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Re: Notice of violation of the Endangered Species Act for take of threatened spring-run Chinook salmon resulting from operation of FERC License No. P-803

Dear sirs and madam:

We are writing on behalf of a coalition of environmental protection and commercial and sport fishing organizations¹ to notify you of ongoing and recurrent violations of Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1538, resulting from the DeSabra-Centerville Project, License No. P-803 (“Project”), operated by Pacific Gas and Electric Company (“PG&E”) and licensed by the Federal Energy Regulatory Commission (“FERC”). As set forth in detail below, during the summers of both 2002 and 2003, the largest run of wild spring-run

¹ The coalition includes the California Sportfishing Protection Alliance, Friends of Butte Creek, Friends of the River, Institute for Fisheries Resources, Northern California Council of the Federation of Fly Fishers, Pacific Coast Federation of Fishermen’s Associations, and Sacramento River Preservation Trust.

Chinook salmon in the Central Valley Evolutionarily Significant Unit (“ESU”), a species listed as threatened under the ESA in 1999, lost a significant portion of its pre-spawning adults due to the operation of the DeSabra-Centerville Project on Butte Creek. Such severe mortality losses of the spring-run Chinook population constitute unlawful takings in violation of Section 9(a)(1)(B) of the ESA and the regulations promulgated thereunder.

This letter constitutes the notice required by Section 11(g)(2)(A)(i) of the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), prior to commencement of legal action. This letter is also an update of letters sent by this coalition on March 19, 2004, May 20, 2005, May 18, 2006, and May 21, 2007, regarding this same subject. As such, it is intended to reiterate the issues already raised in those letters and to make clear that the coalition intends to take whatever legal steps may be necessary to prevent an unauthorized take of spring-run Chinook salmon in summer 2008.

Factual Background

1. Central Valley Spring-Run Chinook Salmon

Once the predominant run in the Central Valley, spring-run Chinook salmon (*Oncorhynchus tshawytscha*) have declined dramatically due to dam construction, water diversions for agriculture, flood control, and hydropower operations, and habitat degradation.² Native populations in the San Joaquin River have been extirpated, and the only streams still containing naturally spawning populations of spring-run Chinook are Butte, Mill, and Deer Creeks, all tributaries of the Sacramento River.³ Butte Creek in particular is home to by far the largest remaining run of spring-run in the Central Valley ESU.⁴ Simply put, Butte Creek is unquestionably the last, best run of wild, naturally spawned spring-run Chinook salmon in this ESU.

Spring-run Chinook salmon enter the Sacramento River and its tributaries each year between March and July. During that time, adult spring-run occupy approximately ten miles of holding and spawning habitat in Butte Creek, from one mile downstream of the Lower Centerville Diversion Dam (“Centerville Dam”) to approximately four miles downstream of the Centerville Powerhouse.⁵ Between 1995 and 2001, an average of 6,737 adults returned to Butte Creek each year, with a record high of 20,212 adults in 1998.⁶ In 2002 and 2003, Butte Creek

² 63 Fed. Reg. 11,482, 11,498 (Mar. 9, 1998).

³ *Id.* at 11,487, 11,491-92; 64 Fed. Reg. 50,394, 50,399-400 (Sept. 16, 1999).

⁴ 64 Fed. Reg. at 50,399.

⁵ Pacific Gas & Electric Company, Letter to Federal Energy Regulatory Commission Secretary Magalie Roman Salas regarding DeSabra-Centerville Project (FERC No. 803) License Article 39, Sept. 5, 2002 at 1.

⁶ California Department of Fish and Game, Proposal to Pacific Gas & Electric for Funding to Conduct Butte Creek Spring-Run Chinook Salmon Pre-spawning Mortality Surveys During 2003 and 2004 (“CDFG Funding Proposal”), May 20, 2003 at 2.

hosted populations of approximately 16,028 and 17,294 adult spring-run, respectively.⁷ The estimated number of spring-run returning to Butte Creek was 10,600 in 2004,⁸ 16,998 in 2005, 6,547 in 2006, and 6,214 in 2007.⁹ The low number of salmon returning in 2006 was likely a result of the 2003 die-off among the parents of this spawning class; the reasons for the lower-than-average return in 2007 are unclear. Spring-run Chinook salmon spawning occurs in Butte Creek each year between mid-September and early October.

