State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

November 6, 2015

Mr. Jeff Wetzel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814-2828

Subject: RESPONSE PACIFIC GAS AND ELECTRIC COMPANY'S PETITION FOR RECONSIDERATION OF THE WATER QUALITY CERTIFICATION FOR THE DESABLA-CENTERVILLE HYDROELECTRIC PROJECT

Dear Mr. Wetzel:

On May 8, 2015, Pacific Gas and Electric Company (PG&E) filed a Petition for Reconsideration (Petition) of the Water Quality Certification (WQC) for the DeSabla-Centerville Hydroelectric Project (Federal Energy Regulatory Commission (FERC #803)). The Department of Fish and Wildlife (Department) is providing comments here to the State Water Resources Control Board (Water Board) in support of the conditions in the water quality certification.

General Comments:

In its Petition, PG&E includes a section entitled "Applicable Law for the Petition to Reconsider". In that section, PG&E cites to the recent FERC decision in Duke Energy Progress, Inc. Project No. 2206-030, 151 FERC ¶ 62004 (April 1, 2015). PG&E indicates that by this case, FERC has established "criteria to identify measures contained in a State's Section 401 water quality certificate that may not become part of the new license issued by FERC." (Petition, p. 4). PG&E goes on to state the criteria as: "(1) Is the measure necessary for a project purpose?; (2) Is the measure ameliorating a project effect?; (3) Is the measure beyond the scope of the license?; or (4) Is the measure related to the project? "(Petition, p. 5).

PG&E overstates the reach and applicability of the Duke Energy Progress Order. PG&E cites to just one paragraph of the Order, which is over 100 pages long, as the source of these apparently new "criteria". In ¶ 93 of the Duke Energy Progress Order, the text states that Commission staff did not recommend that certain measures on non-project lands be included in the license because these parcels of land are not necessary for project purposes or to mitigate a project effect. In a footnote, the Order refers to a Joint Explanatory Statement filed with FERC that indicates the parties to an Agreement did not intend that these land conveyance measures be included in a new license issued for the project. Thus, the Duke Energy Progress Order reflects the intent of the parties, including the Licensee, that the measures pertaining to lands outside the FERC boundary not be included in the State 401 certification or the FERC license for the project. The Duke Energy Progress Order, in ¶ 93, merely reflects the stated intent of

the parties, as set forth in the Joint Explanatory Statement filed with FERC, that certain measures outside the FERC boundary not be included in the new license. ¶ 93 of the Duke Energy Progress Order does not, as stated by PG&E, establish new and different "criteria" by which FERC may now decide not to include certain conditions in a State's 401 Certification.

In addition, the Duke Energy Progress Order exclusion of certain conditions in the State 401 Certification is in error under Clean Water Act section 401(d). Under Clean Water Act section 401(a)(1) FERC may not issue a new license unless the state water quality agency has either issued a water quality certification for the project or has waived certification. Under Clean Water Act section 401(d), the certification "shall become a condition on any Federal license or permit subject to the provisions of this section." Thus, the limitations included in the certification become a condition of any federal license. (See PUD No. 1 of Jefferson Cnty. Washington Dep't of Ecology, 511 U.S. 700, 708 (1994)). Further, in American Rivers, Inc. v. FERC, the Second Circuit U.S. Court of Appeals held that the FERC has no authority under the Clean Water Act of the Federal Power Act to modify or reject 401 certification conditions. American Rivers, Inc. v FERC, 129 F.3d 99, 111 (2d Cir. 1997).

PG&E urges the Water Board to remove measures identified in its Petition that FERC "will reject" from the new license for the DeSabla-Centerville project based on what PG&E believes is the new criteria set forth in ¶ 93 of the Duke Energy Progress Order. As discussed above, ¶ 93 of the Duke Energy Progress Order is much narrower than PG&E states. Thus, the Department believes that the criteria to apply to the State 401 Certification is not one paragraph pulled out of context from the Duke Energy Progress Order, but the language in the Clean Water Act itself, along with such established case law interpreting that language as stated in the Public Utility District (PUD) No. 1 and American Rivers cases cited above.

Comments on Specific Conditions:

The Department would like to respond to some of the specific conditions within the Petition Section "VI: Manner in Which the Petitioner is Aggrieved:"

D. Condition 9: DeSabla Forebay Water Temperature Improvements

On December 26, 2007, the Department, along with U.S. Fish and Wildlife Service, USDA Forest Service, USDOI Bureau of Land Management, Friends of the River, Friend of Butte Creek, and California Sport Fishing Protection Alliance jointly submitted a letter to FERC staff commenting on PG&E's draft study of reduction of heating in DeSabla Forebay. In this letter we stated that:

> *The DeSabla Forebay Study states that the goal was to "identify ways to reduce the residence time and hence the temperature increases in the DSF" and that the "objective was to reduce temperature increases (ΔT) in the DSF by 50%." This*

