceeding. To the contrary, the existing license already requires collection of this data and information and establishes a framework for collaboratively addressing the changes sought by NMFS. Many of these license requirements stem from the biological opinion issued by NMFS. Thus, a license reopener

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<sup>31</sup> Notice ¶ 1, at p. 3.

<sup>32</sup> *Hoopa Valley Tribe*, 629 F.3d at 211-13.

proceeding is not needed to address NMFS' concerns. NMFS is, in effect, seeking to circumvent the licensing framework and instead unilaterally impose changes to existing requirements.

Moreover, the changes sought by NMFS are premature. As the Commission is aware, PG&E's license surrender for this Project is underway.<sup>33</sup> Thus, in the very near future, there will be additional evaluations and submissions to FERC that will provide the resource agencies, including NMFS, the opportunity to reassess the Project's impacts on listed species. Those are the types of changed circumstances that necessitate additional review. There is simply no need to reopen the current license, which already requires ongoing monitoring and adaptive management, tailored to address any effects from Project operations.

For these reasons, discussed in detail below, the Commission should not initiate a reopener proceeding, and instead should take no action in response to its Notice other than to terminate this proceeding.

**A. The Impacts from the Project, if Occurring, are not Unanticipated or More Significant than Expected.**

The interim measures proposed by NMFS, by and large, involve revising actions already underway in accordance with the existing license. As discussed in more detail below, many if not all of the proposed interim measures involve refinements of or additions to monitoring work and other actions already underway. The existing license contains a framework for development, review and approval of those actions. The purpose of those actions is to provide insight into how Project operations may be refined to further minimize

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<sup>33</sup> Response to Request for Plan and Schedule for Surrender Application, Project No. 77-164, Accession No. 20220708-5267 (filed July 8, 2022).

impacts to aquatic species. Impacts to the aquatic species at issue are not unanticipated. Rather, because potential impacts had been identified, these actions are designed to help mitigate those impacts. There has not been any change in the scope or degree of the impacts of the Project. NMFS has not offered *any* evidence of adverse impact, much less impact different from that anticipated when the license was issued.

NMFS has actively participated in the monitoring and adaptive management process established by the license. NMFS' proposed interim measures appear to be nothing more than an attempt to circumvent that existing process and enable NMFS to unilaterally dictate different requirements. And the requirements they are seeking to impose are not designed to protect listed species, but are additional studies and monitoring. Condoning such effort is not at all an appropriate of the Commission's reopener authority—which, again, must only be used in extreme circumstances. The reopener authority is carefully designed to ensure that, in highly unique circumstances of unanticipated and severe adverse impacts caused by a project, such that the intended balance between certain and stable energy development, water supply, and aquatic species is upset, then FERC can intervene and act to restore that balance. Those circumstances are simply not present here.

**B. The Interim Measures Proposed by NMFS Are Not Reasonable and, In Many Cases, Are Already Provided for in the Current Licensing Framework.**

**1. Cape Horn Dam Fish Passage Facility Winter Operations Procedure.**

There is no basis for reopening the license to require implementation of the Cape Horn Dam Fish Passage Facility Winter Operations Procedure because there is already a

process underway to review and approve that Procedure.<sup>34</sup> The Commission and the resource agencies, including NMFS, are actively involved in that process. PG&E has already stated that it supports expeditious approval and implementation of the Procedure.

The process associated with development and approval of this Procedure is underway, in accordance with the terms of the existing license.<sup>35</sup> PG&E submitted for Commission approval a Winter Operations Procedure in November 2020. PG&E engaged in consultation with NMFS regarding this Procedure, and NMFS agreed with the proposed procedure for operating the gates at the entrance to the fish ladder during winter flows.<sup>36</sup> Although the Commission initially approved the Procedure, that approval was rescinded so that formal ESA consultation with NMFS could take place.<sup>37</sup> A temporary plan was developed to control winter operation while consultation on the Procedure took place. FERC issued a Temporary Order on December 13, 2021,<sup>38</sup> determining that the temporary plan 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.”<sup>39</sup> The Temporary Order recognizes that “the licensee’s proposal was coordinated with, and supported by resources agencies.”<sup>40</sup>

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<sup>34</sup> See FERC Docket 77-304.

<sup>35</sup> The Cape Horn Dam fish passage facility has been an integral part of NMFS’ assessments of the Project for listed and non-listed fish since the license proceeding for the existing license began in the 1970s.

<sup>36</sup> Letter from Jamie Visinoni, PG&E, to Kimberly D. Bose, FERC, Project No. 77-302, Accession No. 20201113-5148 (filed Nov. 13, 2020).

<sup>37</sup> Order Modifying and Approving Fish Passage Facility Winter Operation Plan, 174 FERC ¶ 62,057; Order Rescinding Order Modifying and Approving Fish Passage Facility Winter Operation Plan, 174 FERC ¶ 62,181.

