



LAW OFFICES OF
Philip A. Williams

202 West Perkins, Ste B | Ukiah, CA 95482
707.234.3435 | pwilliams@azimusalaw.com

August 22, 2024

Via Certified Mail
Return Receipt Requested

Hon. Gina Raimondo, Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Ms. Jennifer Quan, Regional Administrator
NOAA Fisheries, West Coast Region
1201 Northeast Lloyd Boulevard, Suite 1100
Portland, OR 97232

Ms. Debbie-Anne A. Reese, Acting Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Sixty-Day Notice Of Violation Of The Endangered Species Act By Failing To Ensure FERC's Approval Of PG&E's Variance Request Will Not Jeopardize The Continued Existence Of Listed Species In The Russian River And Potentially Unlawful Take

Dear Madam Secretary and Mses. Quan and Reese,

This letter serves as formal notice pursuant to 16 U.S.C. § 1540(g) on behalf of the City of Ukiah, a municipality in Mendocino County, California, of its intent to sue the Federal Energy Regulatory Commission ("FERC") for violating the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (the "ESA"). FERC's violations are in connection with its June 27th, 2024, order approving PG&E's most recent variance request to reduce flows from the Eel River to the Russian River (the "Order"). Administration of the flows was originally analyzed by a Biological Opinion issued by the National Marine Fisheries Service ("NMFS") in 2002 (the "BiOp").¹

Not only did NMFS entirely fail to look at the whole of the action when analyzing the Order's impacts to listed species in the Russian River, by its own terms the BiOp expired on April 14, 2022. Without performing the analysis required by the ESA, FERC, as a federal agency, is simply precluded from taking action, including issuing the Order. Despite this fatal flaw, PG&E, upon FERC's approval, immediately implemented the Order, even going so far as to reduce flows

¹ National Marine Fisheries Service, *Biological Opinion for the Proposed License Amendment for the Potter Valley Project* (Federal Energy Regulatory Commission Project No. 77-110) (Nov. 26, 2002).

from the Eel to the Russian down to as low as 5 cubic feet per second (“cfs”) only eight days after FERC issued the Order. The record is bereft of any analysis of the impacts these reduced flows will have on listed salmon in the Russian River. Unfortunately, based on the record before FERC and NMFS, jeopardizing the continued existence of listed salmon in the Russian River is okay for those purportedly committed to protecting California trout and salmon species – or at the very least it's okay not to look. Fortunately, it is exactly in circumstances like these, where commitment to principle falters and political asymmetries predominate, where our law shines brightest.

These ESA violations are ongoing, and unless the Commission rescinds the Order, the City of Ukiah hereby puts FERC and NMFS on notice that it may seek declaratory and injunctive relief in federal court as well as reasonable litigation and attorney’s fees.

Ukiah regrets the fact that, while that suit progresses and attorneys engage in seemingly-endless motion practice, the listed species of the Russian River must be content to watch as their habitat is degraded and their continued existence put in jeopardy by the Order’s reduction in flows. The cold comfort FERC, NMFS, and others offer is to point them toward their more fortunate – and apparently more important – cousins in the Eel River.

To call this a tragedy – in the true sense of the word – is an understatement. It is all the more so as it risks jeopardizing the shared bright future Ukiah sincerely and urgently desires for both basins and their endangered species.

1. Legal Background

Congress enacted the Endangered Species Act (ESA) nearly forty-five years ago in a bipartisan effort "to halt and reverse the trend toward species extinction, whatever the cost."² The ESA reflects a national policy of "institutionalized caution" in recognition of the "overriding need to *devote whatever effort and resources [are] necessary* to avoid further diminution of national and worldwide wildlife resources."³ The ESA constitutes "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."⁴

Section 7 of the ESA requires each federal agency, in consultation with the National Marine Fisheries Service (“NMFS”), the U.S. Fish and Wildlife Service (“FWS”), or both of them (together, the “Services”), to “insure” that “any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat.⁵ “Jeopardize the continued existence of” an endangered species “means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”⁶ The requirement for FERC to consult with

² *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *see also* 16 U.S.C. § 1531(a).

³ *Hill*, 437 U.S. at 177, 194 (internal quotation omitted, emphasis in original).

⁴ *Id.* at 180.

⁵ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

⁶ 50 C.F.R. § 402.02.3

NMFS in accordance with Section 7 regarding operations of the Potter Valley Project is what eventually produced the BiOp.

