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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
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FEDERAL ENERGY
REGULATORY COMMISSION

October 22, 2004

In Response Refer To:
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To the parties addressed:

This concerns the restoration of anadromous fish habitat in the Feather River Watershed by providing fish passage at Federal Energy Commission (FERC) licensed hydroelectric projects. My staff has participated in several productive discussions with license applicants, resource agency staff, and environmental groups concerning opportunities to protect, mitigate, and enhance anadromous fish habitat through the Federal Power Act (FPA). We are pleased with the progress made to date and encourage you and your staff to continue participating in these discussions. We believe that a negotiated settlement to relicensing issues will ensure a more robust License with greater balance of public benefits. Alternately, a failure to participate in settlement discussions may result in undue delays in the licensing process and result in protection, mitigation, and enhancement (PM&E) measures with less certainty regarding both costs and benefits.

Several runs of Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and Central Valley steelhead (*Oncorhynchus mykiss*) are listed under the Federal Endangered Species Act (ESA) as threatened or endangered, and the National Marine Fisheries Service (NOAA



Fisheries) is responsible for protecting and recovering these fish. Pacific Gas and Electric Company (PG&E), South Feather Water and Power (SFWP), and the California Department of Water Resources (DWR) operate several projects in the Feather River basin which block access to upstream habitat that is within the historic ranges of these species, and, therefore, have a significant role to play in current protection and recovery efforts. These projects include, but are not limited to, Poe (P-2107), Rock Creek-Cresta (P-1962), Bucks Creek (P-619), Upper North Fork Feather River (P-2105), DeSabra-Centerville (P-813), South Feather (P-2088), and Feather River (P-2100). Several of these projects are in various stages of FERC relicensing.

Comprehensive Development Standard of the FPA

In the Federal Water Power Act of 1920 (FWPA),¹ Congress granted FERC exclusive authority to license non-Federal projects determined by the FERC to be "best adapted to a comprehensive scheme for improvement and utilization" of a river basin (emphasis added) for navigation, water power development, and other beneficial public uses. The FWPA was re-enacted in 1935 as Part I of the FPA.

Section 10(a)(1)² of the FPA establishes the comprehensive development standard which each project must meet to be licensed. A licensed project shall be:

...best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational or other purposes....

Pursuant to this standard, the Commission must explore all issues relevant to the public interest. Typical (and sometimes competing) uses for a waterway include power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. In the Electric Consumers Protection Act (ECPA) of 1986,³ Congress amended Section 4(e) to require the Commission to give equal consideration to developmental and non-developmental values. In addition, FERC is mandated to ensure that any license issued is consistent with existing "Comprehensive Plans". FERC has numerous Comprehensive Plans on file that speak to the issue passage for anadromous fish in the Central Valley. Appendix A (enclosed) provides a list of Comprehensive Plans and Legislation which are relevant to a watershed approach for fish passage on the Feather River.

¹41 Stat. 1063 (1920)

²16 U.S.C. § 803(a)(1)

³P.L. 99-495, 100 Stat. 1243 (Oct. 16, 1986) (codified at 16 U.S.C. § § 71a, *et seq.*)

Section 18 of the FPA

Section 18 of the FPA expressly grants to the Department of Commerce and the Department of the Interior (Departments) exclusive authority to prescribe fishways. Section 18 states that the Commission must require construction, maintenance, and operation by a licensee at its own expense of such fishways as may be prescribed by the Secretary of Commerce or the Secretary of the Interior. Fishways prescribed under Section 18 by the Departments are mandatory upon the Commission. Within the Department of the Interior, the authority to prescribe fishways is delegated from the Secretary of the Interior to FWS Regional Directors. Within the Department of Commerce, the authority to prescribe fishways is delegated to NOAA Fisheries Regional Administrators. Therefore, FWS develops all fishway prescriptions issued by the Department of the Interior under Section 18, and NOAA Fisheries develops all the Department of Commerce's fishway prescriptions.

Additionally, the courts have recently addressed several Section 18 issues which affect the Services' implementation of the fishway prescription process. In following Escondido, 466 U.S. 765 (1984), the courts have continued to hold that the exercise by the Secretaries of their authority under Section 18 is mandatory upon the Commission (Bangor-Hydroelectric Co., Inc., v. FERC, 78 F.3d 659 (D.C.Cir. 1996); American Rivers, Inc. v. FERC, 129 F.3d 99 (2nd Cir. 1997); American Rivers v. FERC, 187 F.3d 1007 (9th Cir. 1999)). Additionally, the Services' fishway prescriptions must be supported by substantial evidence in the administrative record before the Commission and be reasonably related to Service fish passage goals (Bangor-Hydroelectric Co., Inc., v. FERC, 78 F.3d 659 (D.C.Cir. 1996)).