<sup>38</sup> *Pac. Gas & Elec. Co.*, 177 FERC ¶ 62,136 (2021).

<sup>39</sup> *Id.* at P 10.

<sup>40</sup> *Id.*

The Temporary Order remains in effect; the Winter Operation Procedure, which NMFS has reviewed and supports, has been developed and is pending approval following consultation. That process is ongoing, under a separate FERC proceeding. PG&E stands ready to implement the Winter Operation Procedure upon approval. Thus, there is no need to reopen the license and disrupt the already established, ongoing proceeding. NMFS has not offered any evidence or rationale for disregarding the ongoing process and instead reopening the license.

## **2. Water Temperature Management Plan.**

NMFS has not provided substantial evidence (or any evidence) to support reopening the license. There has been no demonstration that the Project is adversely affecting listed or any other species. Even so, PG&E recognizes that the reasonable and prudent alternative in the governing biological opinion (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 are supported by most, if not all, stakeholders.

Actions to address temperature conditions have been taken, in coordination with NMFS, in accordance with the terms of the existing license. License Articles 52 and 57 and Reasonable and Prudent Measure (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. That monitoring plan was approved by the Commission on November 9, 2005. The plan has been implemented since that time, with

the results filed annually since 2006.<sup>41</sup> There is no indication that this monitoring is insufficient or that an additional requirement is needed.

### **3. Summer Flow Component of the RPA.**

As noted above, PG&E has conducted monitoring, and sought variances as necessary, to manage the summer flow component of the RPA. NMFS and other stakeholders have been actively involved in that process. There is no basis for NMFS to suggest that reopening the license is needed, given the ongoing coordination and work relating to the summer flow component of the RPA within the existing license framework. NMFS has not offered any evidence or indication that the existing collaborative process is not working. Moreover, NMFS has not—and cannot—demonstrate that harm to any listed or other aquatic species is occurring. In fact, the opposite is true. The ongoing monitoring work demonstrates that Lake Pillsbury beneficially impacts temperatures in the most critical months (June, July and August). This means that the existing project’s impact on temperature is primarily *benefitting* listed species.

Within the existing license framework, PG&E has stated that it is willing to discuss with agencies and stakeholders a long-term variance of the RPA requirements for approval by the Commission. But such willingness does not warrant a formal reopening of the license.

### **4. Revision of NMFS’ Opinion RPA Operating Rule E.5.**

This proposed interim measure is related to the summer temperatures, reservoir storage and flow releases. As explained above, there is ongoing annual monitoring already occurring. The monitoring data demonstrates that Lake Pillsbury beneficially impacts

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<sup>41</sup> *Pac. Gas & Elec. Co.*, 113 FERC ¶ 62,122 (2005).

temperatures, benefiting rather than harming species. Variances are regularly obtained to adjust releases to address potential impacts to aquatic species. The framework created by the existing license is designed to address the concerns raised by NMFS. PG&E has indicated its willingness to continue to work with agencies and stakeholders on a long-term variance of the RPA requirements, including Rule E.5. But reopening the license is not justified because there is no evidence that the project is having an adverse impact, and the existing license already includes sufficient measures to address the concerns raised by NMFS.

**5.      Reevaluate and Revise Water Year Classifications for Project Operations.**

This proposed interim measure is also related to the summer temperatures and flows. As explained above, there is ongoing annual monitoring already occurring. The monitoring data demonstrate that Lake Pillsbury beneficially impacts temperatures, benefiting rather than harming species. Variances are regularly obtained to adjust releases to address potential impacts to aquatic species. The framework created by the existing license is designed to address the concerns raised by NMFS. In fact, PG&E has indicated its willingness to continue to work with agencies and stakeholders on a long-term variance of the RPA requirements focused on the water year classifications. Reopening the license is unnecessary to implement the interim measure suggested by NMFS, as the process for revising the water year classifications already exists. The existing license already includes sufficient measures to address the concerns raised by NMFS.

**6.      Adult Escapement Monitoring Plan.**

PG&E has previously stated that it 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. Pursuant to the plan, PG&E has conducted annual Chinook salmon carcass surveys at one index station in the upper mainstem Eel River and five sections in the Tomki Creek drainage. These sites were selected based on previously established survey results. These surveys have been conducted annually since 2005. The results have been provided to the Commission and to the resource agencies, including NMFS. At one point, agencies proposed and discussed with PG&E the possibility of reporting on other anadromous fish populations in the Eel and Russian Rivers; however, NMFS and other agencies agreed that most of this data were already provided by other sources, including salmonid arrivals at Van Arsdale Fisheries Station located within the Cape Horn Fish Ladder.

