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11.145.02

June 3, 2019

VIA EMAIL

wr401program@waterboards.ca.gov

Savannah Downey
State Water Resources Control Board – Division of Water Rights
Water Quality Certification Program,
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Notice of Intent to Adopt a Negative Declaration for Pacific Gas and Electric Company's McCloud-Pit Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2106

Dear Ms. Downey:

INTRODUCTION

On behalf of the Winnemem Wintu Tribe and North Coast Rivers Alliance we submit the following comments on the State Water Resources Control Board's (the "Board's") Draft Initial Study and Negative Declaration ("DISND") for Pacific Gas and Electric Company's ("PG&E's") McCloud-Pit Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2106 (the "Project").

The Winnemem Wintu Tribe is a California-recognized Tribe whose aboriginal territory encompasses the upper watersheds of the Sacramento River including the McCloud River. Indeed, the Winnemem Wintu Tribe's cultural identity is inextricably linked to the McCloud River. "Winnemem" is the Tribe's name for the McCloud River itself, and the Winnemem Wintu Tribe has historically occupied the lands along the banks of the McCloud River. Although some of the Tribe's traditional lands are now submerged under the McCloud Reservoir – due to the construction of the McCloud-Pit Hydroelectric Project – and Lake Shasta, the Tribe has continuously maintained its spiritual, cultural and traditional connection to its remaining unsubmerged native lands and waters, cultural spaces and subsistence uses. The Winnemem Wintu Tribe has long advocated for the restoration of the McCloud River Chinook salmon, and for additional protections for any remaining dolly varden bull trout, rainbow and red-banded trout, and suckers in the McCloud River.

North Coast Rivers Alliance (“NCRA”) is a non-profit unincorporated association with members throughout Northern California. NCRA was formed for the purpose of protecting California’s rivers and their watersheds from the adverse effects of excessive water diversions, ill-planned urban development, harmful resource extraction, pollution, and other forms of environmental degradation. Its members use and enjoy California’s rivers and watersheds for recreational, aesthetic, scientific study, and related non-consumptive uses.

In preparing the DISND, the Board has failed to comply with the California Environmental Quality Act, Public Resources Code section 21000 et seq. (“CEQA”) and completely ignored CEQA’s stringent tribal consultation requirements. The Board must prepare an Environmental Impact Report (“EIR”) because the record shows that the Project may have a significant effect on the environment. The Board ignores the Project’s inconsistencies with the beneficial uses of the applicable Basin Plan. And the Board has failed to address its duties under the Public Trust Doctrine. For these reasons, as detailed below, the Board cannot certify the proposed Negative Declaration or approve the Project.

THE DISND VIOLATES CEQA

I. THE BOARD FAILED TO CONDUCT THE REQUIRED TRIBAL CONSULTATION

CEQA requires each public agency to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of the agency’s proposed project. Pub. Res. Code §§ 21084.2, 21080.3.1. This consultation requirement applies to *all* CEQA projects that had “a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.” Stats. 2014, ch. 532 (A.B. 52), § 11(c) (eff. Jan 1, 2015). The Board’s only notice for this Project that was submitted to the CEQA Clearinghouse maintained by the Governor’s Office of Planning and Research (“OPR”) was filed on May 2, 2019 – nearly four years after July 1, 2015.¹ Thus, the Board must comply with CEQA’s tribal consultation requirements.

For the purposes of CEQA, Public Resources Code section 21080.3.1(a) incorporates the definition of “consultation” found in Government Code section 65352.4. The Board was required to undertake

¹ A search of OPR’s online CEQAnet Database, available at <https://ceqanet.opr.ca.gov>, for “McCloud Pit” reveals only one notice: the May 2, 2019, notice for this Project, listed under State Clearinghouse Number 2019059010.

[a] meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

Government Code § 65352.4. OPR publishes a technical advisory directive that provides additional guidance on agencies' duties to consult. It states:

Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which [an agency] can accommodate tribal concerns.

OPR *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* (2017),² p. 6 (quoting OPR *Technical Advisory: SB 18 Tribal Consultation Guidelines* (2005), p. 16).

