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STATE WATER RESOURCES
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DIV OF WATER RIGHTS
SACRAMENTO

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February 10, 2012

Via E-Mail and U. S. Mail
jwatts@waterboards.ca.gov

Ms. Jennifer Watts – Division of Water Rights
STATE WATER RESOURCES CONTROL BOARD
P. O. Box 100
Sacramento, CA 95812-0100

**Re: Draft Water Quality Certification for Pacific Gas and Electric Company's
Chili Bar Hydroelectric Project, FERC Project No. 2155**

Dear Ms. Watts:

Pacific Gas and Electric Company ("PG&E") hereby respectfully submits its comments on the January 11, 2012 Draft Water Quality Certification issued by the State Water Resources Control Board ("State Water Board") for PG&E's Chili Bar Hydroelectric Project, FERC Project No. 2155 ("Project").

PG&E joins the Sacramento Municipal Utility District ("SMUD")¹ in thanking the State Water Board staff for largely honoring the Relicensing Settlement Agreement for the Upper American River Project and the Chili Bar Hydroelectric Project ("Settlement Agreement").² As discussed herein, however, PG&E does have concerns with several conditions set forth in the Draft Water Quality Certification ("Draft Conditions"), in particular ones that PG&E believes are inconsistent with certain provisions of the Settlement Agreement as well as with the Draft Water Quality Certification issued for the Upper American River Project ("UARP").

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¹ See November 14, 2011 letter from Leslie A. Dunsworth, Chief Assistant General Counsel, SMUD, to Jennifer Watts, State Water Resources Control Board ("Comments on Draft 401 Water Quality Certification for SMUD's Upper American River Project, FERC Project No. 2101").

² The Settlement Agreement was filed with the Federal Energy Regulatory Commission on February 1, 2007.



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I. INCONSISTENCIES WITH SETTLEMENT AGREEMENT AND UARP DRAFT WATER QUALITY CERTIFICATION.

The Draft Water Quality Certification modifies the Settlement Agreement language in several respects, many of which have the potential to complicate compliance for PG&E as it works to comply with multiple sets of license requirements. Many of the changes are also inconsistent with the Draft Water Quality Certification issued for the UARP.

To avoid unnecessary complexity and confusion, PG&E requests that, wherever possible, the State Water Board adopt the Settlement Agreement language, as discussed below.

A. Draft Condition 1: Minimum Instream Flows to Protect Aquatic Life Beneficial Uses.

Draft Condition 1 differs from the Settlement Agreement article relating to minimum instream flows (Article 2-1) in two respects. First, the Settlement Agreement requires that PG&E provide notice of any minimum instream flow modifications to, among other agencies, the U.S. Bureau of Land Management (“BLM”). Draft Condition 1, however, strikes the reference to BLM and replaces it with a reference to the U.S. Forest Service (“USFS”). While both the USFS and BLM are signatories to the Settlement Agreement, only BLM manages lands within the Chili Bar project boundary (the USFS manages lands within the UARP project boundary). Consequently, PG&E requests that the reference to the USFS in Draft Condition 1 be stricken and replaced with BLM.

Second, Draft Condition 1 alters the water year type reporting schedule from that contained in the Settlement Agreement. The Settlement Agreement provides as follows: “*Each February through May* the licensee shall determine the water year type based on the DWR Bulletin 120 forecast...”; Draft Condition 1, in contrast, states that “*Each month between February and May* the Licensee shall determine the water year type based on the DWR Bulletin 120 forecast...” (emphasis supplied). Although perhaps inadvertent, PG&E reads this language as changing the requirement to report water year type in the months of February, March, April and May, as stated in the Settlement Agreement, to reporting it only in March and April. PG&E believes maintaining consistency with the Settlement Agreement language will prevent unnecessary confusion and potential conflict.

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B. Draft Condition 4: Coordination with UARP Licensee (SMUD).

Draft Condition 4 adds several requirements to the proposed license article contained in the Settlement Agreement addressing the coordination of operations between the Chili Bar Project and UARP. These include submittal of the coordination plan to the Deputy Director 75 days after issuance of the UARP or Chili Bar license (whichever is last issued), and review and approval by the Deputy Director prior to the submission of the plan to the Federal Energy Regulatory Commission (“FERC”). The Settlement Agreement, in contrast, requires the licensees to file with FERC a coordinated operations plan within 120 days of issuance of the last-issued license.