2. Factual Background

In issuing the Order without ensuring doing so would not jeopardize the continued existence of listed salmon species in the Russian River or adversely modify their habitat, FERC has violated Section 7 of the ESA. NMFS, too, has an obligation under Section 7; its own failure to ensure FERC's Order will not jeopardize these species or adversely modify their habitat in the Russian River violates not only its core mission but also Section 7 of the ESA.

The Potter Valley Project

The Potter Valley Project is owned and operated by Pacific Gas and Electric Company ("PG&E") and consists of Scott Dam, creating Lake Pillsbury, Cape Horn Dam, creating Van Arsdale Reservoir, and a diversion tunnel and powerhouse located on the East Branch of the Russian River (the "Potter Valley Project"). The waters diverted from the Eel make their way to the East Branch of the Russian River and eventually to the mainstem of the Russian River below Lake Mendocino and Coyote Valley Dam all the way out to the Pacific Ocean.

PG&E's Variance Request and the Order

PG&E's Variance Request

In February 2024, PG&E, as owner of the Potter Valley Project, requested the Commission approve a temporary variance of the flow and irrigation release requirements set for as part of PG&E's license (the "Variance Request"). After PG&E studied the effects of flow releases on the salmon fisheries in the Eel River and the East Branch of the Russian River, the Commission approved a license amendment adding Article 52 to PG&E's license to operate the Potter Valley Project. As then approved, Article 52 requires PG&E to comply with a reasonable and prudent measure provided in the BiOp to prevent jeopardy to the listed salmonids in the Eel River. The RPA established a regime of minimum flows into the Eel River and East Branch Russian River based on a variety of factors including cumulative inflow to Lake Pillsbury and the water-year classification.⁷

In addition to establishing minimum flows into the Eel from Scott Dam and from Cape Horn Dam further downstream on the Eel, the RPA requires PG&E to release minimum flows into the East Branch Russian River, based on water-year classification, for the protection of aquatic resources. The flows into the East Branch Russian River, as called for in the RPA, are:

- during a normal water-year, PG&E must provide a minimum flow of 75 cfs in the East Branch Russian River from May 15 through September 15 and 35 cfs

⁷ A water-year begins in California on October 1 every year and ends on September 30 the following year. Water-year classifications are based on data prepared by the California Department of Water Resources.

from September 16 through May 14;

- during a dry water-year, PG&E must provide a minimum flow of 25 cfs in the East Branch Russian River from April 15 through September 15 and 35 cfs from September 16 through April 14; and
- during a critical water-year, PG&E must provide a minimum flow of 5 cfs in the East Branch Russian River all year.⁸

In February 2024, PG&E filed the Variance Request to the Commission. As part of the Variance Request, PG&E requested to initially reduce minimum flows to the East Branch Russian River to the dry water-year requirement of 25 cfs, with the ability to further decrease these flows as low as 5 cfs if daily average Lake Pillsbury release water temperatures exceed 15 degrees Celsius or as needed based on PG&E and resource agency determinations. After September 30, minimum flows in the East Branch Russian River would remain at 25 cfs for the remainder of the temporary variance, but further reductions could occur if monitoring indicates that Lake Pillsbury storage is approaching the critical 12,000 acre-feet storage level.

In support of the Variance Request, PG&E consulted with NMFS, California Department of Fish and Wildlife, the United States Fish and Wildlife Service, and the Round Valley Indian Tribe, all of which supported the Variance Request.

The Order

On June 27th, 2024, over the objections of Ukiah and others in the Upper Russian River, the Commission issued the Order approving the Variance Request. In the Order, the Commission acknowledged the arguments by Ukiah and others that

Reduced flows in the East Branch Russian River under the proposed variance have the potential to reduce aquatic habitat and increase water temperatures in the Russian River below Lake Mendocino, *which could become increasingly severe* in the warmer summer months. This has the potential to cause elevated stress and possible salmonid *mortality*.⁹

In a shocking display of choosing the health of listed species in the Eel over those in the Russian, without any actual analysis, the Commission immediately goes on to suggest that “[t]he temporary variance would minimize these effects by reducing flows below 25 cfs only if necessary to protect listed species in the Eel River.”¹⁰ The message appears to be: mortality to listed salmon in the Russian River is okay to protect listed salmon in the Eel; Eel River salmon are important, and Russian River salmon are not, regardless of the fact that the mandates of the ESA require *both* to be protected.

⁸ RPA, Condition C.1.

⁹ Order, at ¶ 41 (emphasis added).