CEQA mandates that the Board consult with the Winnemem Wintu Tribe respecting this Project. The Winnemem Wintu Tribe is traditionally and culturally affiliated with lands and waters within the Project's identified area of potential effect ("APE"), and the Winnemem Wintu Tribe's cultural resources are threatened by the Project. This consultation is necessary to determine whether the Project "may cause a substantial adverse change in the significance of a tribal cultural resource." Pub. Res. Code §§ 21084.2 (quote), 21074 (defining tribal cultural resource). The Winnemem Wintu Tribe's traditional cultural practices along the McCloud River, and its historical, spiritual, and subsistence relationship to the McCloud River Chinook salmon, should be considered and addressed as part of this required tribal consultation. The Board was required to consult with the Winnemem Wintu Tribe regarding its cultural resources and practices, the Project's potential impacts on them, and alternatives or measures that would mitigate impacts to these cultural resources, *before* completing its CEQA review and releasing this Negative Declaration. Pub. Res. Code §§ 21080.3.1, 21080.3.2(a), 21084.3.

Instead of conducting the required tribal consultation, the Board has improperly relied

² Available at http://opr.ca.gov/docs/Revised_AB_52_Technical_Advisory_March_2017.pdf (last visited May 30, 2019)

upon the *woefully* insufficient information compiled by *PG&E* – the Project’s private, profit-driven applicant – during the Federal Energy Regulatory Commission (“FERC”) relicensing process. DISND 2-35, 3-90. The DISND falsely claims that “[s]tudies to identify [Traditional Cultural Properties (“TCPs”)] were conducted with the assistance of the Pit River Tribe and the Winnemem Wintu Tribe to identify culturally sensitive areas within the Project area.” DISND 3-90, 3-164, 3-165. But the Winnemem Wintu Tribe’s TCPs were *not* included in the Historic Properties Management Plan (“HPMP”), because *PG&E* never completed the Winnemem Wintu Tribe’s cultural study.

This essential cultural study was never completed because *PG&E* failed to respect its Memorandum of Understanding with the Winnemem Wintu Tribe, and demanded that the Winnemem Wintu Tribe allow third-party access to its *confidential* tribal information. When the Winnemem Wintu Tribe declined to provide this sensitive data to those outside parties, *PG&E* refused to allow further work on the cultural study to continue. *See, e.g.*, February 25, 2011 FERC Final Environmental Impact Statement (“FERC FEIS”) 307.

The U.S. Forest Service’s mandatory section 4(e) conditions require the HPMP to be revised, should the Winnemem Wintu Tribe’s cultural study be completed. FERC FEIS Appendix E-24. *PG&E*’s unilateral approach to the Winnemem Wintu Tribe’s cultural resource study is no substitute for the government-to-government consultation required by CEQA. Pub. Res. Code § 21080.3.1(a); Government Code § 65352.4.

The DISND fails to adequately address the extent of Project impacts on the Winnemem Wintu Tribe’s traditional cultural properties – including areas used to collect significant ethno-botanical resources, ceremonial areas, and other culturally significant areas – because essential cultural resource studies were never completed. The Board cannot accurately conclude that the Project’s impacts will be less than significant because the Board has failed to gather and examine the relevant information. FERC’s proposed solution – to allow licensing to go forward and integrate the Winnemem Wintu’s cultural information into the HPMP *after* the completion of environmental review – is insufficient under CEQA and fails to honor and protect these resources. Because the Winnemem Wintu Tribe’s cultural resource study was omitted from the FERC FEIS, the Project jeopardizes the Tribe’s cultural resources at Star City Creek, Ah Di Na, and throughout the APE.

Contrary to the DISND’s entire premise, the Project’s resource management plans, including those mandated by the 4(e) conditions imposed by the U.S. Forest Service, set forth Project activities that will *directly impact* areas of cultural importance to the Winnemem Wintu Tribe. The management plans for vegetation and weeds, coarse sediment, and recreation development, for example, all implicate cultural resources that have not been adequately addressed. As it stands, the DISND allows *PG&E* to destroy the Winnemem Wintu Tribe’s

cultural resource by refusing to cooperate with the Winnemem Wintu Tribe's requests to adequately protect its confidential, culturally sensitive information.

The Board's complete abdication of its duty to timely consult with the Winnemem Wintu directly contravenes the Legislature's clear command that the Board consider the special expertise of tribes regarding their cultural resources. Pub. Res. Code § 21080.3.1(a).

