March 15, 2006

Deputy Chief, National Forest Systems
United States Forest Service
Washington Office Lands Staff
Mail Stop 1124
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0003

Re: Comments of the California Sportfishing Protection Alliance regarding 4(e) alternative conditions submitted by the Pacific Gas and Electric Company for the Upper North Fork Feather Hydroelectric Project, FERC Project No. 2105.

Dear Deputy Chief,

Pursuant to the Energy Policy Act of 2005 and 7 C.F.R. §1.670, enclosed for filing please find comments of the California Sportfishing Protection Alliance regarding 4(e) alternative conditions submitted by the Pacific Gas and Electric Company for the Upper North Fork Feather River Hydroelectric Project, FERC Project No. 2105.

These comments will also be posted on FERC's e-Library under Docket P-2105.

Thank you.

Respectfully submitted,

/s/

Jim Crenshaw, Executive Director
California Sportfishing Protection Alliance
1248 E. Oak Ave
Woodland, CA 95776
530-661-0997 (phone)
530-661-0541 (fax)
crenshaw@cal.net

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

Pacific Gas and Electric Company Upper North Fork Feather Hydroelectric Project FERC Project No. 2105	)

COMMENTS OF THE CALIFORNIA SPORTFISHING PROTECTION ALLIANCE 4(E) ALTERNATIVE CONDITIONS SUBMITTED BY PACIFC GAS AND ELECTRIC COMPANY FOR THE UPPER NORTH FORK FEATHER HYDROELECTRIC PROJECT, FERC PROJECT NO. 2105

I. INTRODUCTION

Pursuant to 7 C.F.R. §1.673 and Section 241 of the Energy Policy Act (EPAct), Public Law 109-58 (Aug. 8, 2005), the California Sportfishing Protection Alliance (CSPA) files these comments on Pacific Gas and Electric Company's (PG&E) "Submittal of Alternative Conditions for Certain Final § 4(e) Conditions Submitted by the USFS for the Upper North Fork Feather Project No. 2105" (Alternative Conditions) dated December 19, 2005.

Since Section 241 of the Energy Policy Act of 2005 (EPAct), Public Law 109-58 (Aug. 8, 2005) does not provide for the retroactive application of its terms, and the rules under which this intervention is filed apply retroactively to reopen final matters in pending hydropower licenses, the rules violate the law. Thus, the United States Forest Service (USFS) consideration of alternative conditions proposed by PG&E is an impermissible retroactive application of the law.

Nonetheless, to ensure that the USFS is fully informed of the impact of the alternative conditions proposed by PG&E, CSPA files these comments.

On March 11, 2005, the USFS filed its final conditions under Section 4(e) of the Federal Power Act (FPA), 16 U.S.C. 797(e) (Section 4(e) conditions). On December 19, 2005, PG&E filed its Alternative Conditions challenging USFS 4(e) conditions 4, 6, 9, 10, 11, 17, 19, 20, 21, 22, 44, 46.

II. THE FEDERAL POWER ACT PROVIDES THE OPPORTUNITY FOR COMMENTS

The CSPA appreciates this opportunity to provide comments. CSPA was formed to protect, restore and enhance the state's fishery resources and the aquatic ecosystems that they depend on to ensure this renewable public resource is conserved for the public's use and that of future generations. CSPA represents over twenty prominent fishing organizations across the state and individual members representing some 5,000 recreational anglers committed to conserving the state's fishery resources.

On February 24, 2003, CSPA filed a motion to intervene in the Upper North Fork Feather, FERC No. 2105 relicensing proceeding. Because the motion was unopposed, CSPA became a party to the relicensing 15 days after their motion was filed. 18 C.F.R. § 385.102(c). Furthermore and most importantly, CSPA has a direct interest in the health of the Upper North Fork Feather River and the aquatic life forms that it supports.