¹⁰ *Id.*, at ¶ 42.

The Biological Opinion: Expired and Inadequate

The BiOp Has Expired

A Section 7 consultation is intended to analyze the impacts of a described federal action on listed species and their habitats. For the BiOp, the federal action at issue is described as FERC's issuance of "a new 50-year license (backdated to 1972) to PG&E for operations of the Potter Valley Project (FERC Project Number 77-110) in Northern California until April 14, 2022."¹¹ Later in the BiOp, NMFS confirms the consultation covered only until 2022: "[u]pon closure of this FERC proceeding, the flow regime and modifications that are selected will remain in effect for the next twenty years, *until 2022*."¹² Later, by letter from NMFS to FERC dated March 16, 2022, NMFS further confirmed the BiOp analyzed the impacts of the federal action for a limited period of time:

NMFS' 2002 Opinion on the amendment to the Project license identified RPAs and provided incidental take authorization for implementing the proposed action for a 20-year period, which elapses on April 14, 2022. The 20-year duration of the proposed action is a central component of the Opinion.¹³

The BiOp expired on April 14, 2022. This is no mere procedural issue or "gotcha," as NMFS only analyzed the effects of the proposed action for the period of time described in the proposed action. Therefore, NMFS and FERC have not consulted on the effects of the federal action on listed species and their habitats past April 14, 2022.¹⁴ Neither the federal agencies, nor the public, have either looked or understand what the impacts of the Order are to the Listed Salmonids – the record is silent.

NMFS Defined the Action Area Include Listed Salmonids in the Russian River

The action area is defined as all areas affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.¹⁵ The BiOp defines the Action Area:

The action area for the Potter Valley Project includes the entire mainstem Eel River below Scott Dam to the Pacific Ocean, and the East Branch Russian River below the Potter Valley Project powerhouse to its confluence with the mainstem Russian River, *and below this confluence to the Pacific Ocean at Jenner[.]*¹⁶

¹¹ BiOp, at pg. 9.

¹² *Id.* (emphasis added).

¹³ See Nat'l Marine Fisheries Serv., Letter to FERC Re: Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act Consultations on the Potter Valley Project (P-77) on the Eel River, California (Mar. 16, 2022) ("NMFS March 2022 Letter to FERC") at 1.

¹⁴ Ukiah is not the only, or the first, to point this fact out. A variety of Eel River environmental interests, including Friends of the Eel River and California Trout, sent NMFS and FERC a 60-day notice letter on April 15, 2022, making the same observations as those offered here.

¹⁵ 50 CFR 402.2.

¹⁶ BiOp, at 11 (emphasis added) (see also Figure 1, referenced in the above definition of the Action Area, at page 130 of the BiOp).

Three species of concern are implicated by the Potter Valley Project: Central California Coast steelhead (*Oncorhynchus mykiss*, “CCC steelhead”), Central California Coast coho salmon (*O. kisutch*, “CCC coho”), and California Coastal Chinook salmon (*O. tshawytscha*, “CC Chinook” and, collectively, the “Listed Salmonids”). Each of the Listed Salmonids is protected as threatened or endangered under the ESA. CCC coho salmon have been listed as endangered¹⁷ and the Russian River has been designated as their critical habitat¹⁸. CCC steelhead have been listed as threatened¹⁹, and the Russian River has been designated as their critical habitat²⁰. CC Chinook salmon have been listed as threatened²¹, and the Russian River has been designated as their critical habitat²².

NMFS acknowledges the Listed Salmonids reside within the Action Area for the BiOp. Table 1 of the BiOp, on page 11, lists all three Listed Salmonids, and alleges that the biological information for the Listed Salmonids is “addressed in this [BiOp] for both the Eel *and the Russian River basins.*”²³

Were it so. Nowhere in the record is there any indication whatsoever of an analysis of impacts to the Listed Salmonids, in direct contravention to the requirement in Section 7 of the ESA.

3. FERC and NMFS Have Violated Section 7 By Failing to Ensure that Issuing the Order Will Not Jeopardize the Continued Existence of the Listed Salmonids and May be in Violation of Section 9 for Unlawful Take

Section 7(a)(2) of the ESA states: “[e]ach Federal agency shall, in consultation with . . . the Secretary [of Commerce or the Interior] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species”²⁴ Section 7 “includes an affirmative grant of authority to attend to protection of listed species within agencies’ authority when they take actions covered by section 7(a)(2).”²⁵

A. The Biological Opinion Has Expired

By its own terms, the BiOp expired as of April 14, 2022. Given that the analyses, such as they are, only analyzed the effects on Listed Species until then, by definition FERC and NMFS have failed to ensure that the Order, granted in 2024, will not violate Section 7’s prohibition of

¹⁷ 71 FR 37192-93 [June 28, 2005]; updated by 79 FR 20802 [April 14, 2014].