II. THE BOARD MUST PREPARE AN EIR

"All lead agencies shall prepare . . . an [EIR] on any project which they propose to carry out or approve that may have a significant effect on the environment." Pub. Res. Code, § 21100(a). This mandate applies fully here.

A. The Board has Failed to Examine and Detail the Significant Effects of the Project

As discussed above, the Board has failed to account for the Project's significant impacts on the Winnemem Wintu Tribe's tribal resources because it has failed to consult as CEQA requires. The Board's improper reliance upon PG&E's inadequate resource information led the Board to its unsupported – and unsupportable – conclusion that the Project would not impact tribal cultural resources. DISND 3-163 to 3-165. The DISND states that all impacts "would not be significant" (DISND 3-91), but the Board cannot make this conclusion without receiving required input from the Winnemem Wintu Tribe. This error must be corrected. *Id.*

The DISND fails to address additional impacts of the Project. For example, the DISND does not address the hydrological impacts associated with the construction of recreational accommodations as part of a Recreation Development Management Plan ("RDMP"). DISND 3-123 to 3-126. The new recreational accommodations include river-adjacent trails, the installation of vault toilets in at least eight recreational sites, new day-use areas, new access points for the McCloud Reservoir, boat ramps, parking spaces, paths, and other facilities. DISND 2-21 to 2-31. In addition, the construction of new day-use areas along the McCloud River, and the improvements to existing recreational facilities are intended to increase recreational access to the Project's rivers.

Yet the DISND fails to address how this plainly foreseeable increase in recreational use will impact water quality. All of these activities are sources of erosion, run-off, and other potential contaminants that could impair water quality. The DISND assumes that PG&E's "best management practices" and future compliance through coverage under a Construction General Permit will prevent any impacts. But CEQA requires more than vague assurances that a future plan will mitigate potentially significant impacts. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306 ("adopt[ion of] mitigation measures [to be] recommended in a future study

is in direct conflict with the guidelines implementing CEQA”); *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-794 (mitigation measures that merely “require a report be prepared and followed,” without establishing specific performance standards, violate CEQA). Instead, the Board must examine the impacts and adopt binding, enforceable mitigation measures as part of its CEQA process.

The Project includes the placement of large woody debris in the McCloud River below the McCloud Dam. While such debris is likely beneficial to fish, its placement may impact flow, temperature and turbidity. The FERC FEIS states that the monitoring program included in the Large Woody Debris Management Plan (“LWDMP”) “would provide information necessary to assess whether the locations and quantity of [large woody debris] placement are appropriate to achieve the objectives.” FERC FEIS 78. The Forest Service’s Draft LWDMP identifies a preferred site for the introduction of the debris below the dam, but is silent as to the potential impacts of placing the debris in the McCloud River.

Likewise, the Project includes the excavation of coarse sediment from Star City Creek or Tarantula Gulch to allow for the periodic addition of 150 to 600 metric tons of gravel and coarse sediment to the McCloud River below the McCloud dam. But the FERC FEIS, and the DISND fail to account for the impacts to cultural resources of the Winnemem Wintu Tribe associated with such excavation. And the DISND also does not account for the water quality impacts that could arise from the large woody debris or coarse sediment activities within the McCloud River. Instead, the DISND relies upon an Erosion and Sediment Control Management Plan – which will be finalized later – to claim that “the impacts will not be significant” upon its implementation. DISND 3-124.

In addition, the Board has incorporated the various plans proposed to monitor and reduce the Project’s impacts as part of the Project itself instead of treating these plans as mitigation measures. *E.g.*, DISND 3-67; 3-128. Thus, the Board has failed to examine the Project’s impacts independently of the measures proposed to lessen those impacts. By collapsing this analysis into a single step, the Board has failed to identify the Project’s potentially significant impacts. *Lotus v. Dep’t of Transportation* (2014) 223 Cal.App.4th 645, 655-656. By instead taking the Project as PG&E has presented it without critically examining the Project’s impacts, the Board has failed to present the information required for informed decisionmaking and review.

B. The DISND Fails to Examine Project Impacts on Restored Native Fish Including Listed Salmonids, Despite Likelihood of Reintroduction During Project Operation

Early in FERC’s integrated relicensing process, the Winnemem Wintu Tribe and other interested parties requested that PG&E and FERC consider, study and plan for the reintroduction

of native fish species along the McCloud River. Indeed, the Winnemem Wintu Tribe has long-advocated for the return of the McCloud River Chinook salmon from stock that was introduced to New Zealand over a century ago.