Scope of the Federal Power Act

It is implicit that in order to provide for "protection, mitigate of damage to, and enhancement of fish and wildlife.....," FERC must first evaluate environmental impacts. The FPA clearly distinguishes between the project boundaries and the environment affected by the project (action area). For instance, FERC's relicensing regulations at 18 CFR 16.8(b)(i) require that the applicant provide detailed maps of the project boundaries, and at 16.8(b)(iv) the applicant must additionally provide an identification of the environment affected, or to be affected, and proposed mitigation. FERC wouldn't make these separate requirements of a description of the affected environment if it was the same as the project boundaries.

Further, in FERC's regulations stipulating what must be included in a license application, at 18 CFR 4.41(f)(3), FERC requires information on fish and wildlife "in the vicinity of the proposed project", not just the project boundaries. In 18 CFR 4.41(f)(3)(i), FERC requires a description of resources in the "proposed project area and its vicinity" and requires mitigation for impacts on fish and wildlife. Thus, FERC clearly distinguishes between the project area and the vicinity for purposes of considering impacts on natural resources.

Regulations governing the preparation of the license application require the inclusion of an Exhibit E. FERC's guidance on what must be in Exhibit E includes a summary of the resource

agencies' views on resource needs in the project vicinity and region. This further confirms the absolute requirement to collect information on resources affected beyond the project boundaries. From a purely scientific basis, by its very nature, a dam could affect resources well beyond project boundaries. If the project is affecting the environment upstream or downstream of the actual project boundaries, it would be arbitrary to consider and mitigate only for impacts occurring within the project boundaries. Further, FERC has the authority to collectively formulate and impose PM&E measures on more than one license at a time. On past occasions where public resource and licensing decisions overlapped within a shared watershed, FERC has collectively evaluated impacts and imposed PM&E measures on multiple project licenses within the watershed. For instance, in the Ohio River proceedings, FERC collectively evaluated direct, indirect, and cumulative impacts (including water quality and fish passage) and imposed PM&E measures for over a dozen different project licenses. Such actions may be necessary for FERC to meet the comprehensive development and balancing standards of the FPA.⁴

Conclusion

Under FPA, NOAA Fisheries has the authority to prescribe fishways at the Oroville project (P-2100) to allow for the safe, timely, and effective passage of fish into their historic habitats. These facilities and operations are feasible for Oroville Dam. Accordingly, PG&E, SFWP, and DWR have a concurrent legal obligation to address their projects' effects on anadromous fishes, including implementation or funding of prescribed fishways and other protection, mitigation, and enhancement measures required by FERC in consultation with NOAA Fisheries and other resource agencies.

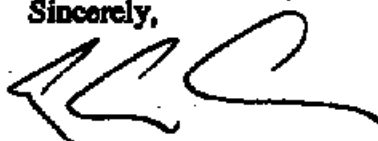
Although NOAA Fisheries may find it necessary to prescribe upstream and downstream passage devices at many facilities in the Feather River basin, we are prepared to explore alternate and potentially more cost-effective options. The settlement process for the Feather River project (P-2100) is currently developing a plan to return a small number of Central Valley spring run Chinook salmon and Central Valley steelhead to the Seneca Reach of the North Fork Feather River. Under this preliminary plan, adults would be collected at the Feather River Fish Hatchery ladder, and transported by truck to one or more locations on the Seneca Reach. Initially, a temporary screening facility would be put in place above Belden Forebay, which would be replaced later by a cost-effective permanent facility if results of tests were satisfactory. Juveniles would be tagged and transported back down to the Lower Feather River for release. Other reaches would be established later.

NOAA Fisheries is formally requesting that PG&E, SFWP, and DWR participate fully in the development of these alternatives. Otherwise, NOAA Fisheries may be required to implement strategies to protect and recover anadromous fishes without the input of all parties. FERC is

⁴ Also see *See Platte River Whooping Crane Critical-Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding that "FERC was not required to first determine extent to which first power district[licensee], rather than second power district [licensee] was responsible for alleged harm to birds... prior to imposing...flow conditions [on first licensee]).

supportive of a watershed approach to these issues.⁵ Currently DWR, the U.S. Fish and Wildlife Service, the U.S. Forest Service, California Department of Fish and Game, the California State Water Resources Control Board, the California Federation of Fly Fishers, American Rivers, CalTrout, several Native American tribes, and many others are helping to develop an Ecological Committee to recommend coordinated protection, mitigation, and enhancement measures regarding environmental issues in the Feather River Watershed. Again, we urge you to become fully engaged in these processes by sending a representative with decision-making authority to future meetings if you are not already planning to do so, and to support a program which will improve the status of these species via fish passage. Please contact Mr. Eric Theiss by telephone at 916-930-3613 or by electronic mail at Eric.Theiss@NOAA.GOV in order to be apprised of the upcoming schedule.