Section 33(a) of the FPA plainly and repeatedly allows any party to submit evidence or otherwise comment on alternative conditions submitted in any proceeding. Section 33(a)(2) of the FPA requires that that Secretary's determination must be "based on substantial evidence provided by the license applicant, *any other party in the proceeding*, or otherwise available to the

Secretary…." In making a determination on proposed alternative conditions, FPA Section 33(a)(3) provides that the Secretary must consider "evidence provided for the record by *any party to a licensing proceeding*, or otherwise available to the Secretary, on the implementation costs or operational impacts … of a proposed alternative." FPA Section 33(a)(4) provides that the Secretary must submit to the record a written statement "…based on such information voluntarily provided in a timely manner by the applicant *and others*." (emphasis added in all quotations).

The rules establish that the USFS, in deciding whether to adopt a proposed alternative, must consider a range of information including, but not limited to, comments received on any draft or final NEPA documents. 7 C.F.R. § 1.673(a). The Interim Final Rule expressly states that "FERC will issue its draft NEPA document, which will include for comment the Departments' preliminary conditions and prescriptions and any alternatives proposed by the parties."[1] As such, it is clear that the Departments of Commerce, Interior, and Agriculture, when developing the rules, established an opportunity, albeit an inadequate one, for the public to comment on any proposed alternatives through comment on the Commission's NEPA documents. This opportunity obviously exists in proceedings in which the NEPA documents have not yet been issued. However, the Departments also made the EPAct provisions applicable to proceedings in which preliminary and final conditions have already been submitted and in which the NEPA documents have already been completed. In doing so, they clearly identified the opportunity for intervention and response in any trial type hearings for these proceedings that were requested prior to December 19, 2005. The rules, however, do not provide for a corresponding public comment opportunity on any alternative conditions that were filed by the December 19th deadline.

[1] 70 Fed. Reg. 69804, 69807 (November 17, 2005).

This lack of an opportunity for public comment appears to be an oversight by the Departments, given that the rules and the EPAct clearly contemplate an opportunity for the public to comment on any alternative conditions filed in proceedings in which the relevant agency has not filed a preliminary prescription or condition with FERC by November 17, 2005 and FERC has not issued a license as of that date.

Not providing the public with the opportunity to comment on alternatives filed by December 19th for proceedings in which the NEPA document has already been finalized would result in inequities between proceedings covered by the EPAct. For future proceedings where NEPA process has not yet occurred, public comment is afforded through the NEPA process. Yet for the narrow group of proceedings that both retroactively qualify for application of the EPAct and where NEPA is already complete, there is no specified public comment period.

Ensuring public comment on any alternatives to the Department's mandatory environmental measures is critical. The Departments benefit from diverse expertise and input on the impacts of alternative conditions. Importantly, alternative conditions and the level of environmental protection afforded by them have a direct impact on many stakeholders in the hydropower dam licensing proceeding. Precluding public comment runs counter to the intent of both the EPAct and the FPA, as well as to longstanding practice in the licensing process.

The Upper North Fork Feather proceeding received its final NEPA document in November 2005. The project therefore falls into that category of proceedings for which the rules have not identified any discrete public comment opportunity. For the reasons noted above, CSPA urges the USFS to accept and consider these comments in its analysis of the alternative conditions submitted by PG&E.

III. PG&E'S ALTERNATIVE CONDITIONS 4, 6, 10, 11, 17, 20, 22, AND 44 IMPROPERLY RESTRICT THE SCOPE OF SECTION 4(E) TO NATIONAL FOREST LANDS WITHIN THE PROJECT BOUNDARY.

PG&E argues that the Forest Service Section 4(e) conditions must be restricted to National Forest lands within the Project boundary. For example, PG&E's proposed alternative condition 9 regarding the Licensee's responsibility for fires is "blacklined" so that it provides only for the prevention and extinguishing of "~~fires in the vicinity of~~on National Forest System lands within the Project boundary." (PG&E's Submittal of Alternative Conditions for Certain Final Section 4(e) Conditions Submitted by the United States Forest Service for the Upper North Fork Feather River Project No. 2105. Dec. 19, 2005, p. 25).