> *objective of reducing temperature increases in the Forebay by only 50% is simply not a stringent enough criteria, and is not consistent with the Water Temp Study plan goal of evaluating what Project operation alternative can best protect spring-run Chinook salmon (SRCS) and steelhead in Butte Creek from temperature related pre-spawning mortality. To assure adequate protection for salmon and steelhead in Butte Creek, the objective should be to evaluate alternatives that virtually eliminate heating in the DeSabla Forebay. Evaluation of such alternatives should also consider their effects on the thermal environment in the DeSabla Forebay for other aquatic resources.*

PG&E now states in their Petition that they need more than one year to complete the DeSabla Forebay Water Temperature Improvement Plan, and that requirement for this device to reduced thermal loading by greater than 80% should be removed because this amount of accuracy would be too difficult to gage. With respect to the first issue, since the time the joint letter mentioned above was sent, PG&E has had eight years to begin planning for this project, and two years since they first saw this condition in a Draft Water Quality Certification. Yet PG&E has not moved forward with any preconstruction, or design activities; instead, they continue to argue about how and whether this device will be constructed. Department staff and other relicensing participants agreed that this is one of the most important conditions for benefit of the spring-run Chinook salmon, and we would like to encourage PG&E to begin collaboratively and constructively sitting down to work on plans for actual construction. We believe the Water Board should hold PG&E to a tight schedule to ensure that this essential infrastructure element be completed.

With respect to the 80% reduction issue, the gaging of the effectiveness of this solution is not the issue. The issue is that PG&E is seeking to install a less expensive fix to this solution, which would not be as effective at reducing thermal loading in DeSabla Forebay. If this 80% reduction criteria is removed, PG&E will be able to install a much easier solution that will reduce heating through the forebay, but by a smaller, and less significant amount. As we noted in our December 26, 2007 letter that is quoted above, this is not a stringent enough criteria. No matter what the gaging accuracy is, it will be impossible, post-construction, to determine exactly what thermal benefit is produced by this solution, because the reduction device will already be in place. The project should be planned with an *80% design reduction* in thermal loading within DeSabla forebay. Condition 9 in the WQC only requires PG&E submit a plan that "will describe how the DeSabla Water Temperature Reduction Device will reduce the thermal loading within the DeSabla Forebay an average of 80 percent or greater." Because this condition specifies that it is to reduce the heating *on average* 80% or greater, any standard temperature monitoring equipment is certainly capable of collecting monitoring data accurate enough that daily, weekly, and monthly averages can be compared to pre-construction average data. The post-project monitoring can be completed by comparison of pre and post-project data.

E. Condition 12: Hendricks Diversion Fish Screen and Passage

PG&E states, in their Petition for Reconsideration that due to numerous natural barriers downstream of the Hendricks Diversion Dam, a fish ladder to enable fish to migrate upstream "serves no purpose whatsoever."

Aquatic habitat connectivity is essential to the survival and continued existence of many fish species. It is a priority of the Department that efforts are made to ensure proper fish passage in order to maintain critical habitat connectivity and provide habitat access to fish species. Throughout the seasons it is imperative that fish are able to migrate into the best quality habitat available in order to survive through varying water temperatures and access usable, suitable temperature spawning habitat.

The aquatic habitat below Hendricks Head Dam on the West Branch Feather River has been degraded due to increased water diversions. The resident rainbow trout need to be able to escape the warmer temperatures in this reach by being allowed access to the habitat above Hendricks Head Dam. A fish ladder was/is required to create the necessary habitat connectivity from below Hendricks Head Dam to above Hendricks Head Dam.

Fish Passage Study Notes

In their letter to the Water Board dated June 11, 2013, PG&E first filed the Fish Migration Report, which included detailed aerial and field survey information regarding several jump barriers downstream of Hendricks Head Dam. This report is being used to support PG&E's argument that there are many natural barriers downstream that would prevent fish from moving upstream through this area anyway, and that a ladder therefore "serves no purpose whatsoever." PG&E requested that the Department and other entities provide comments on the Fish Migration Report. The Department provided comments in a letter to PG&E on July 27, 2015, and attached a memo titled *Comments on Assessment of Fish Migration Barriers on the West Branch Feather River: 2011 Field Survey and Data Compilation Report.* Information from that memo is synthesized with other Department comments below.

<u>Study Comments:</u>

1. Flow During the Study Time Period

The Fish Migration Report details field work done at flows between 17-24 cfs during the summer of 2011 to assess these potential passage barriers. In this list, they describe three barriers in the first five miles below Hendricks Head Dam, the first of which is 1.7 miles downstream, as "confirmed barriers." However, even in describing both of "the two migration barriers considered to have the greatest potential to prevent passage to trout" at river mile 24.4 and 27.5, the report states that:

> *It is expected that passage ability would not improve with lower flows; however, as flows increase, the vertical drop (i.e., fish jumping height) has the potential for reduction, which may allow passage.*

An exceedance analysis of 30 years of observed flows at this location illustrates that flows below Hendricks Head Diversion Dam routinely exceed the mapping flow of 24 cfs, with daily averages ranging up to 1890 cfs. Even in some of the driest (5% exceedance) days on record, flows can exceed the mapped levels during springtime. In the median condition (50% exceedance) flows exceed 24 cfs for all of February through mid-May. At these higher flows, the low-flow passage barriers may have significantly higher downstream water surface elevation, which can make passage over barriers much easier. Additionally, at these high flows, multiple flow pathways would open up, which can provide more passage opportunities for fish.