Sincerely,



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Northern California Habitat Supervisor

cc: Magalie Roman Salas (8 copies)
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⁵ Interagency Task Force Reports on Improving Coordination of ESA Section 7 Consultation with the FERC Licensing Process, NEPA Procedures in FERC Hydroelectric Licensing.

Appendix A

Legislation and Management Plans Consistent with Fish Passage at Oroville Dam¹

State of California

(a) Salmon, Steelhead Trout, and Anadromous Fisheries Program Act (Senate Bill 2261)

In 1988, the State legislature passed the Salmon, Steelhead Trout, and Anadromous Fisheries Restoration Act (Chapter 1545/88/Senate Bill 2261), which established the long-term goal of doubling anadromous fish populations from their 1988 abundance levels by the end of the century. This Act precipitated several plans for restoring Central Valley anadromous fisheries populations and their habitat: the Central Valley Salmon and Steelhead Restoration and Enhancement Plan, and Restoring Central Valley Streams. In general, these planning documents have outlined efforts to restore Chinook salmon populations, and have assumed that steelhead populations would secondarily benefit from the restoration measures. Restoration activities currently being implemented as a result of these plans, and California Senate Bill 1086 (described below) include: a pilot pumping project to improve fish passage at Red Bluff Diversion Dam, installing water temperature control devices at Shasta Dam and Whiskeytown Reservoir, correcting fish passage problems on several Sacramento River tributaries, and acquiring riparian woodland areas along Butte Creek and the Sacramento River. As part of the Salmon, Steelhead Trout, and Anadromous Fisheries Program, the Steelhead Management and Restoration Project was also established in 1991. The California Department of Fish and Game (CDFG) has produced a draft plan which outlines management activities for the restoration and maintenance of California's steelhead populations. In the Central Valley, the CDFG's focus for steelhead restoration is on recovering wild populations and restoring hatchery-maintained runs. As an example, the draft plan outlines measures for the Sacramento River include correcting fish passage and screening problems, agricultural drainage, and heavy metal pollution from the Iron Mountain Mine Superfund Site. Within the Sacramento River system, Mill, Deer, and Antelope Creeks have the greatest potential for restoration of wild steelhead

¹ Source: Steelhead Conservation Efforts - A Supplement to the Notice of Determination for West Coast Steelhead under the Endangered Species Act. National Marine Fisheries Service, August 1995.

populations, and the plan recommends improved flows in the lower reaches by exchanging groundwater for surface flows. A monitoring program has also recently been established to assess adult steelhead numbers in Mill and Deer Creeks. In addition, the CDFG plan recommends temperature and flow regimes for the Yuba River; adequate minimum flows, flow fluctuation standards, and water temperatures in the American River as well as storage levels in Folsom Reservoir. The CDFG has developed several other fishery management plans for Central Valley streams including: the Lower Yuba River fishery management plan; the Lower Mokelumne River Fisheries Management Plan; and the Steelhead Restoration Plan for the American River. Implementation of actions identified in these plans will also assist in restoring Central Valley steelhead in the rivers below the dams as mandated under Senate Bill 2261.

(b) The Keene-Nielsen Fisheries Restoration Act of 1985

This Act states that California intends to "make reasonable efforts to prevent further declines in fish and wildlife, and intends to restore fish and wildlife to historic levels where possible. Just over 15 million dollars were initially authorized in approved legislation; however, only 11.25 million dollars were actually appropriated between 1985 and 1987. The Act was reworded through 1990 legislation to closely tie expenditures from this account to projects called for under the Salmon, Steelhead Trout, and Anadromous Fisheries Program Act of 1986; however, the legislation provided no funding to the Keene-Nelson account, nor have the budgets of subsequent governors.