But all requests that PG&E and FERC examine and plan for the reintroduction of extirpated fish have fallen on deaf ears. For example, in studying the impact of various flow regimes at the McCloud Dam on fish species, PG&E did not include habitat criteria appropriate for the bull trout or the native salmonids despite the Tribe's requests. FERC FEIS 141. PG&E refused to acknowledge the need for providing such information on the grounds the fish were not present in the watershed. *See, e.g., PG&E's SD-1, PAD, and Study Plan Comments Reply* (January 5, 2007), p. 25. In preparing the DISND, the Board likewise declined to analyze whether the Project would have an impact on these species. DISND 3-28. Instead, the Board asserted that "since listed anadromous fish are not currently present in the waters of the McCloud-Pit Project, this analysis does not include impacts of the Proposed Project on listed salmonids." *Id.*

Yet contrary to this Board's false premise, the U.S. Bureau of Reclamation and the National Marine Fisheries Service ("NMFS") have moved forward with plans to reintroduce endangered native salmonids to areas above Shasta and Keswick dams. FERC FEIS 387. These plans, in part, prompted NMFS to request minimum flows to support these species' reintroduction.

The FEIS improperly dismissed the minimum flows proposed by NMFS on the erroneous grounds that "the requested flows have not been based on results of the minimum flow studies conducted by PG&E." FERC FEIS Appendix A-59. Thus FERC ignored – and allowed PG&E to avoid examining – the likely environmental impacts of the Project on these salmonids. The Board has perpetuated FERC's inexcusable failure to recognize the grievous wrong done to the Winnemem Wintu Tribe when Shasta Dam extirpated its salmon. Although the DISND acknowledges that a fish passage program for fish reintroduction above Shasta Dam is part of the Reasonable and Prudent Alternative included in NMFS 2009 Biological Opinion for the Long-Term Operation of the Central Valley Project and State Water Project, it fails to apply that knowledge to this Project. DISND 3-28. The DISND completely fails to account for how Project operations might – and very likely would – impede these reintroduction efforts. By failing to include the necessary modeling, analysis, and appropriate flow regimes to accommodate reintroduced salmonids, the Board has failed to examine the potentially significant impact of the Project on the environment.

The Project does not include adequate measures to protect any reintroduced salmonids along the McCloud River. The FERC FEIS states that FERC's 'standard reopener' clause, Standard Form L-1, article 15, provides sufficient authority to allow the license to be altered to

respond to the presence of endangered salmonids. FERC FEIS 389. Form L-1, article 15, however, does not adequately protect listed species upon their reintroduction into the McCloud River watershed. This “reopener” clause merely reserves FERC’s authority to make changes without mandating *any* action upon the reintroduction of listed species.³ And, during the November 17, 2010, Section 10(j) meeting, FERC staff member Emily Connor informed participants that she could provide “no guidance on what [the standard reopener clause] entails.” The FERC FEIS indicates that any potential reopener will occur after FERC’s review of an annual status report on the Interagency Fish Passage Steering Committee (FERC FEIS 58),⁴ now known as the Shasta Dam Fish Passage Steering Committee.⁵ At the same time, however, other agencies continue to work to assess reintroduction. For example, in 2017 the Bureau of Reclamation announced that it would prepare an EIS for the Shasta Dam Fish Passage Evaluation. 82 Fed.Reg. 27552 (June 15, 2017); 82 Fed.Reg. 41049 (Aug. 29, 2017). The Winnemem Wintu Tribe has identified a potential fishway along Cow Creek, Little Cow Creek,

³ The full text of Article 15 states: “The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.” FERC Standard Form L-1, article 15, from <https://www.ferc.gov/industries/hydropower/gen-info/comp-admin/l-forms/l-01.pdf> (last visited May 30, 2019).