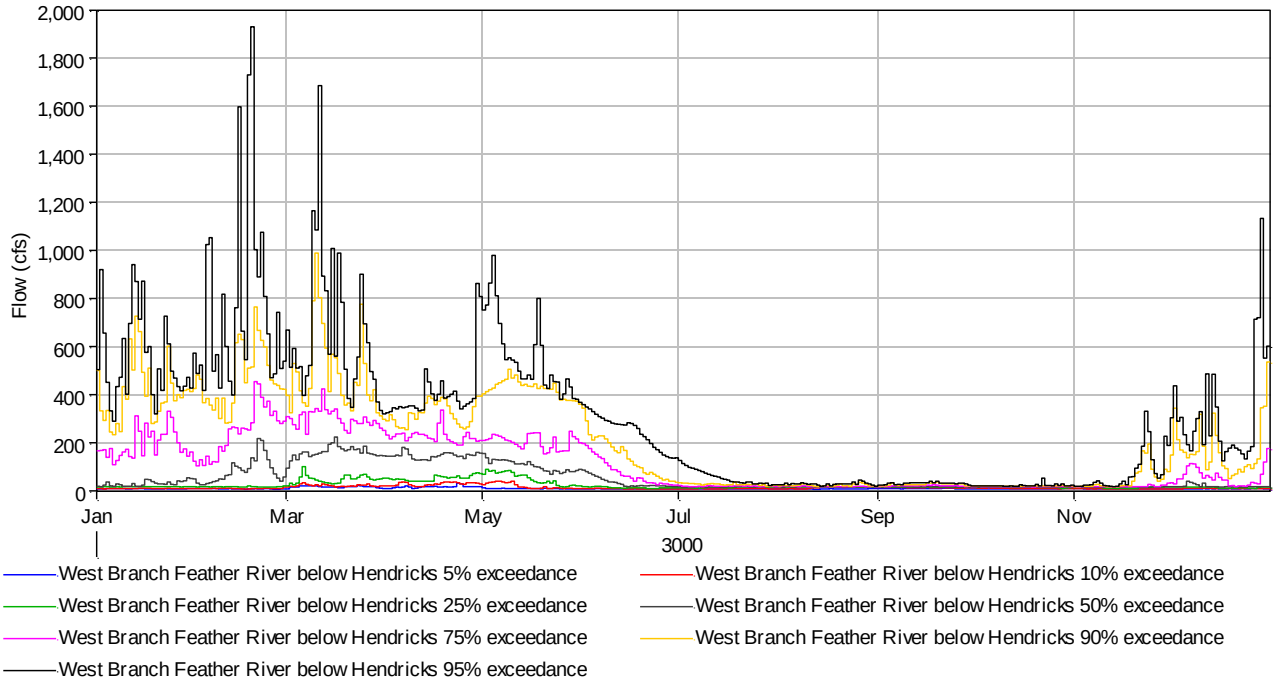

Figure 1: Exceedence plot showing measured hydrology below Hendricks Head Dam. This plot shows high flows experienced at this location on the y-axis.