(c) California Fish and Game Commission's Steelhead Rainbow Trout Policy

This policy of the California Fish and Game Commission (CFG) was recently updated and amended. The policy recognizes the need to protect genetic integrity and habitat of all stocks and places management emphasis on natural stocks. The policy declares: Management of steelhead will be directed towards protection and maintenance of populations and genetic integrity of all identifiable stocks; rescued juvenile steelhead must be returned to their natal stream, and rescue will only be allowed when fish can be held until habitat conditions improve; restoration and acquisition plans will be developed and implemented to safeguard critical habitats such as estuaries, lagoons, and spawning and rearing areas; and securing necessary instream flows; existing steelhead habitat shall not be diminished further without offsetting mitigation of equal or greater long-term habitat benefits; sport fishing for adult and juvenile steelhead will only be permitted where CDFG has determined that harvest will not harm existing wild populations; and resident fish will not be planted in drainages of steelhead waters if CDFG has determined that it will interfere with steelhead populations.

(d) Senate Bill 1086

The State of California passed Senate Bill 1086 in 1986, calling for a management plan to protect, restore, and enhance the fish and riparian habitat and associated wildlife of the upper Sacramento River. In response to this legislation, the Resources Agency of

California prepared the Upper Sacramento River Fishery and Riparian Habitat Management Plan. This plan recommends a variety of habitat restoration measures, including improving spawning gravel, water quality, and passage at dams and diversions. Senate Bill 1086 appropriated \$250,000 to prepare this management plan and to develop an inventory of riparian lands.

(e) Trout and Steelhead Conservation and Management Planning Act of 1979

This Act declares that it is a policy of the State to establish and maintain wild trout and steelhead stocks in suitable waters of the state, and establish angling regulations designed to maintain wild trout and steelhead through natural production.

(f) Central Valley Spring-Run Chinook Salmon Restoration Efforts

The decline of spring-run Chinook salmon in Mill, Deer, and Antelope Creeks has instigated habitat restoration efforts for these creeks. The *Spring-Run Chinook Salmon Workgroup* has been established with the purpose of exploring measures to recover these populations in order to avert a listing of the spring-run population under the ESA. Restoration efforts for spring-run Chinook salmon are likely to benefit steelhead.

(g) Fish and Game Commission Water Policy

It is the policy of the CFGC that the quantity and quality of the waters of the state should be apportioned and maintained to produce and sustain the maximum numbers of fish and wildlife. It requires that CDFG review and comment on proposed water development projects and applications for use, and recommends and seeks adoption of proposals necessary or appropriate for the protection and enhancement of fish and wildlife and their habitats.

(h) Cooperatively Operated Rearing Programs for Salmon and Steelhead Policies

The CFGC policy on Cooperatively Operated Rearing Programs states that the bulk of the State's salmon and steelhead resources shall be produced naturally and that the State's goals of maintaining and increasing natural production take precedence over the goals of cooperatively operated rearing programs. Section 1200 *et seq.* of the Fish and Game Code authorizes CDFG to enter into agreements with counties, nonprofit groups, and private persons for the management and operation of rearing facilities for salmon and steelhead. All such agreements shall be in accordance with the policies of the CFGC and the criteria of CDFG which govern the operation under such agreements.

(i) Salmon and Steelhead Stock Management Policy

It is the policy of CDFG to maintain the genetic integrity of all identifiable stocks of salmon and steelhead in California. Each salmon and steelhead stream shall be

evaluated by CDFG and the stocks classified according to their probable genetic source and degree of integrity.

(j) California Fish and Game Code 1385 et seq.

Also known as the California Riparian Habitat Conservation Act established this program to protect, preserve, and restore riparian habitat throughout California through acquisition of interests and rights in land and waters.

(k) California Fish and Game Code 2786(e)

Under the California Wildlife Protection Act (CWPA) of 1990, CDFG code 2786(e) stipulates that funds allocated under CWPA may be used for acquisition, restoration, or enhancement of aquatic habitat for spawning and rearing of anadromous salmonids and trout resources.

(l) California Fish and Game Code 6900 et seq.

It is the policy of the State to significantly increase the natural production of salmon and steelhead, and existing natural salmon and steelhead habitat is not to be diminished further without offsetting impacts of lost habitat.

(m) California Water Code 1243

Declares that the use of water for preservation and enhancement of fish and wildlife resources is a beneficial use. Requires the State Water Resources Control Board (SWRCB) to notify CDFG of any application for permit to appropriate water.

(n) California Water Code 1707

This law passed by the California Legislature and signed by the Governor in 1991, authorizes a water right owner to petition the SWRCB for a change for purposes of preserving or enhancing wetlands, habitat, fish, and wildlife. It authorizes the SWRCB to approve the petition, regardless of whether the proposed use involves a diversion of water. Generally, the law allows for an existing water right to be left in the stream to benefit fish and wildlife, instead of being diverted for consumptive or out-of-stream uses.