⁴ As the Project is currently designed, PG&E is to file this report “on the reintroduction and status of listed anadromous species in the project area,” detailing reintroduction status, the findings of the Interagency Fish Passage Steering Committee, and including comments by [NMFS].” FERC FEIS 58, 387. As noted by PG&E’s April 2011 comments on the FEIS, “committee meetings are not open to entities other than the resources agencies involved on the committee.” PG&E Comment Summary (April 29, 2011), p. 4. Thus, PG&E is not a participant, and its reports will necessarily be derived from reports issued from the committee itself. PG&E Comment Summary, p. 8. Given that PG&E’s financial interests are adverse to the reintroduction of these species on the McCloud River, PG&E has recently filed for bankruptcy, and PG&E will not be participating the meetings, PG&E is plainly *not* the appropriate entity to provide FERC with reports on the reintroduction and status of listed anadromous species in the Project area.

⁵ 2017 Interagency Fish Passage Steering Committee Report, p. 3 (available at <http://deltacouncil.ca.gov/docs/interagency-fish-passage-steering-committee-ifpsc> (last visited May 30, 2019)).

and Dry Creek that could allow for reintroduced fish to bypass the Keswick and Shasta Dams.

Under Form L-1, Article 15's "standard reopener," FERC will lack the ability to immediately modify the license conditions upon the reintroduction of listed anadromous species to the Project area. Instead, FERC will be notified of reintroduction activities on an annual basis. FERC FEIS 58. There may be a significant delay between any annual report provided to FERC and any FERC action. FERC FEIS 58, 387; PG&E Comment Summary 8. Upon receipt of any report regarding salmonid reintroduction, FERC has no deadline to develop or consider appropriate Project modifications. Standard Form L-1, Article 15. If and when FERC decides that such modifications are necessary, it will need to provide notice of the decision and an opportunity to comment. *Id.* Meanwhile, any reintroduced fish will be subjected to a flow regime that has not been managed to provide the appropriate water temperatures, water levels, and rate of flow necessary for their successful reproduction and survival. FERC FEIS 141.

The U.S. Forest Service correctly observed in its June 17, 2011, comment letter regarding the FERC FEIS that FERC has set up a potential catch-22 for the anadromous fish. USFS Comment Letter, p. 8. As the Project is currently designed, reintroduced anadromous fish will be deterred from reestablishing a presence on the McCloud River by conditions that will not be changed unless and until the fish reestablish a presence there. Without any built-in protections, the Project threatens to frustrate and impede the reintroduction of the McCloud River's native anadromous salmonids. The Board's DISND disregards this concern. DISND 3-28.

In its comments on the FERC FEIS, NMFS asked FERC to adopt NMFS' 10(j) conditions with an "active 'trigger mechanism' that will put the conditions into effect as soon as listed species are present and impacted by project operations." FERC FEIS A-58. A triggering condition provides clear guidance to all parties as to the future responsibilities, and allows the timely and orderly implementation of such conditions without mandating drawn out procedures. The U.S. Environmental Protection Agency also raised this concern. In keeping with the science underlying NMFS's flow proposal, the Winnemem Wintu Tribe proposed an alternative flow regime on August 5, 2010.⁶ The Board must study whether increased flows, such as those in the NMFS or Winnemem Wintu Tribe proposals, would be protective of reintroduced anadromous fish. The Board must propose an appropriate flow regime for these reintroduced fish as either an alternative or a mitigation measure to reduce the Project's reasonably foreseeable significant

⁶ August 5, 2010 Letter to PG&E and the U.S. Forest Service (attached as Exhibit 1).

impacts.⁷

**THE PROJECT DOES NOT PROVIDE ADEQUATE PROTECTION
FOR THE BENEFICIAL USES IDENTIFIED IN THE BASIN PLAN**

The Project does not adequately protect the beneficial uses identified in the Basin Plan, including salmon and steelhead spawning habitat, and cold fresh-water habitat on the McCloud River. The existing operation of the McCloud-Pit Hydroelectric Project also impairs the potential beneficial use of the Pit River as warm fresh-water habitat because the cold water of the McCloud River is diverted through a series of tunnels and generators to the warmer Pit River. While the Project increases the cold-water flows downstream of the McCloud Dam (and thus has the potential to reduce hydroelectric diversions that flow to the Pit River), the Project's new flow regime still fails to adequately protect the beneficial uses of the McCloud River as cold fresh-water habitat and spawning habitat for salmon and steelhead.