Thus, Draft Condition 4 shortens the time for PG&E and SMUD to develop the coordinated operations plan from 120 days to 75 days. PG&E respectfully suggests that this shortened timeframe will likely prove infeasible. PG&E further notes that the analogous Draft Condition in the Draft Water Quality Certification for the UARP, Draft Condition 24, does not contain the 75 -day requirement, but instead simply states as follows:

Within 120 days after issuance of the UARP or Chili Bar license, whichever is later, the Licensee shall, jointly with the Chili Bar Licensee, prepare and file with the Commission for approval a plan for coordinated operations of the two projects as described in the Cooperation Agreement. Prior to filing with the Commission, the Licensee shall submit the Plan to the Deputy Director for approval. The Deputy Director may require modifications as part of the approval. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission.

PG&E respectfully requests that the State Water Board modify Draft Condition 4 to make it consistent with Draft Condition 24 in the UARP Draft Water Quality Certification, since PG&E and SMUD will be developing and implementing this plan jointly.

Furthermore, while PG&E recognizes the State Water Board’s authority to approve and modify plans, the constraints presented by such review and modification are of concern. FERC sets strict time requirements for the submission of plans and the failure to meet the deadlines constitutes a violation of the project license that exposes licensees to the imposition of civil penalties. If the State Water Board requires its approval before a plan can be submitted to



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FERC, and if that approval is not granted in a timely manner, PG&E is at risk of failing to comply with its FERC license and may be subject to civil penalties. Therefore, PG&E requests that the State Water Board include language in Condition 4 stating that PG&E may file the subject plan with FERC prior to receiving the Deputy Director's approval if doing so is necessary to meet a FERC deadline.

C. Draft Condition 6: Monitoring Program.

Draft Condition 6 alters the timelines and protocols for the submission of the monitoring plans required under Draft Conditions 6A, 6B, 6C, 6D and 6E from those established in the Settlement Agreement. The changes render the review and approval process extremely unclear and, if adopted, will necessarily complicate PG&E's ability to comply both with the Draft Conditions themselves and with deadlines established by FERC for the submittal of the same plans.

Article 2-4 of the Settlement Agreement requires the licensee to develop certain monitoring plans in consultation with the resource agencies, including the State Water Board. Article 2-4 further requires the licensee to provide the resource agencies, including the State Water Board, with a minimum 90-day review and approval period prior to implementation of the plans. Draft Condition 6 requires the licensee to develop several of the same monitoring plans. However, Draft Conditions 6A, 6B, 6C, 6D and 6E, in contrast to the Settlement Agreement protocols, require the licensee to submit the plans to the Deputy Director for approval "within 60 days after agency consultation." The Draft Conditions further strike the Settlement Agreement's 90-day review and approval period.

PG&E has several concerns with the 60-day requirement. First, it is unclear when this 60-day period begins. Two possibilities are evident: 1) the 60-day period begins after the initial consultation meeting with the resource agencies; or 2) the 60-day period begins after the licensee develops and finalizes a draft of the plan in consultation with the resource agencies. The former is unworkable since it will take significantly more than 60 days to prepare draft plans. And the latter is not logical – there is no benefit to the licensee in postponing for 60 days the submission of a completed draft plan (prepared in consultation with the resource agencies, including the State Water Board) to the Deputy Director for approval.

Second, the purpose of the 60-day period is also unclear. PG&E presumes the intention of the Draft Condition is to either (1) provide the resource agencies with a 60-day review period prior to submission of the plans to the Deputy Director for review and approval; or



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(2) allow the State Water Board a 60-day period to review and approve the plans prior to their submission to FERC and/or implementation by the licensee. However, Draft Condition 6, as written, does not effectuate either possibility.

To the extent the State Water Board is attempting to ensure it has an opportunity to review and approve the various monitoring plans before they are implemented, Article 2-4 of the Settlement Agreement allows for such review by establishing a minimum 90-day review and approval process for the State Water Board (and others).

Moreover, PG&E notes that the analogous conditions in the Draft Water Quality Certification for the UARP, Draft Condition 8A, 8B, 8C, 8E, and 8I, do not contain the 60-day language. Rather, those Draft Conditions simply provide that “The Licensee shall submit the Plan to the Deputy Director for approval.” No timeframes are indicated. PG&E respectfully requests that the State Water Board take the same approach with Chili Bar as it has with UARP, or re-instate the 90-day review and approval process set forth in the Settlement Agreement. This is particularly important because several of these plans, as stated in Article 2-3 of the Settlement Agreement, will be developed and implemented cooperatively with SMUD.