PG&E never quotes or addresses the statutory language itself in support of its argument that the FPA limits the application of Section 4(e) conditions to lands that are within both the project boundary and the relevant reservation. *See* PG&E Alternative Conditions, p. 44. Instead, PG&E asserts that its conclusion is compelled by *Escondido*, cites a FERC order, and insists that the Forest Service conditions are "clearly" contrary to law. *Id.*, p. 46. The utility is wrong on all counts.

A. The FPA Provides For The Department To Impose Conditions To Protect Reservations That Contain A Part Of A Licensed Project.

Section 4(e) provides in relevant part that "licenses shall be issued within any reservation" only if FERC determines that the license will not interfere with "the purpose for which such reservation was created," and provides further that the license "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." FPA § 4(e), 16 U.S.C. § 797(e).

The statute therefore provides a two-step process for both FERC and the Department's responsibilities under this clause. For both agencies, the clause applies only to licenses for projects that fall in part "within any reservation." *Id.*; *see Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 780-81 (1984) (discussed below). Once the agencies determine the project falls "within any reservation" and the clause applies, they are to carry out their respective responsibilities with respect to the license for "such reservation." *Id.*

B. The Forest Service's Interpretation Of Section 4(e) Is Fully Consistent With *Escondido*.

Escondido addressed the first step in this process, but not the second. Even PG&E's chosen quote makes this clear: "The section [Section 4(e)] imposes no obligation on the Commission or power upon the Secretary, with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works." PG&E Alternative Conditions, p. 27 (quoting *Escondido*, 466 U.S. at 781).

In *Escondido*, the Secretary of the Interior adopted Section 4(e) conditions for six Indian reservations it deemed affected by a project, while only three of them contained a part of the licensed works. *Escondido*, 466 U.S. at 780. The Court determined that Section 4(e) applied only for the three which contained some of the licensed works. *Id.* at 784. PG&E's assertions to the contrary, the Court had no occasion to consider the legal question presented here. The Court simply did not consider whether, for those reservations containing part of the project, the Section 4(e) conditions could apply to the extent necessary to protect the reservation or only within those parts of the reservation that are also within the project boundary.[2]

[2] PG&E also looks to a FERC order to bolster its position. *See* PG&E Alternative Conditions, p. 28 (citing *Upper Peninsula Power Co.*, 110 FERC ¶ 61,141 (2005). That

While not controlling, *Escondido* and the reasoning behind it are fully consistent with the Forest Service's interpretation of FPA Section 4(e). Indeed, some of the conditions ultimately upheld in the case did in fact apply to project works located off reservation lands. *See Secretary of the Interior v. Escondido Mutual Water Co.*, 6 FERC ¶ 61,189, at n. 144-157. While it is true that the Supreme Court did not specifically address the scope of those conditions, it is also true that there is absolutely nothing in the opinion that suggests the Court found the reach of the conditions troubling.

C. The Plain Language Of Section 4(e) Authorizes The Forest Service To Add Any Section 4(e) Conditions To A License That It Deems Necessary For The Adequate Protection Of The Reservation.

Outside the hydropower context, *Escondido* is perhaps most notable for its insistence that the interpretation of any statute begins with the text of the legislation itself. *See Escondido*, 466 U.S. at 772. Unfortunately, PG&E avoids all discussion of the statutory text. As it was in *Escondido*, the statutory language is decisive.

Section 4(e) provides as follows:

> "That *licenses* shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and *shall be subject to and contain such conditions as the Secretary* of the department under whose supervision such reservation falls *shall deem necessary for the adequate protection and utilization of such reservation*:"

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order asserts—without analysis—that *Escondido* limits conditions to those portions of the reservation containing project works. As explained in the text, *Escondido* did no such thing, and the FERC order cannot be considered persuasive authority on this point.

FPA § 4(e), 16 U.S.C. § 797(e) (emphasis added). (The Energy Policy Act of 2005 section authorizing the instant proceeding uses similar language, stating that "alternative conditions" must "provide[] for the adequate protection and utilization of *the reservation.*" FPA § 33, 16 U.S.C. § 823d.)