¹⁸ 64 FR 24049 [May 5, 1999].

¹⁹ 71 FR 857 [January 5, 2006]; updated by 79 FR 20802 [April 14, 2014].

²⁰ 70 FR 52487 [September 2, 2005].

²¹ 70 FR 37192 [June 28, 2005]; updated by 79 FR 20802 [April 14, 2014].

²² 70 FR 52487 [September 2, 2005].

²³ BiOp, at pg. 11.

²⁴ 16 U.S.C. § 1536(a)(2).

²⁵ *Defenders of Wildlife v. EPA*, 420 F.3d 946, 965 (9th Cir. 2005).

jeopardy or adverse modification. Absent the analysis required by Section 7, FERC is simply precluded from issuing the Order.

Ukiah does not know what effects the Order will have on the Listed Salmonids – in fact, that is the point: no one does, including FERC and NMFS. The Ninth Circuit recently held that a plaintiff in a Section 7 claim is “not required to establish what a Section 7 consultation would reveal, or what standards would be set, if the [federal agency] were to reinitiate consultation. Ideally, *that is the objective and purpose of the consultation process.*”²⁶ Finding the Section 7 claim to be ripe, the Ninth Circuit noted that “[b]ecause the alleged procedural violation – failure to reinitiate consultation – is complete, so too is the factual development necessary to adjudicate the case.”²⁷ The Ninth Circuit also confirmed the continuing legal obligation placed on federal agencies to reinitiate consultation.²⁸

B. FERC and NMFS Failed to Reinitiate Consultation Once the BiOp Expired

The duty to reinitiate consultation lies with both the action agency and the consulting agency.²⁹ Reinitiation of consultation requires the appropriate consulting agency to issue a new biological opinion before the agency action may continue.³⁰ The Northern District of California has followed this clear precedent. *See: Pacificans for a Scenic Coast v. Cal. DOT*, 204 F.Supp.3d 1075, 1093 (N.D. Cal. 2016) (“the Ninth Circuit has stated that the duty to reinitiate consultation lies with both the action agency and the consulting agency”); *Hoopa Valley Tribe v. NMFS*, 230 F.Supp.3d 1106, 1117 (N.D. Cal. 2017) (“the purpose of reinitiating formal consultation is not simply to check off a procedural box, but to complete a formal consultation process that ensures to the extent possible that there are no substantive violations of the ESA” and finding that the federal defendants’ claim that a reinitiation claim is not cognizable against NMFS as the consulting agency fails).

C. FERC and NMFS Never Have Conducted an Adequate Analysis on the Effects to Listed Salmonids in the Russian River

Furthermore, even if the effects analyzed in the expired BiOp were somehow extended past the expiration date or were analogized to current conditions in 2024, there is a complete lack of any discussion on the effects to the Listed Salmonids for the agencies to fall back on. It’s simply not there.

Despite that the Action Area is defined to include the Russian River to its outlet at Jenner at the Pacific Ocean, and despite the explicit identification of the Listed Salmonids as residing in the Russian River and therefore the Action Area, the BiOp contains no analysis on the effects on the Listed Salmonids of the reduced flows FERC allows in the Order. As stated above, the Action

²⁶ *Cottonwood Envtl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th Cir. 2015) (emphasis added).

²⁷ *Id.* at 1084.

²⁸ *Id.* at 1086-1087 (noting “the ESA’s statutory command that agencies consult to ensure the ‘continued existence’ of listed species”) (emphasis in original).

²⁹ *Salmon Spawning & Recovery All. v. Guitierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

³⁰ *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001).