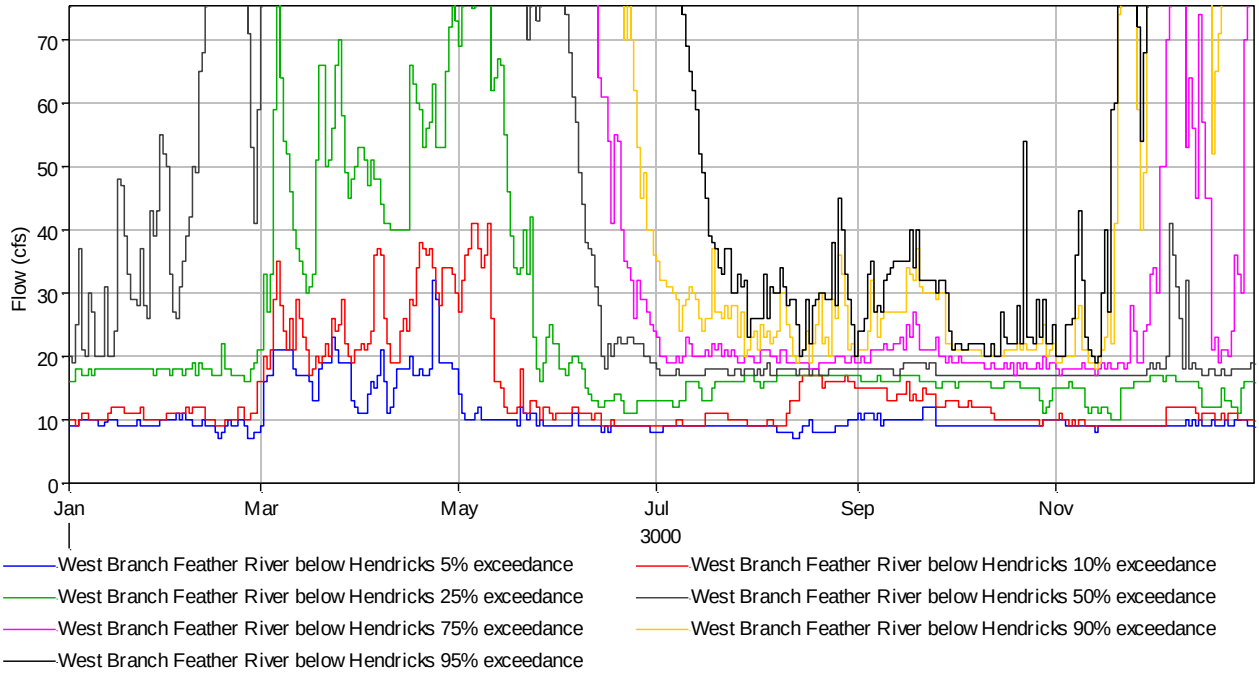

Figure 2: Exceedence plot showing measured hydrology below Hendricks Head Dam.
This plot shows lower flows experienced at this location on the y-axis.

Trout will use these higher flows to move opportunistically through more difficult barriers when conditions are appropriate. For example, temperature data from 2005 collected on the West Branch Feather River shows that daily average temperatures above Miocene Diversion started to reach 20^{o}C around July 7. At this time, flows in the reach below Hendricks were about 17 cfs at the top of the reach (below Hendricks), and 65 cfs at the bottom of the reach at the Miocene diversion. However, within the next week, storm flows increased flows to 58 cfs at the top of the reach, and 108 cfs at the bottom of the reach.

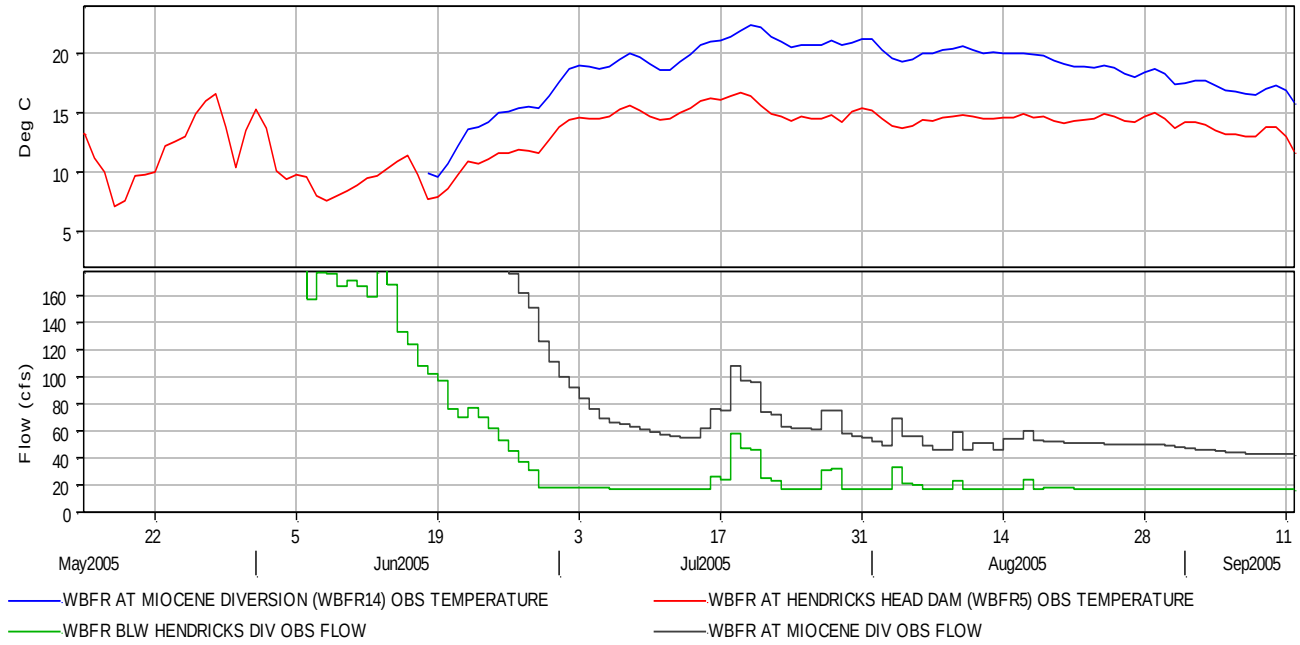

Figure 3. Temperatures and Flows in the West Branch Feather River during 2005.
At these higher flows, fish are more likely to be able to move through this reach and with a fish ladder at Hendricks, could be able to access cooler temperatures and more available habitat above Hendricks Head Diversion Dam.