Furthermore, PG&E requests that the State Water Board include language in Conditions 6A, 6B, 6C, 6D and 6E stating that PG&E may file the subject plans with FERC prior to receiving the Deputy Director’s approval (where such approval is required), if doing so is necessary to meet a FERC deadline.

D. Draft Condition 9: Streamflow and Reservoir Elevation Gaging.

Draft Condition 9 alters the review and approval process for the Streamflow and Reservoir Elevation Gaging Plan from that contained in the Settlement Agreement. Article 2-8 of the Settlement Agreement allows PG&E one year to prepare the Streamflow and Reservoir Elevation Gaging Plan, provide copies of the plan to the resource agencies, obtain Deputy Director approval, and file the plan with FERC. Draft Condition 9, in contrast, while stating that the licensee has the same one year period to develop and file an approved plan with FERC, in actuality provides for significantly less time. Specifically, the Draft Condition states that the licensee must provide copies of the plan to the resource agencies *and to FERC* “within nine months of license issuance.” It is not clear from the text of Draft Condition 9 how the one-year and nine-month timeframes are to be reconciled. Reconciliation of the two timeframes is particularly challenging given that the Draft Condition also requires the licensee to receive Deputy Director approval of the plan prior to filing it with FERC. This language suggests PG&E



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will, as a practical matter, have to circulate a draft plan well in advance of the nine-month period to ensure Deputy Director approval prior to submission to FERC “within nine months of license issuance.” Although it is unclear from the text of Draft Condition 9 what the precise timing requirements are for the submission of the plan, it is clear that a compressed timeframe of less than nine months is not practical.

Moreover, PG&E notes that the analogous condition in the Draft Water Quality Certification for the UARP, Draft Condition 6, does not contain the nine-month requirement. It simply tracks the requirements of the Settlement Agreement. PG&E respectfully requests that the State Water Board take the same approach with Chili Bar as it has with UARP and adopt the Settlement Agreement language. PG&E further requests that the State Water Board add language making it clear that the licensee may file the plan prior to receiving approval of the Deputy Director if doing so is necessary to meet a FERC deadline.

E. Draft Condition 11: Streamflow and Reservoir Level Public Information Services.

Draft Condition 11 alters the review and approval process for the Public Information Plan from that contained in the Settlement Agreement. Article 2-14 of the Settlement Agreement requires the licensee to submit to FERC “within 6 months of license issuance”, a public information plan that has been prepared in consultation with the resource agencies and that has been approved by BLM and the State Water Board. Draft Condition 11, in contrast, provides that the licensee shall submit the plan to the Deputy Director for review and approval “within four months of license issuance” and then file the plan with FERC “within six months of license issuance following Deputy Director approval.” In this way, the licensee is provided significantly less time to prepare a draft of the subject plan. While PG&E recognizes the State Water Board’s desire to review and approve the plan prior to its submission to FERC, shortening the timeframe for plan preparation to four months, PG&E suggests, is not practical.

Moreover, PG&E notes that the analogous condition in the Draft Water Quality Certification for the UARP, Draft Condition 7, does not contain the four-month requirement. It simply tracks the requirements of the Settlement Agreement. PG&E respectfully requests that the State Water Board take the same approach with Chili Bar as it has with UARP and adopt the Settlement Agreement language. This is particularly important because, as stated in Article 2-3 of the Settlement Agreement, this plan will be developed and implemented cooperatively with SMUD.



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PG&E further requests that the State Water Board add language making it clear that the licensee may file the plan prior to receiving approval of the Deputy Director if doing so is necessary to meet a FERC deadline.

F. Draft Condition 13: Hazardous Materials Plan.

Draft Condition 13 requires the licensee to file with FERC a plan approved by BLM and the Deputy Director for hazardous substances storage and spill prevention and cleanup. The Draft Condition requires that the plan be filed with FERC “[w]ithin one year of license issuance or prior to undertaking activities on BLM lands, whichever occurs first.” However, the Draft Condition also requires that the plan be submitted for Deputy Director review and approval “within nine months of license issuance.”