Area defined in the BiOp includes the whole of the Russian River. Furthermore, NMFS includes the whole of the Russian River – from its East and West Branches in the north to its outlet at Jenner and the Pacific Ocean in the south – in establishing the environmental baseline.³¹

However, in its analysis on the effects of the action, NMFS limits its analysis to only the area and those species *above Coyote Valley Dam* – thus failing to either identify or analyze the effects on the Listed Salmonids it identifies as part of the environmental baseline and as residing in the Action Area. NMFS therefore conducts no analysis of the effects on Listed Salmonids, all of which are found below Coyote Valley Dam. It instead simply concludes – without explanation or authority – that “[e]ffects of the proposed action to [the Listed Salmonids] and critical habitat in the Russian River Basin are limited to the river reach below Coyote Dam.”³²

This conclusion fails for two immediately-obvious reasons. First, NMFS cannot include the entire Russian River in the area affected directly or indirectly by the reduced flows, specifically identify the Listed Salmonids as residing in that area, and then summarily exclude any analysis of the effects of the reduced flows on the Listed Salmonids. To do so flies in the face of common sense and our law. Secondly, physics tells us that gravity exerts its force on water, drawing it downhill, and will continue to do so until some intervening force stops it. Water is continually released from Coyote Valley Dam for either water supply or flood control operations; Coyote Valley Dam does not impose an impermeable barrier between the flows from the PVP and the Russian River below Coyote Valley Dam.

In determining whether to uphold agency action, such as the BiOp, the Ninth Circuit has consistently observed that it must ask “whether the agency ‘considered the relevant factors and articulated a rational connection between the facts found and the choice made.’”³³ Issuance and adoption of a biological opinion that fails to do so is arbitrary and capricious, and agency action predicated on such a biological opinion will be set aside.³⁴

The Ninth Circuit has consistently held that the “‘may affect’ standard [triggering the preparation of a biological opinion] ‘must be set sufficiently low to allow Federal agencies to satisfy their duty to insure under section 7(a)(2) [that species are not jeopardized].’”³⁵ “*Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.*”³⁶ Thus, while petitioners bear the burden of showing that the groundwater withdrawals “may affect” listed species or critical habitat, the burden is not a

³¹ See, BiOp, at pgs. 51, ff.

³² BiOp, at pg. 75.

³³ *Natural Resources Defense Council v. United States Dep’t of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (quoting *Resources, Ltd. v. Robertson*, 35 F.3d 130, 1204 (9th Cir. 1993), in turn quoting *Pyramid Lake Paiute Tribe of Indians v. United States Dep’t of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (see also *Pacific Coast Federation of Fishermen’s Ass’n, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1034 (9th Cir. 2001).

³⁴ *Pac. Coast Fed’n of Fishermen’s Ass’ns*, 265 F.3d at 1034 (quoting *Natural Res. Def. Council v. U.S. Dep’t of the Interior*, 113 F.3d 1121, 1124 (9th Cir.1997)).

³⁵ *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1122 (9th Cir. 2012) (quoting *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1072 (9th Cir. 2005).

³⁶ *Id.* (internal quotation marks omitted) (emphasis in original); *accord Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1106 (9th Cir. 2011).

heavy one. Essentially, petitioners need to show only that an effect on listed species or critical habitat is plausible.³⁷

As the Ninth Circuit observed in similar circumstances, “[i]t is of course *possible*” that the minimum flows would ultimately have no “discernable effect” on the Listed Salmonids, but “it is also *plausible*” that the minimum flows provided for in the Order would adversely affect the Listed Salmonids.³⁸ In *Center for Biological Diversity v. Bureau of Land Management*, the Ninth Circuit found that the groundwater withdrawals at issue constituted a “relevant factor” to determining whether the project would result in jeopardy or adverse modification.

Like the facts in *Center for Biological Diversity*, the existence of statements elsewhere in the record, including those in the Order itself, only increases the plausibility of an adverse effect on the Listed Salmonids, thus requiring analysis under a biological opinion. The Order states that “[t]he reduced flows in the East Branch Russian River under the proposed variance have the potential to reduce aquatic habitat and increase water temperatures in the Russian River below Lake Mendocino.”³⁹ Thus the Order acknowledges what the BiOp ignores: the potential for adverse effects to the Listed Salmonids below Coyote Valley Dam. Like the record before the Ninth Circuit in *Center for Biological Diversity*, while the record here may not compel a particular conclusion about the magnitude or extent of the effects on Listed Salmonids, it does establish that the minimum flows were “a ‘relevant factor’ that required discussion in the [BiOp].”⁴⁰ Furthermore, as in *Center for Biological Diversity*, the BiOp “provides no indication that [here, NMFS] applied its expertise” to the question of whether the minimum flows would adversely affect the Listed Salmonids; the “surface inadequacy” of the short explanation given about Coyote Valley Dam only compounds the error.⁴¹

The BiOp, notwithstanding the fact that what analysis is there has expired, simply failed, in clear violation of the Endangered Species Act, to analyze the effects of the Order on the Listed Salmonids. That the Order purports to minimize the unknown effects on the Listed Salmonids by reducing flows below 25 cfs “only if necessary to protect listed species in the Eel River”,⁴² adds absurdity to injury and is completely antithetical to the mandates of the ESA.