2. Analysis of Fish Jumping Capabilities

The rainbow and brown trout size classes that were used in PG&E's classification of barriers in their Fish Migration Report were based solely on fish population size classes observed below Hendricks Head dam and included a maximum size of 250 mm. As we described above, not only would this analysis need to be conducted at much higher flows, but the size classes of fish should have included those trout likely to be washed over the dam from upstream (which ranged up to 270 mm) and trout that were entrained in the canal (which ranged up to greater than 430 mm [FERC Final EA page 3-99]) that may instead move downstream due to a future fish screen.

Additionally, the Fish Migration Report stated that:

> *Based on Alexander (1967) and Clay (1961): Rainbow trout observed in the WBFR downstream of Hendricks Diversion ranged from 55–250 mm (2–10 in.), which equates to a sustained swim speed of 0.7–3.3 fps and a burst speed of 1.8–8.2 fps. One brown trout was observed at 450 mm (18 in.), which equates to a sustained swim speed of 5.9 fps and a burst speed of 14.7 fps; the remaining brown trout were within the size range of the rainbow trout.*

Based on research by Rieser and Peacock (1985), and Videler (1993), burst swimming speed ranges between 8 and 12 body lengths/sec for trout. Using a maximum burst

speed of 12 body lengths per second, the maximum burst speed of a 250 mm (10") trout would be 10 ft/sec, and the maximum burst speed of a 430 mm (18") trout would be 18 ft/sec. These larger burst speeds would be more appropriate to determine the maximum jumping capabilities for trout at these locations.

3. Additional Notes Regarding Fish Passage at Hendricks Head Dam:

The Department submitted extensive evidence to the Water Board and to FERC regarding the need for a fish screen and ladder at this location in our Section 10(j) recommendations that were filed with FERC on June 30, 2008. In our 10(j) recommendations, Department staff concluded that:

1) *100% of the water in the WBFR is diverted into the Hendricks canal (except during spilling events);*

2) *rainbow trout and other fish species, amphibians, aquatic macroinvertebrates, and nutrients that do not go through the downstream bypass release (approximately 80% of the water in the WBFR in summer months) are entrained in the Hendricks Canal;*

3) *the Department does not consider the Project's canal system to be good or viable aquatic habitat;*

4) *available adult rainbow trout habitat is greater per unit of stream above Hendricks Diversion dam than below the diversion dam;*

5) *the data provided in the FLA on WBFR rainbow trout populations is highly variable due to the low amount of sampling provided;*

6) *insufficient data on Hendricks Diversion canal entrainment numbers were provided in the FLA;*

7) *the Department cannot determine the level of significance of the numbers of aquatic organisms entrained;*

8) *positive correlations exist between the percentage of streamflow diverted and the number of young of the year (YOY) captured;*

9) *rainbow trout populations on the upper WBFR and the lower WBFR are genetically isolated by the Hendricks Diversion Dam.*

The purpose of the fish ladder is not only to allow fish from lower West Branch Feather River to move up seasonally, but also to allow fish that have passed over the dam, or are routed downstream via a future fish-screen, to migrate back upstream to habitat

above the dam that has better temperatures and habitat availability than the reach immediately downstream. As we noted in our Section 10(j) recommendations:

> *The analysis shows that there is between 60% to 100% available habitat for growth and rearing of adults above the Hendricks Diversion Dam with the lowest amount being in 2007 (which was considered a dry water year type). For the same four years, below Hendricks Diversion Dam, the available adult habitat values range from 23% to 48% (an average of 41% in a normal year and an average of 23% in a dry year).* ***Because of the fact that the majority of available habitat is upstream of the dam in both normal and dry years, the Department believes that allowing fish in the lower river access to upstream areas will allow for better protection of the fisheries resource and help mitigate for low releases below Hendricks Diversion Dam during both wet and dry years.*** [***emphasis added***]

The access to this better habitat is critically important during dry and critically dry water years. For example, during the extended drought of 2015, PG&E requested variances in the DeSabla-Centerville project. Among these variances was a request, which was supported by the Department and other resource agencies, to reduce flows below Hendricks Head Dam to a "target" instream flow of 7 cfs. This variance helped PG&E deliver additional water through the Hendricks/Toadtown system to the SRCS Holding/Spawning habitat in Lower Butte Creek. Although we supported this request, Department staff note that while flows downstream of Hendricks Head dam were reduced to 7 cfs, flows above the Dam remained higher, as releases from Philbrook reservoir ranges from 15-30 cfs throughout the summer. Addition of a fish ladder at this location would help safeguard fish in the WBFR to be able to pass to more abundant, cooler habitat and remain in good condition even during drought conditions.

And lastly, because we contemplated installation of a ladder and screen at this location, no minimum instream flows were required immediately below the dam during the relicensing process. Without a fish ladder, the 0.12 mile long section between the dam and the return release to the river would continue to be completely dry during low-flow portions of the year.