The National Marine Fisheries Service (“NMFS”) published its final rule listing the spring-run Chinook salmon as a threatened species under the ESA on September 16, 1999, effective November 15, 1999.¹⁰ On September 2, 2005, Butte Creek up to the Centerville Dam, which constitutes the upper boundary of the spring-run’s range, was designated as critical habitat for this species.¹¹

2. The DeSabra-Centerville Project

The DeSabra-Centerville Project is a 24.85 megawatt hydropower operation run by PG&E on Butte Creek, Philbrook Creek, and the West Branch of the Feather River in Butte County, California.¹² The Project consists of the (1) Round Valley Reservoir and Dam, (2) Philbrook Reservoir and Dam, (3) Hendricks, Butte Creek, and Centerville Diversion Dams, (4) Hendricks, Toadtown, Butte Creek, and Centerville canals, (5) DeSabra Forebay, (6) penstocks, (7) two powerhouses, (8) a 10-mile long 60-kv transmission line, and appurtenant facilities.¹³ PG&E operates the Project under the licensing authority of FERC. The Project’s current license was issued in 1980 and is set to expire in 2009.¹⁴

3. Impacts of the Project on Spring-run Chinook Salmon

Through its system of dams, canals, reservoirs, powerhouses, and other facilities, the DeSabra-Centerville Project has completely supplanted the natural hydrology of Butte Creek so that the streamflows and temperature of holding and spawning habitat for spring-run Chinook are controlled by Project operations. In recent years, low streamflows, warm water temperatures,

⁷ *Id.* at 3; California Department of Fish and Game, Email message from Tracy McReynolds, Associate Fishery Biologist to Several Recipients, including Allen Harthorn (“CDFG Email”), Dec. 10, 2003.

⁸ Pacific Gas & Electric Company, Letter to Federal Energy Regulatory Commission Secretary Magalie Roman Salas regarding DeSabra-Centerville Project (FERC No. 803) ESA Consultation – Quarterly Progress Report, Mar. 31, 2005 at 1 (quoting California Department of Fish and Game estimate).

⁹ The 2005 through 2007 return figures were provided by Allen Harthorn, Executive Director, Friends of Butte Creek, and were the reported results of surveys conducted by the California Department of Fish and Game.

¹⁰ 64 Fed. Reg. at 50,394.

¹¹ 70 Fed. Reg. 52,488 (Sept. 2, 2005).

¹² 108 FERC ¶ 61,156 at ¶ 2 (Aug. 5, 2004).

¹³ 11 FERC ¶ 62,207 at 63,390 (June 12, 1980).

¹⁴ *Id.*

and pathogenic outbreaks¹⁵ on Butte Creek have killed thousands of adult spring-run Chinook in summer and early fall, before the salmon had a chance to spawn. In 2002, for example, the California Department of Fish and Game (“CDFG”) counted 1,699 pre-spawning mortalities and subsequently estimated that at least 3,431 spring-run Chinook, or 21% of the 16,028 salmon estimated to have returned to Butte Creek that year, died before spawning.¹⁶ The following year, the vast majority of the returning salmon did not survive long enough to spawn, according to estimates by both CDFG and NMFS. CDFG documented 5,472 pre-spawning mortalities as of August 28, 2003, and estimated that a total of 11,231 spring-run salmon were killed before spawning.¹⁷ Moreover, NMFS reported that only 10 to 20% of the total run survived the 2003 conditions to spawn.¹⁸

Despite this recurrent significant mortality to the threatened spring-run Chinook caused by operation of the DeSabra-Centerville Project, PG&E has never submitted an application for an incidental take permit nor a habitat conservation plan regarding the effects of the operation of the Project on this species. Similarly, FERC has never formally consulted with NMFS under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), regarding the impacts of Project operations on the spring-run, even though NMFS requested such consultation after the massive fish kill in 2003.¹⁹ In its September 3, 2003 request, NMFS also outlined several “immediate steps” to be implemented “to avoid or minimize any future episodes of high pre-spawning mortality levels of Central Valley spring-run Chinook salmon in Butte Creek.”²⁰

Rather than formally consulting or fully implementing those measures, FERC and PG&E have attempted to work informally with NMFS, CDFG, and other agencies to develop annual Reservoir Operating Plans for the Project, with the objective of maintaining cold water temperatures below the Centerville Dam during the summer and early fall pre-spawning season. These Operating Plans have allowed water to be diverted from the West Branch of the Feather River to Butte Creek, effectively entering spring-run habitat in Butte Creek at the Centerville Powerhouse — yet by-passing more than 50% of the spring-run holding habitat.²¹ Not

¹⁵ These pathogens, columnaris (*Flavobacterium columnare*) and ich (*Ichthyophthirius multifiliis*), flourish in the warm water and low flow conditions caused and controlled by Project operations. Federal Energy Regulatory Commission, Summary of Inter-agency Meeting Held November 18, 2003 Regarding DeSabra-Centerville Project (“Meeting Summary”), Dec. 12, 2003 at 1. Spawning salmon become susceptible to lethal diseases when temperatures reach 16° C. 71 FERC ¶ 62,073 at 64,102 (Apr. 27, 1995).