(o) Association of California Water Agencies

The Association of California Water Agencies have prepared and submitted to NOAA Fisheries a list of participants (individual agencies) ongoing restoration efforts for anadromous salmonids in watersheds located throughout the state. These are a host of voluntary and mandatory efforts to restore salmonids and their habitat. As an example, the Carmel River Captive Steelhead Broodstock project is the only cooperative spawning and rearing facility in California operated solely for genetic conservation of a

native steelhead stock. This program was necessary to guarantee the survival of the Carmel River steelhead population and to speed its recovery. Another captive breeding facility has been proposed for Fillmore Hatchery on the Santa Clara River. Other activities include: fish rescues, gravel replacement, population monitoring, correcting fish passage problems, changes in water drafting and conveyance schedules, and public education outreach.

(p) The Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region

This Basin Plan designates cold water habitat for the North Fork Feather River. Recent presentations made by the Pacific Gas and Electric Company with regard to the Rock Creek / Cresta (FERC No. 1982) and Upper North Fork Feather River (FERC No. 2105) show that maintaining water temperature at 20° Celsius or below is achievable with the temperature control device proposed for Lake Almanor.

http://www.swrcb.ca.gov/rwqcb5/available_documents/basin_plans/benplnab.pdf

(q) US Government ²

Central Valley Project Improvement Act (CVPIA)

The CVPIA was signed into law on October 30, 1992. The CVPIA amends the authorization of the Department of Interior's CVP to give fish and wildlife protection, restoration, and mitigation projects equal priority with irrigation and domestic water uses. The CVPIA also makes fish and wildlife enhancement equal in importance to power generation. The CVPIA identifies several specific measures to meet these new priorities and sets a broad goal of sustaining natural populations of anadromous fishes in Central Valley rivers and streams. Specific provisions of the CVPIA that potentially benefit steelhead (and which have already been initiated) include: dedication of 800,000 acre-feet of CVPIA yield for fish and wildlife; release of pulsed flows to increase survival of migrating anadromous fish; and installation of fish screens at water diversions. The CVPIA also places limitations on water contracting and establishes a restoration fund of 50 million dollars annually. More specifically, the CVPIA requires the Secretary of the Interior to develop and implement "a program which makes all reasonable efforts to ensure that, by the year 2002, the natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long term basis, at levels not less than twice the average levels attained during the period of 1967- 1991" (Section 3406[b][1]). This program is already in progress and is known as the Anadromous Fish Restoration Program (AFRP). A coalition of fish experts from the Federal and State agencies, private industry and academia (AFRP Core Group) has developed a working plan for restoring salmon and steelhead in the Central Valley. The working plan provides a platform upon which the participating agencies and public will build a final

² Please see "NOAA Fisheries Resource Goals and Objectives" for a further discussion of legislation.

plan. Actions are recommended for each watershed. They cover a broad spectrum of habitat restoration activities, such as improving instream flows, maintaining adequate water temperatures, correcting fish passage problems at dams and diversions, and restoring spawning gravel and riparian habitat. The population abundance goal for steelhead is 13,000 adults per year spawning upstream from the Red Bluff Diversion Dam in the Sacramento River. Because there is insufficient data of steelhead in other streams and rivers in the Central Valley, it has so far been impossible to set numeric restoration goals for these other streams. Further details on the recommended actions may be found in the Working Paper on Restoration Needs: Habitat Restoration Actions to Double Natural Production of Anadromous Fish in the Central Valley of California.

(r) MSFMCA

Pacific coast salmon (*Oncorhynchus spp.*) - Amendment 14 (May 2000), Appendix A Identification of Essential Fish Habitat, Adverse Impacts, and Recommended Conservation Measures for Salmon (August 1999) and Appendix B (Description of the Ocean Salmon Fishery and its Social and Economic Characteristics (August 1999)) to the Pacific Fishery Management Council's Pacific Coast Salmon Plan (1997)

Feather River Relicensing

NOAA Fisheries is requesting a coordinated passage investigation to be undertaken by the Oroville (FERC No. 2100), Poe (FERC No. 2107), Upper North Fork Feather River (FERC No. 2105), and South Feather (FERC No. 2088) relicensings.

Restoring Central Valley Streams - A Plan for Action (1993)

Steelhead Restoration and Management Plan for California (1986)