Subsequent to our filing 10(j) recommendations, FERC staff held a section 10(j) meeting on April 13, 2009. After this meeting, FERC staff made a new recommendation to include a fish screen and fish ladder in their staff alternative. In their Final EA, FERC staff noted that:

> *The installation of a fish ladder on the Hendricks diversion dam would allow for the connectivity of the West Branch Feather River's habitat from the downstream Miocene diversion (non-project facility) upstream to the headwaters of the West Branch Feather River. This connectivity would support natural behavioral movements of the native trout population for foraging, rearing and spawning.*

FERC staff adopted the recommendation for a fish screen and fish ladder at this location by including “Install and operate fish screen at Hendricks Head Dam” as Measure #77 in their staff alternative in the Final Environmental Analysis. U.S. Forest Service (USFS) also included a screen and ladder in their revised 4(e) conditions. It is unclear why PG&E is requesting reconsideration of this condition that has already been mandated by both FERC and USFS.

F. Condition 15 and Attachment A: Mitigation Measure 4

In PG&E’s petition, they state that:

> *Condition 15 and Attachment A, Mitigation Measure 4, both include the following condition: “If temperatures in the DeSabla Forebay exceed the EPA temperature criteria (EPA 2003) for the life stage being stocked during a scheduled stocking or within one month of a scheduled stocking, fish will not be stocked in DeSabla Forebay. When multiple life stages are stocked, the most conservative life stage EPA temperature criteria shall be used.” (Final WQC, p. 39, and Attachment A of WQC, p. 3.) For the reasons explained below, PG&E strongly recommends that the State Water Board use criteria used by the California Department of Fish and Wildlife (CDFW), which conducts the fish stocking program in DeSabla Forebay.*
>
> *The CDFW has specific criteria for stocking hatchery fish in reservoirs. The EPA criteria, in contrast, are meant to protect the longevity of wild trout populations in native streams. Using EPA’s criteria would constrain CDFW’s ability to plant fish into the DeSabla Forebay and would reduce fishing recreation opportunities. PG&E will create a plan in consultation CDFW biologists who are qualified in determining if the conditions of the reservoir are appropriate for stocking. Thus, PG&E recommends that the State Board reference the use of temperature criteria used by CDFW, instead of the EPA criteria.*

We agree with this recommendation. The Department typically plants catchable sized trout that are intended as “put and take fishery”. Therefore, adhering to the Department’s criteria will allow for the maximum fishing opportunities at DeSabla Reservoir. During the development of a Fish Stocking Plan, collaborative consultation with the Department and other license participants shall determine schedule, type, quantity and location of stocked fish. If water conditions deteriorate to levels approaching the Department’s criteria, collaboration between license participants shall determine alternate planting sites at nearby sites such as Paradise or Philbrook Reservoirs.

G. Condition 23: Wet Meadow Funding

In PG&E’s petition for reconsideration, they state that since the Butte Creek house (BCH) wet meadow habitat site is located outside of the Project boundary, and the “activities are being performed by a State agency over which FERC has no authority of

jurisdiction" then the requirement for PG&E to submit a plan to the Water Board to show how they would fund the activities needed to maintain this habitat should be removed from the WQC.

On March 12, 2012, following PG&E's oversight of including the wet meadow habitat funding in their Draft License Application measures, Department staff submitted a letter to FERC detailing additional background information about this site, and PG&E's continuing responsibility to fund this mitigation site. In this letter we stated that:

> *The current DeSabla-Centerville Project license requires that the Licensee provide funding contributions toward the ongoing preservation and management of wet meadow habitat, acquired as off-site mitigation for Project No. 803. Article 39 of the license includes Exhibit S, an agreement between the Licensee and the Department (dated December 16, 1983). The "Agreement Between Pacific Gas and Electric Company and the State of California Department of Fish and Game Relating to the Fish and Wildlife Resources of FERC Project No. 803, DeSabla-Centerville" was revised in 1986 and an Order Amending the Revised Exhibit S was issued by the FERC on May 6, 1987 (Docket No. 803-019). Consistent with Section III C, Items 1 – 3 of the amended agreement, wet meadow lands were acquired to expand the Butte Creek House Ecological Reserve. Item 4 of Section III carries an additional requirement for the continuing funds that shall be made available annually to the Department for the purpose of managing the BCH Meadow (and Item 5 specifies funding amount and method). Specific language in Item 4 stipulates:*
>
> > *This provision shall continue each subsequent accounting year for the period of time Licensee retains the license for FERC 803.*
>
> *PG&E has retained the license for FERC Project 803, therefore the obligation to fund the maintenance of those lands at BCH as mitigation for project impacts continues.*
>
> *Department staff were active participants in the Integrated Licensing Process (ILP) for the DeSabla-Centerville project. To our knowledge, mitigation commitment(s) from past agreements for Project No. 803 were never placed as an agenda item or brought up for discussion during ILP meetings.*