PG&E suggests that the nine-month language creates unnecessary complexity and ambiguity. For example, it is not clear under this language when the licensee would be required to submit the plan for Deputy Director approval in the event that it undertakes activities on BLM lands less than a year after license issuance. PG&E further notes that the analogous condition in the Draft Water Quality Certification for the UARP, Draft Condition 23, does not contain the nine-month requirement. It simply provides that the licensee “file with the Commission a plan approved by . . . the Deputy Director.” No timeframe for submission of the plan to the Deputy Director for such approval is indicated. In addition, while Draft Condition 13 for Chili Bar requires that additional plans or updates filed with FERC first be approved by the Deputy Director, Draft Condition 23 for the UARP does not require Deputy Director approval prior to submission of additional plans and updates to FERC.

PG&E respectfully requests that the State Water Board take the same approach with the Chili Bar project as it has with the UARP and simply require PG&E to file with FERC a plan approved by the Deputy Director. PG&E further requests that the State Water Board add language making it clear that the licensee may file the plan prior to receiving approval of the Deputy Director if doing so is necessary to meet a FERC deadline. Finally, PG&E requests that the State Water Board strike the requirement that any additional plans or updates filed with FERC first be approved by the Deputy Director. At a minimum, PG&E requests that such a requirement, if retained, again make clear that the licensee may file the additional plans or updates prior to receiving approval of the Deputy Director if doing so is necessary to meet a FERC deadline.

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II. DRAFT CONDITION 12: REINTRODUCTION OF ANADROMOUS FISH.

Draft Condition 12 states that “[i]t is possible that anadromous fish passage will be restored at Nimbus and/or Folsom Dams on the American River downstream of Chili Bar during the course of the Commission license term.” The Draft Condition requires PG&E “prior to the restoration of fish passage” to consult with the resource agencies and the State Water Board “to determine whether changes are needed in the certification conditions to protect beneficial uses associated with anadromous fish.” The Draft Condition further reserves to the Deputy Director authority to modify or add conditions to the certification based on the outcome of the consultation process.

As authority for this Draft Condition, Paragraph 25 of the Draft Certification cites to the National Marine Fisheries Service’s (“NMFS”) March 2009 Biological and Conference Opinion on the Long-term Operation of the Central Valley Project and State Water Project (“Biological Opinion”). Paragraph 25 notes that the NMFS Biological Opinion includes a measure to evaluate the feasibility of providing access for steelhead to habitat above Nimbus and Folsom Dams.

PG&E objects to this Draft Condition on several grounds and respectfully requests that it be withdrawn. First, the March 2009 NMFS Biological Opinion on which the Draft Condition is based was recently found by the U.S. District Court for the Eastern District of California to be “arbitrary, capricious, and unlawful,” and was remanded to NMFS. *See In re Salmonid Consolidated Cases*, 791 F.Supp.2d 802, 959 (E.D.Cal. 2011). The Court further ordered NMFS to submit a revised final Biological Opinion by February 1, 2016. *Id.*, 1:09-CV-01053 LJO DLB (E.D. Cal., Dec. 12, 2011). PG&E suggests that, given its legal infirmities, the relied-upon Biological Opinion does not provide a sufficient legal basis for the imposed Draft Condition. Second, PG&E believes the Draft Condition is unduly vague. The requirement that PG&E consult with the resource agencies and the State Water Board “prior to the restoration of fish passage” fails to provide a comprehensible standard. An appropriate standard, if this Condition remains, would be for the licensee to consult with the resource agencies and the State Water Board within 120 days after physical completion and initiation of operation of fish passage facilities at Nimbus and/or Folsom Dams. Finally, as noted in Section VII below, PG&E questions whether the State Water Board has the statutory authority to change unilaterally the requirements of a FERC license by imposing additional requirements sometime in the future.

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III. DRAFT CONDITION 19.