¹⁶ CDFG Funding Proposal at 3. CDFG has indicated that this is likely an underestimate. *Id.*

¹⁷ California Department of Fish and Game, Butte Creek Spring-run Chinook Salmon Spawning Escapement Survey, 2003 (“CDFG 2003 Escapement Survey”), Aug. 28, 2003; CDFG Email.

¹⁸ National Marine Fisheries Service, Letter from Sacramento Area Office Supervisor Michael E. Aceituno to Federal Energy Regulatory Commission Secretary Magalie R. Salas regarding High Pre-spawning Mortality Levels in 2003 (“NMFS Letter”), Sept. 3, 2003 at 2.

¹⁹ NMFS Letter at 2-3.

²⁰ *Id.* at 3-4.

²¹ Although water diverted from the Feather River initially enters Butte Creek at the DeSabra Powerhouse, most of this water is subsequently diverted out of Butte Creek and into the Lower Centerville Canal at the Centerville Dam.

surprisingly, approximately 70 percent of the spring-run Chinook in 2002 and 50 percent in 2003 were in holding pools upstream of the Centerville Powerhouse when the fish kills occurred,²² and the majority of the mortalities took place in this low-flow stretch of upstream spawning habitat.²³

To add to this concern, not all of the objectives set forth in the Operating Plans were met in these or prior years. For example, in 2001 and 2002, water temperatures in Butte Creek exceeded the Operating Plans' temperature objective of 16 °C on 53 and 56 days, respectively.²⁴

While such voluntary measures and fortunate weather conditions resulted in only a few hundred pre-spawning adult spring-run deaths in 2004 through 2007, neither the conditions of Butte Creek — in particular, the stretch upstream from the Centerville Powerhouse where the great majority of 2002 and 2003 mortality occurred — nor Project operations have changed such that a prohibited take will not occur again in summer 2008. Moreover, the below-normal precipitation during the 2007-2008 season, throughout northern California, including the watersheds that feed the Project, gives further cause for concern about threats to the health of adult spring-run this summer. Also of concern are recent temperature modeling efforts for the FERC relicensing of the project that reveal a significant amount of “thermal loading” associated with the DeSabra Forebay. With limited storage, the ability to mitigate this thermal loading will be critical to the survival of the salmon this year.

It appears at present that, despite significant declines of various salmonid runs in the Central Valley and elsewhere in California and the Pacific Northwest, as widely reported in the press this spring, Butte Creek will have a good return of spring-run this year. This healthy return makes it all the more important to protect the Butte Creek population, especially given apparent declines in spring-run returns to Deer Creek and Mill Creek.

Endangered Species Act Violations

1. Section 9 of the ESA — Prohibited Take of Spring-Run Chinook Salmon

Section 9(a)(1)(B) of the ESA provides that it is unlawful for any person — including federal agencies and private entities — to “take” any endangered species. 16 U.S.C. § 1538(a)(1)(B). By regulation, NMFS has extended this take prohibition to threatened species, such as the spring-run Chinook salmon. *See* 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31.

This water then re-enters Butte Creek at the Centerville Powerhouse, bypassing the first several upstream miles of spring-run habitat. 108 FERC ¶ 61,156 at ¶ 2.

²² CDFG 2003 Escapement Survey.

²³ Meeting Summary at 1. Both Quartz Bowl Pool and Whiskey Flat are above the Centerville Powerhouse. *See* CDFG 2003 Escapement Survey; CDFG Funding Proposal at 6.

²⁴ Pacific Gas and Electric Company, DeSabra-Centerville Project Reservoir Operating Plan, June 1, 2002 at 1; Pacific Gas and Electric Company, DeSabra-Centerville Project Reservoir Operating Plan, June 30, 2003 at 2. The Operating Plans for 2004 and 2005 do not provide any such figures for later years.

ESA Section 10(a)(1)(B) provides an exception to the Section 9 prohibition for takings that are “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Such an exemption requires the issuance by the Secretary of Commerce, acting through NMFS, of an “incidental take permit.” *Id.* Before an incidental take permit can be issued, the party seeking it must submit to NMFS:

a conservation plan that specifies –

- (i) the impact which will likely result from such taking;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

16 U.S.C. § 1539(a)(2)(A). If NMFS finds, with respect to the submitted application and conservation plan that the taking will be incidental, that the applicant will minimize and mitigate the impacts of the taking to the maximum extent practicable, that the applicant will ensure adequate funding to implement the plan, and that the taking will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild,” an incidental take permit shall be issued. 16 U.S.C. § 1539(a)(2)(B).