The Fish and Wildlife Agreement between Pacific Gas and Electric Company and the State of California relating to the FERC project no. 803 was made effective on December 16th, 1983. Within the general provision of this agreement it is stated that:

> *Amendments hereto shall be in writing, may be proposed by either part and shall become effective upon approval by both parties and concurrence by the Commission when required.*

> *The duration of this agreement shall be for the term of the License issued to Licensee by the Commission, or as extended by an annual license until a new license is issued,* ***and shall continue in force until a new agreement is reached between the Licensee and Fish and Game [emphasis added].***

In its Petition for Reconsideration of the Water Quality Certification for FERC Project 803, PG&E asserts that Condition 23 should be removed from the Final Water Quality Certification. PG&E bases this assertion on a mixture of fact and assumption. First, the property at BCH is outside the FERC 803 Project boundary. Second, that FERC has no jurisdiction over activities done by the Department. Third, Condition 23 requires conduct outside the scope of the license and the Project. Fourth, that FERC will not include this provision in the new license.

The property described in the Revised Article 39 Agreement and acquired by the Department as mitigation for impacts derived from FERC 803 is currently outside the boundary of FERC 803. FERC projects have impacts beyond the boundary of a project. In the past, FERC has included license conditions that contain mitigation obligations for those impacts outside the specific boundary for a project. *See 91 F.E.R.C.P61, 176 (2000), License required fish stocking outside the project boundary as a form of mitigation for project impacts, and Licensee bears the burden of showing that such stocking is no longer needed or appropriate to mitigate for the project's impacts on the pre-existing fisheries. See also, See also 67 F.E.R.C. P62, 256 (1994)Licensee not required to incorporate 12-acre wetland mitigation area into the project boundary based on proposal to donate land to a non-profit organization for a bird sanctuary with a Declaration of Protective Covenants to ensure the mitigation area is properly maintained by the licensee.*

Second, PG&E claims that Condition 23 should be removed because FERC does not have jurisdiction over the Department. The Department is not the Licensee for FERC Project 803, however, FERC clearly has the authority to enforce the terms and conditions of licenses it issues. Article 39 is a condition in the current license for FERC Project 803. Article 39 has an exhibit which includes the Revised Article 39 Agreement, relating to the fish and wildlife resources of FERC Project 803. The obligations in the Revised Article 39 Agreement predominantly run to the Licensee, PG&E, not the Department. PG&E is obligated to annually make funds available to the Department for the purpose of managing the property at BCH. It is irrelevant that FERC does not have direct jurisdiction over the Department since it does have authority over the Licensee, which has the obligations to continue to provide funds for the property at BCH.

Third, PG&E alleges that Condition 23 requires conduct outside the scope of the license and the Project, and makes a reference to the Order Issuing New License for FERC Project No. 2206-030, 151 FERC [P] 62,004 (April 1, 2015) (Duke Energy). PG&E overstates the scope of the Duke Energy Order. Also, there are several factual differences between Condition 23 and the Duke Energy Order. One condition not included in the Duke Energy Order, placing restrictive covenants on non-project lands, was not included by FERC because FERC stated the Licensee had signed an

agreement to place the restrictive covenants on the land, and FERC expected the Licensee to perform this work per its signed agreement. FERC further noted that the condition was not related to the project. Neither situation applies to Condition 23. Here, Condition 23 the maintenance of wet meadow habitat at BCH, is related to the project as mitigation for project impacts. The mitigation at BCH was designed to mitigate for loss of wet meadow habitat to compensate, acre-for-acre, for meadows habitat inundated by the creation of Round Valley Reservoir, Philbrook Reservoir, and DeSabla Forebay (PG&E,1980). And, unlike in the Duke Energy situation with a signed agreement the Licensee was expected to perform under, PG&E did not include the Revised Article 39 Agreement in its relicensing application, did not refer to it during the lengthy ILP process, and the Department has had difficulty in the past in obtaining funds for these lands from PG&E. A second condition not included in the Duke Energy Order would have required the Licensee to lease non-project lands to the state. FERC indicated that this was not included in the Order because FERC determined that the non-project land was not required to ensure public access to a project lake, thus was not necessary for project purposes. Here, again, the land at BCH is necessary for project purposes as mitigation for project impacts, unlike the situation in the Duke Energy Order. The Duke Energy Order was a narrow order based on specific facts different than the facts presented in FERC Project 803.

Fourth, PG&E argues that the Water Board should not include Condition 23 because FERC will not include this provision in the new license, based on the precedent of Duke Energy Order. First, it is not yet known what will or will not be in a new license not yet issued by FERC. Second, the Duke Energy Order is not only factually different, but incorrect in the exclusion of certain 401 Certification conditions as a matter of law., Under Clean Water Act section 401(a)(1), FERC may not issue a new license unless the state water quality agency has either issued water quality certification for the project or has waived certification. Under Clean Water Act 401(d), the certification “shall become a condition on any Federal license or permit subject to the provisions of this section.” In *American Rivers Inc. v. FERC* (129 F.3d 99 (2d Cir. 1997), the Second Circuit U.S. Court of Appeals held that FERC has no authority under the Clean Water Act or Federal Power Act to modify or reject 401 Certification conditions. The Duke Energy Order’s exclusion of certain 401 Certification conditions was not in accordance with the law and likely will not stand.