By its terms, the FPA provides no geographic limitation on a Section 4(e) condition once it is established that part of the project falls within a reservation. Instead, the statute authorizes the Secretary to impose any conditions on the license, provided only that the Secretary deems the conditions "necessary for the protection and utilization of such reservation." *Id.* By the same token, the statute directs Section 4(e) conditions to "licenses," not to particular project works—let alone to those project works that fall within the reservation. *Id.*

Taken together, the plain text of the FPA therefore reveals that Congress granted the Secretary authority is to mandate "such conditions" as are "necessary," to protect such "reservations" as have projects within their boundaries. *Id.* Congress might have limited the conditions to the portion of the project that falls within the reservation, or to the portion of the reservation that falls within the project boundary, but it did not.

While *Escondido* did not decide the question directly, the case is consistent with this view. There, the Court wrote that "Congress concluded that *reservations* were not entitled to the added protection provided by the proviso of Section 4(e) unless *some of the licensed works* were actually within the reservation." *Escondido*, 466 U.S. at 784 (emphasis added). The negative implication, of course, is that the reservation *is* entitled to protection under Section 4(e) so long as some part of the project falls within it.

D. The Legislative History Of Section 4(e) Supports An Expansive Interpretation Of The Secretary's Power.

When it drafted the language that became Section 4(e) of the FPA, Congress intended that the Secretaries retain responsibility "for ensuring that reservations under their respective supervision were adequately protected." *Escondido*, 466 U.S. at 773. While the legislation vested in the Commission the authority to issue licenses, Congress "wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." *Id.* at 775. The Supreme Court summarized the legislative intent as follows:

> The legislative history concerning § 4(e) plainly supports the conclusion that Congress meant what it said when it stated that the license 'shall … contain such conditions as the Secretary … shall deem necessary for the adequate protection and utilization of such reservations.'

Id. at 775 (citing Section 4(e)) (ellipses by the Court). Consistent with that mandate, the Supreme Court dismissed the notion that FERC had the authority to reject a condition deemed necessary by the Secretary. *Id.* at 779.

PG&E's cramped interpretation of Section 4(e) would frustrate the purpose of the statute. National Forests and other federal reservations frequently have boundaries that do not square up exactly with the "project boundary" established for a license. Often, federal lands are interspersed with private or state lands, and project works might pass through the same

reservation several times. In order to protect the reservation as Congress intended, the Secretary must have the power to impose conditions on the license for the entire project.[3]

Although the Secretary's power is not limited by the somewhat arbitrary reservation or project boundaries, the Secretary's power is not unlimited. The statute provides for conditions only for reservations containing a portion of the project, and for conditions only so far as the Secretary deems them "necessary for the adequate protection and utilization" of the reservation. FPA § 4(e). A court will uphold § 4(e) conditions only "if they are reasonably related to [the] goal of protecting and utilizing the reservation, otherwise consistent with the [Power Act], and supported by substantial evidence." *Southern California Edison Co. v. FERC*, 116 F.3d 507, 519 (D.C. Cir. 1997) (internal citations omitted) (parentheses by the court).

IV. CONCLUSION

PG&E's proposed conditions 4, 6, 10, 11, 17, 20, 22, 40 improperly interpret the geographic limitations of Section 4(e) conditions per the plain language of the FPA, and would frustrate the Secretary's mandate to adequately protect the Plumas National Forest. Therefore, the Secretary must reject PG&E alternative conditions 4, 6, 10, 11, 17, 20, 22, and 40.

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[3] In some cases, it will be physically impossible to limit a § 4(e) condition to reservation lands. In *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 744 (D.C. Cir. 2001), for example, the court of appeals rejected challenge to a 4(e) condition related to water level. The licensee argued the condition was invalid because it applied to non-reservation as well as reservation land, because "[a] lake can have only one level" and the condition was necessary to protect the reservation. Id. Because the court was able to decide the case on the narrow issue that it was impossible to protect the reservation without also affecting non-reservation lands, the court declined to decide the precise scope of the government's power under § 4(e).