Draft Condition 19 provides as follows: “This certification is contingent on compliance with all applicable requirements of the Basin Plan.” PG&E has objected to the inclusion of Draft Condition 19 in two recent Water Quality Certifications issued by the State Water Board for other PG&E hydroelectric projects: the Spring Gap-Stanislaus Project, FERC Project No. 2130 (Draft Condition 23), and the Pit 3, 4, 5 Project, FERC Project No. 233 (Draft Condition 13). PG&E objected to this draft Condition in the prior water quality certifications, and continues to object to its inclusion in the present water quality certification, because it would require PG&E to comply with “all applicable requirements” of the water quality plan for the Sacramento and San Joaquin River Basins. PG&E has contended that it is unfair for a compliance determination to hinge on the opinion of future regulators as to what may or may not have been intended as an “applicable requirement” of such a lengthy document, particularly one that may be changed from time to time. The State Water Board agreed to delete draft Condition 23 from the Spring Gap-Stanislaus certification and draft Condition 13 from the Pit 3, 4 & 5’s certification. PG&E respectfully requests that Draft Condition 19 be deleted here as well.

IV. DRAFT CONDITION 26.

PG&E suggests that the requirement in Draft Condition 26 for PG&E to submit to the Deputy Director “any change to Chili Bar . . . that would adversely affect water quality” is vague and ambiguous, and would create an administrative burden far beyond what the State Water Board could efficiently process. PG&E instead proposes the State Water Board focus its oversight on facility changes that would have a significant or material effect on water quality, and suggests the following revisions:

The Licensee must submit any change to Chili Bar facilities, including project operations that would ~~adversely affect~~ have a significant or material effect on water quality, to the Deputy Director for review and written approval. If such a change would also require submission to the Commission, the change must first be approved by the Deputy Director, unless it must be submitted earlier to meet a Commission deadline.

Including a significance or materiality threshold as suggested above is consistent with Water Quality Certifications issued for PG&E’s Spring Gap-Stanislaus Project (Condition 28), and Pit 3, 4, 5 Hydroelectric Project (Condition 15). PG&E also requests, as indicated, that the



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State Water Board include language in Condition 26 stating that PG&E may make the submission to FERC prior to receiving the Deputy Director's approval if doing so is necessary to meet a FERC deadline.

V. DRAFT CONDITION 28.

Draft Condition 28 reserves to the State Water Board the authority "to modify this certification if monitoring results indicate that Chili Bar would violate water quality objectives or impair the beneficial uses of the SF American River watershed." As noted below, PG&E does not believe that the State Water Board has the statutory authority to unilaterally change the requirements of a FERC license. In addition, the reference to "Chili Bar" is vague and ambiguous. PG&E assumes the State Water Board meant to reference "the operation and maintenance of Chili Bar". To the extent the State Water Board retains this Condition, PG&E requests that it be clarified as noted.

VI. DRAFT CONDITION 32.

To ensure that PG&E is afforded legally sufficient due process protections consistent with other water quality certifications issued by the State Water Board, PG&E respectfully requests that Condition 32 be amended to read: "When exercising its reserved authority as described in the General Conditions above, the State Water Board ~~may~~ shall provide notice and an opportunity for hearing." See e.g. *Water Quality Certification for the Spring Gap-Stanislaus Hydroelectric Project, FERC Project No. 2130, Condition 33.*

VII. RESERVATIONS OF AUTHORITY.

The Draft Water Quality Certification includes reservations of authority in Draft Conditions 12, 24, 27, 28, 29, 30 and 31 for which no reference to an underlying statute is given. The state's retained jurisdiction as stated in these Draft Conditions would allow the State Water Board to unilaterally change the requirements of PG&E's FERC license, in violation of the Federal Power Act. In addition, § 401 of the federal Clean Water Act, 33 U.S.C. § 1341, does not allow a water quality certification to be withdrawn once it is issued. Therefore, PG&E proposes that these Draft Conditions be stricken or substantially re-drafted to conform to the State Water Board's statutory authorities.

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VIII. CONCLUSION.

PG&E would like to thank the Board for the opportunity to submit these comments. It is PG&E's hope that it can continue to work cooperatively with the State Water Board to achieve reasonable solutions that fulfill all necessary water quality requirements while protecting existing beneficial uses, including the continuation of a clean, reliable, and economic energy source for California.

If you have any questions regarding these comments, please contact me at the e-mail or phone number listed above. You may also contact Lisa Whitman at (415) 973-7465.

Very truly yours,

A handwritten signature in blue ink that reads "Matthew A. Fogelson /BD".

Matthew A. Fogelson

MAF:bd
Dictated but not read.

cc: Ms. Gail Cismowski, Division Chief - SWRCB
Ms. Lisa Whitman, Project Manager – PG&E Power Generation
Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission
Service List for Chili Bar Hydroelectric Project, FERC Project No. 2155