The Basin Plan includes cold fresh-water and cold water spawning habitat that supports salmon and steelhead in the list of the McCloud River's beneficial uses. Without adequate protection for reintroduced native salmonids within the Project's new flow regime, the Project will impair these beneficial uses of the McCloud River. The Board must examine alternatives that will protect these beneficial uses as required under the Clean Water Act and Water Code sections 13240 et seq.

NMFS has described the reintroduction of steelhead, and winter-run and spring-run Chinook salmon, as "imminent" in its comments to FERC on this Project. Despite this, and repeated requests by both NMFS and the U.S. Environmental Protection Agency that FERC adopt a flow regime that would support reintroduced salmonids within the Project area, the Project's flow regime does not include measures to support reintroduction, as detailed above. In developing the Project's flow regime, PG&E declined to include habitat criteria appropriate for bull trout or these native salmonids. FERC FEIS 141. But the public, not PG&E, owns these rivers and their public trust fisheries. The Board must mandate that the Project include sufficient mitigation measures to ensure that the Basin Plan's beneficial uses are not impaired.

⁷ As discussed above, had the Board appropriately considered measures to reduce the Project's impacts separately from the Project itself, this would clearly be a mitigation measure. But, as the Board has inappropriately collapsed its CEQA analysis, the NMFS condition appears to be an alternative to the conditions included in the Project itself.

**THE PROJECT DOES NOT PROVIDE ADEQUATE
PROTECTION FOR PUBLIC TRUST RESOURCES**

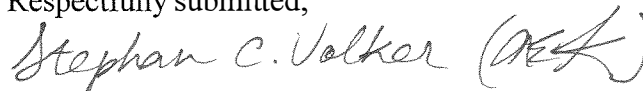
The Board must take into account its duties under the Public Trust Doctrine. Although compliance with CEQA “may assist an agency in complying with its duties under the public trust doctrine . . . [,] CEQA review of a project does not necessarily or automatically satisfy the agency’s affirmative duties to take the trust into account and protect public trust uses whenever feasible.” *San Francisco Baykeeper Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 571. “[A] public trust use is not any use that may confer a public benefit, but rather a use that facilitates public access, public enjoyment, or public use of trust land.” *Id.* at 570.

Thus, the Board must consider whether the Project sufficiently protects the public trust resources and uses under its jurisdiction to the extent feasible. This consideration requires it to do more than simply maintain the baseline condition. Unlike CEQA, where the impacts of the Project – and the alternatives designed to lessen those impacts – are framed in the context of that baseline condition, the Public Trust Doctrine requires the Board to examine whether Project activities will protect public trust uses *independently* of that condition. Where, as here, Project activity has led to the extirpation of native fish, the Board must take affirmative action to protect the remaining – and reintroduced – fish populations in the McCloud River below McCloud Dam and other waters in the Project area. These actions could include habitat restoration, new or improved fish passage projects, dam removal, increased instream flow requirements, and other protective measures to help restore these imperiled fish, including the recovery of the McCloud River salmon and the habitat required to accomplish that objective.

CONCLUSION

For the reasons stated above, the DISND violates applicable law. The Board’s current environmental analysis violates CEQA, and its Project is counter to the Basin Plan and the Public Trust Doctrine. The Board must prepare a comprehensive EIR that details the Project’s impacts, and alternatives and mitigation measures designed to lessen those impacts, before determining whether to move forward with this ill-considered and highly impactful Project.

Respectfully submitted,



Stephan C. Volker
Attorney for the Winnemem Wintu Tribe
and North Coast Rivers Alliance

Exhibit List:

- Exhibit 1: August 5, 2010 Letter to PG&E and U.S. Forest Service Re: McCloud-Pit Hydroelectric Project, FERC Project No. 2106

EXHIBIT

1

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August 5, 2010

Via Email

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Regional Forester's Office
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Re: McCloud-Pit Hydroelectric Project, FERC Project No. 2106

Dear Mr. Nevares and Ms. Tupper,

Pursuant to the commitment made by Pacific Gas & Electric ("PG&E") and the United States Forest Service ("USFS") during the April 22, 2010 relicensing meeting to allow further discussion and consideration of flows on the Lower McCloud River, including minimum instream flow and ramping, we submit the following on behalf of the Winnemem Wintu Tribe.