Here, PG&E has never submitted an application for an incidental take permit nor a Section 10 conservation plan regarding the effects of the operation of the DeSabra-Centerville Project on the spring-run Chinook salmon. In consequence, PG&E, as the licensee under License No. P-803, does not have an incidental take permit for its operation of the Project and is strictly liable under Section 9 and the regulations promulgated under ESA for *any* taking of threatened spring-run Chinook that results from such operation. 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. § 17.31.

Section 7(o)(2) of the ESA provides a parallel exemption from Section 9 liability for a taking by a *federal agency* that is incidental to, and not the purpose of, the agency action, provided that such taking “is in compliance with the terms and conditions specified in [an incidental take statement]. . . .” 16 U.S.C. § 1536(o)(2). The requirements for an incidental take statement are set forth in Section 7(b)(4), 16 U.S.C. § 1536(b)(4). Such a statement must specify the impact of the taking on the species, reasonable and prudent measures necessary to minimize such impact, and terms and conditions required to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4). An incidental take statement is the equivalent of an incidental take permit, *see Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996), and any taking

“that is in compliance with” the incidental take statement “shall not be considered to be a taking of the species concerned.” 16 U.S.C. § 1536(o)(2).²⁵

It is clear from the text of Section 7(o)(2) that compliance with the incidental take limits contained in an incidental take statement is a condition precedent to exemption from the take prohibitions of Section 9 with regard to federal agency actions. As described above, FERC has never formally consulted with NMFS pursuant to Section 7(a)(2) regarding the impacts of the DeSabra-Centerville Project on the threatened spring-run Chinook salmon. 16 U.S.C. § 1536(a)(2). In consequence, NMFS has never prepared a biological opinion concerning the effects of the DeSabra-Centerville Project on the spring-run nor issued an incidental take statement based upon such statutorily-mandated consultation.

In sum, neither PG&E nor FERC has received an exemption from the prohibition on taking a threatened species contained in Section 9 and the regulations thereunder. 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. § 17.31. As documented above, the Project has been operated in a manner that has resulted in the deaths of an estimated 3,431 or more pre-spawning adult spring-run in Butte Creek in summer 2002 and of an estimated 11,231 pre-spawning adults, or as many as 80 to 90 percent of the returning adult population, in 2003. Any death of spring-run Chinook caused by the Project’s operation constitutes a prohibited take and gives rise to Section 9 liability. While we acknowledge the voluntary measures and monitoring of project operations undertaken by FERC and PG&E, it remains highly possible that a prohibited take will occur again in summer 2008.

Conclusion

PG&E has been operating, and continues to operate, the DeSabra-Centerville Project in a manner that is likely to result in the unlawful taking of spring-run Chinook salmon in violation of Section 9 of the ESA. FERC, which retains explicit discretionary control over Project operations to protect the natural resources of the Project area, including the spring-run, is also in violation of Section 9 for allowing the Project under its control to take this listed species. Unless these violations are cured within 60 days hereof by the initiation of consultation between FERC and NMFS concerning the Project’s effects on spring-run, by PG&E’s application for and NMFS’s issuance of an incidental take permit for operation of the Project prior to the 2006 arrival of the adult salmon in the Project area, and by FERC’s and PG&E’s modification of Project operations as necessary to comply with take limits set in the incidental take permit, we intend to take appropriate legal action on behalf of any or all of the organizations on whose behalf this letter is submitted.

The coalition of organizations represented here further assert that FERC and PG&E have been fully apprised of the alleged section 9 violations by the coalition’s letters of March 19, 2004, May 20, 2005, May 18, 2006, and May 21, 2007, so that the 60-day notice period required

²⁵ NMFS may only issue an incidental take statement if the incidental taking “will not violate [Section 7(a)(2)]” — that is, will not jeopardize the species or adversely modify or destroy its critical habitat. 16 U.S.C. § 1536(b)(4)(A).

Carlos M. Gutierrez, *et al.*
May 7, 2008
Page 8

before a legal challenge of any unlawful take of Butte Creek spring-run Chinook salmon has long since run. We send the present letter to underscore that our concerns about the Project's ongoing impacts on the spring-run have yet to be adequately addressed and that FERC and PG&E have yet to comply with the applicable requirements of the ESA.

If you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to call us.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Trent W. Orr". The signature is fluid and cursive, with a long horizontal stroke at the end.

Trent W. Orr
George Torgun
Earthjustice
Attorneys for California Sportfishing
Protection Alliance, *et al.*

cc: All coalition organizations