In our March 12, 2012 letter mentioned above, we additionally stated that:

> *At this time the Department draws the FERC's attention to the temporal intent of this mitigation measure as stated, the funding of management expenditures for the BCH Meadow should continue into perpetuity, or as long as the DeSabla-Centerville Project is owned and operated by the Licensee. This expressed goal clearly lends itself to the reinstatement of such an article into any New License. Department staff were active participants in the Integrated Licensing Process (ILP) for the DeSabla-Centerville project. To our knowledge, mitigation commitment(s) from past agreements for Project No. 803 were never placed as an agenda item or brought up for discussion during ILP meetings. We agree that*

> *Project No. 803 is complex hydroelectric project, and we realize that relicensing efforts under new ILP format brought additional challenges that may have distracted from this important issue. With that in mind, Department staff have concern now for mitigation commitments made in the past, and wish to remedy any failure to offer this subject for discussion during ILP negotiations.*
>
> *The Department has considered Project No. 803 relicensing documents filed by the Licensee with the FERC, and we are not aware of any disclosure made regarding the continuing requirement for the Licensee's mitigation funding of BCH Meadow. The Application for New License on DeSabla-Centerville (2007) fails to include proposed protection, mitigation, or enhancement (PM&E) measure to address this historic mitigation commitment for "wet meadow habitat." The need for this ongoing PM&E may have been overlooked by the Licensee, or perhaps the Licensee is aware of reconciling process applied by FERC staff for advancing standard or continuing mandates forward from old to new license (and thus rendering the disclosure of "wet meadow habitat' PM&E unnecessary?). Regardless, Department staff asks that silence be broken on this matter, and that the FERC's attention now be directed to continuing the mitigation commitments at BCH Meadow.*
>
> *With clear awareness of the ongoing responsibilities associated with mitigation for wet meadow habitat, the Department requests that the FERC carry forward the language of Revised Exhibit (Article 39) into any New License issued to the Licensee for Project No.803.*

Department staff reiterates that same request to the Water Board. The 401 certification should reflect conditions on the whole of the action, which includes this condition which is in PG&E's current FERC license, and was intended to extend into any additional FERC licenses for the DeSabla-Centerville project.

Section I, J and K.

> **Conditions 39, 40, 51: Reservation of Authority and Revocation**
> **Condition 41: Climate Change**
> **Condition 42 and 43: Compliance with Basin Plan and Clean Water Act**

In Section VI. I, J, and K, PG&E argues that Conditions 39, 40, 41, 42, 43 and 51 should be deleted for reasons that vary from conflict with the Federal Power Act, lack of project nexus, and vagueness. These arguments are not new. The Water Board has addressed each allegation in issuing its Water Quality Certification for the Chili Bar Project (Order WQ 2013-0018). In that Order, the Water Board denied these arguments in PG&E's Petition for Reconsideration and should reject them on the same grounds here.

M. Conditions 50. Ground Disturbing Activities

Department staff would like to suggest alternative language to address PG&E's concern:

> *The Deputy Director and the Executive Officer shall be notified one week prior to the commencement of ground disturbing activities that have the potential to impact lakes or streams.*

The Department appreciates the opportunity to comment on this Petition for Reconsideration. If you have any questions please contact Elizabeth Lawson at (916) 358-2875 or beth.lawson@wildlife.ca.gov

Sincerely,

Tina Bartlett
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REFERENCES:

Alexander, R.M. 1967. Functional design in fishes. Hutchinson and Company, London.

Clay, C.H. 1961. Design of fishways and other fish facilities. Department of Fisheries of Canada, Ottawa. Cat. No. Fs 31-1961/1.

EPA. 2003. EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards. EPA 910-B-03-002. Seattle, WA: Region 10 Office of Water.

FERC (Federal Energy Regulatory Commission). 2009. Final Environmental Assessment for new major hydropower license: DeSabla-Centerville Hydroelectric Project. FERC Project No. 803-087. Prepared by the Federal Energy Regulatory Commission, Office of Energy Projects, Division of Hydropower Licensing. Washington, DC. July.

Pacific Gas and Electric Company. 1980. *DeSabla-Centerville Project-FERC No. 803 Fish and Wildlife Proposal.* Correspondence from H.M. Howe to E. C. Fullerton. June 25, 1980.

Reiser, D. W. and R. T. Peacock. 1985. A technique for assessing upstream fish passage problems at small-scale hydropower developments. Pages 423–432 in F. W. Olsen, R. G. White, and R. H. Hamre, editors. Symposium on small hydropower and fisheries. American Fisheries Society, Western Division, Bethesda, Maryland.

Videler, JJ. 1993. Fish Swimming. London, Chapman & Hall.