D. FERC May Be Liable for Unlawful Take

Additionally, FERC may be liable for unlawful Take of the Listed Salmonids. Section 9 of the ESA⁴³ prohibits the Take of listed species without specific exemption.⁴⁴ Take is defined broadly in the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.”⁴⁵ See *Babbitt v. Sweet Home Chapter of Cmty. for*

³⁷ *Center for Biological Diversity*, 698 F.3d, at 1122.

³⁸ *See, id.*, at 1124 (9th Cir. 2012) (emphasis in original).

³⁹ Order, at pg. 18.

⁴⁰ *Center for Biological Diversity*, 698 F.3d at 1124.

⁴¹ *See, id.*

⁴² *See*, Order, pg. 18.

⁴³ 16 U.S.C. § 1538.

⁴⁴ 16 U.S.C. § 1538(a)(1)(B), (G).

⁴⁵ 16 U.S.C. § 1532(19).

a Great Or., 515 U.S. 687, 704 (1995) (finding Congress intended “take” to be defined “in the broadest possible manner to include every conceivable way in which a person can “take” or attempt to “take” any fish or wildlife.”⁴⁶ “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”⁴⁷ “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁴⁸

There are exceptions from liability for unlawful Take. Section 7 of the ESA⁴⁹ provides one such exemption: the issuance of, and compliance with, an incidental take statement issued in accordance with Section 7(b)(4). Section 7(o)(2) reinforces the exemption: “any taking that is compliance with the terms and conditions specified in a written [incidental take] statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.”⁵⁰

Importantly, none of the exceptions are present in the record or facts before us. In its Order, the Commission orders PG&E to notify interest parties, including FERC and NMFS, of any adverse effects to aquatic resources observed or reported during implementation of the Order. Despite this order, there is no attending order instructing PG&E *how* to comply with the order to discover and then report adverse effects.,⁵¹ Given the broad definition of Take provided in the law, FERC may be liable for unlawful Take should any such adverse effects to the Listed Salmonids be discovered. Ukiah hereby puts FERC on notice that it retains the right to bring a Section 9 claim should such facts bear out, including unlawful Take of the Listed Salmonids due to increased temperature of water in Lake Mendocino and turbidity below Coyote Valley Dam resulting from the Order.

4. Conclusion

This sixty-day notice is sent in compliance with the Endangered Species Act’s requirements and in the spirit of enforcing its prohibitions. We respectfully request discussions with NMFS and FERC on the matters addressed in this letter with the hope of understanding the federal agencies’ plan to ensure FERC’s Order, and any subsequent approval of a request by PG&E to vary the minimum flows called for in its license, complies with the ESA and other laws.

That for the past twenty years the effects on the Listed Salmonids of the minimum flows granted in PG&E’s license have gone by unknown and unacknowledged stops here. This ignorance

⁴⁶ Quoting S. Rep. No. 93–307, p. 7 (1973).

⁴⁷ 50 C.F.R. § 17.3.

⁴⁸ *Id.*

⁴⁹ 16 U.S.C. § 1536.

⁵⁰ *Id.*, §1536(o)(2).

⁵¹ As a Commissioner in a related proceeding once observed, “One must also bear in mind that compliance typically does not immediately follow an order’s issuance. Orders requiring compliance frequently entail compliance plans which can take years to develop, review, and approve.” *Pac. Gas & Elec. Co.*, 180 FERC ¶ 61,047 (2022) Danly, Commissioner, *concurring*.

August 22, 2024

Page 11

is once again reflected in the Order. Devotion to principle may falter. Political asymmetries may predominate. From this chaos our law emerges to unapologetically engage in the great contest of ensuring a bright future for all of us – including listed species in the Eel and our neighbors there, whose long history we readily acknowledge is intimately tied to those species' health. Ukiah remains fully committed to this shared future – but it must be a *shared* future.

Yours Sincerely,



Philip A. Williams, Esq.
Attorney for the City of Ukiah
Law Offices of Philip A. Williams
202 West Perkins St., Suite B
Ukiah, CA 95482
T: (707) 234-3435
Email: pwilliams@azimuslaw.com