Thus, NMFS' request for an interim measure to monitor escapement is redundant of existing escapement monitoring through the Chinook Salmon Carcass Surveys. There is no evidence that this monitoring is insufficient. Nor is there any indication that the current monitoring is creating adverse impacts, or that the measure proposed by NMFS will effectively address an adverse impact. In fact, the opposite is true. The monitoring proposed by NMFS extends far downstream to the South Fork Eel River, an area far outside the area potentially impacted by the Project. The fact that escapement monitoring is already required by the existing license also demonstrates that there is no new, unanticipated impact from the Project that necessitates reopening the license.

**7. Continuation of Annual Sacramento Pikeminnow Suppression Plan.**

As the Commission has already acknowledged, PG&E has developed an annual Sacramento Pikeminnow Suppression Plan. PG&E has already been implementing the plan. As with all of the other interim measures proposed by NMFS, this issue was anticipated and addressed by the existing license.

**8. Stream Gaging Plan.**

NMFS proposes 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. Imposing such a measure 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.

**V. NMFS HAS NOT ESTABLISHED THAT THE INTERIM MEASURES ARE IN THE PUBLIC INTEREST**

Even if the Commission were to determine that the Project's impacts are unanticipated and substantial (which, as explained above, they are not), they must also find that the proposed mitigation measures are required in the public interest.<sup>42</sup> They are not, for two reasons. First, there is already a comprehensive, collaborative adaptive management process in place that, as described above, provides for many of the actions sought by NMFS. Second, that collaborative process involves numerous stakeholders reflecting a wide variety of interests. The flow regime associated with the Project was established in light of all of these interests. The measures proposed by NMFS are focused

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<sup>42</sup> *Wis. Pub. Serv. Corp.*, 62 FERC ¶ 61095, at p. 61685-86 (1993).

solely on species, but would have impacts beyond species.<sup>43</sup> And they would be imposed through a process outside of the collaborative management framework established by the license and biological opinion and in place for decades. This framework should not be set aside, particularly where NMFS has not provided substantial evidence of an unanticipated harm.

## **VI. REINITIATION OF CONSULTATION UNDER THE ESA IS UNWARRANTED.**

In addition to NMFS' failure to demonstrate with substantial evidence that the Project is causing unanticipated, serious impacts to fishery resources, there is no basis for the Commission to reinitiate consultation with NMFS under ESA section 7, as NMFS suggests in its letters to the Commission. The ESA requires federal agencies, including the Commission, to ensure that any discretionary federal action, like issuing or altering a hydropower license, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.<sup>44</sup> If listed species may be present and affected by a given discretionary action, federal agencies must consult under ESA section 7 to assess those impacts.<sup>45</sup> If, through this consultation process, NMFS determines that incidental take of a listed species may occur, NMFS may provide a written Incidental Take Statement (ITS).<sup>46</sup>

The ESA does not require that the Commission consult with NMFS about the impact of ongoing operations of the Project.<sup>47</sup> ESA section 7 consultation for the Project

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<sup>43</sup> This is amply demonstrated by the large number of intervention requests filed in this proceeding.

<sup>44</sup> 16 U.S.C. § 1536(a)(2).

<sup>45</sup> *Id.* § 1536(a)(3).

<sup>46</sup> *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(h).

<sup>47</sup> *Cal. Sportfishing Protection Alliance v. FERC*, 472 F.3d 593, 597 (2006) ("Congress could have provided that once a species is listed as threatened or endangered under the ESA, federal agencies must

already took place in 2002 and culminated in the NMFS' issuance of a Biological Opinion (BiOp) and the ITS for the Project.<sup>48</sup> Neither the BiOp nor the ITS included an expiration date. Rather, the BiOp and ITS repeatedly reference that they apply for the "life" or "term" of the FERC license, and annual license extensions are included within the life of the license.<sup>49</sup> The Commission then incorporated the reasonable and prudent measures for species protection and ITS from the BiOp into the Project license.

Reinitiation of ESA Consultation is required only 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.<sup>50</sup> None of these circumstances are present here.

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consult with expert agencies like NMFS about the impact of all ongoing operations, including those carried out pursuant to licenses. This is how the petitioners ask us to interpret the ESA. Congress did not so provide, however.”)

<sup>48</sup> Biological Opinion for the Proposed License Amendment for the Potter Valley Project, Project No. 77-110, Accession No. 20021202-0257 (filed Nov. 29, 2002).

<sup>49</sup> *Id.* at 105, 106.

<sup>50</sup> 50 C.F.R. § 402.16.

**VI. CONCLUSION**

WHEREFORE, for the reasons discussed above, the Commission should terminate this proceeding and not initiate a license reopener proceeding.

Respectfully submitted,



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DATED: December 16, 2022

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person identified below, each of which has filed a timely comment or notice or motion for intervention in response to the Commission's Notice issued in this proceeding (Project No. 77-314) on November 16, 2022.

Dated at Washington, DC, this 16<sup>th</sup> day of December, 2022.

Respectfully submitted,

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