The Winnemem Wintu Tribe historically had a subsistence relationship with the salmonids that inhabited the McCloud River, including the endangered Sacramento River winter-run Chinook salmon and threatened Central Valley spring-run Chinook salmon. The tribe has been working with multiple agencies in order to restore these traditional runs to the McCloud River. As the National Marine Fisheries Service ("NMFS") noted in its January 28, 2010 *Preliminary Section 18 Prescriptions, Terms, Conditions, Recommendations and Comments*, "it is imminent that winter-run Chinook salmon, CV spring-run Chinook salmon, and CV steelhead will be passed upstream of the Shasta Dam and into their historic habitats in the McCloud, Sacramento, and Pit River Systems." *Id.*, p. 22. For that reason, NMFS has reserved the right to mandate fishways upon the McCloud River under §18. In order for the McCloud River to present a hospitable environment for these salmonids, upon reintroduction the McCloud River flows must provide adequate temperatures, depths and velocities to support these fish.

The Tribe has been working with NMFS in an attempt to reestablish the traditional runs from Chinook salmon stock removed from the McCloud Hatchery and exported to New Zealand. For these fish to re-imprint to the McCloud River, they will require different flow regimes than those considered in the preliminary 4(e) proposals submitted this spring by USFS, PG&E, CalTrout and Trout Unlimited and American Whitewater. None of the proposed 4(e) flow conditions submitted maintain sufficient summer flows to preserve the cooler temperatures required by the winter-run Chinook.

The Tribe reminds USFS and PG&E that as early as scoping comments submitted in 2006, members of the public raised the goal of restoring historic fish species to the McCloud River, including

Steve Navares
 PG&E Sr. Project Manager
 Julie Tupper
 US Forest Service
 August 5, 2010
 Page 2

Chinook salmon, Central Valley steelhead and bull trout. *See, e.g. California Trout, Friends of the River and Trout Unlimited Comments and FERC Scoping Document 1 and Proposed Studies for PG&E's McCloud-Pit Project, FERC No. 2106-047* November 2006. The Winnemem Wintu Tribe emphasized this goal in its February 1, 2010 filing, recommending that "measures identified by NMFS as essential for full restoration of the native salmon runs on these rivers be fully implemented through inclusion in PG&E's license conditions."

The Tribe proposes that the minimum instream flows on the McCloud River be increased to 300 cfs by 2013 in order support the reintroduced salmon populations. A flow of 300 cfs is still substantially less than the historic unimpaired minimum flows on the McCloud River. In addition, the Winnemem Wintu Tribe proposes, consistent with the upper range of flows proposed by NMFS to keep water temperatures below levels that cause salmon mortality, that by 2015 flows be increased to 600 cfs in July, 400 cfs in August, and 400 cfs in dry and critically dry Septembers to assure the survival of these restored salmonids. In so doing, the Winnemem Wintu Tribe embraces the science underlying NMFS' January 28, 2010 filing with FERC.

| Winnemem Wintu Summer Flow Proposal to Be Achieved by 2015 | | |
|--|-----------------|--------------------|
| Month | Water Year Type | Minimum Flow (cfs) |
| July | Wet | 600 |
| | Normal | 600 |
| | Dry | 600 |
| | Critically Dry | 600 |
| August | Wet | 400 |
| | Normal | 400 |
| | Dry | 400 |
| | Critically Dry | 400 |
| September | Wet | 300 |
| | Normal | 300 |
| | Dry | 400 |
| | Critically Dry | 400 |

Steve Navares
PG&E Sr. Project Manager
Julie Tupper
US Forest Service
August 5, 2010
Page 3

It is prudent to establish the appropriate flow regimes for reintroduced salmonids during the relicensing process. By considering the appropriate flows for reintroduced salmonids at this stage, FERC, PG&E and the conditioning agencies will preserve the necessary flexibility to alter the flow regimes as needed to restore these species. If PG&E's license does not now include provision for summer flows sufficient to support the reintroduction of these salmonids, FERC would needlessly set the stage for an endangered species "train wreck."

The Tribe additionally echoes the call for gradual down-ramping after spillover events, as rapid down-ramping increases the risks to the McCloud's aquatic resources.

The Tribe requests time to present information regarding the flow requirements of the McCloud River's native fish at the August 18 flow meeting.

Sincerely,



Stephan C. Volker
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cc: The Winnemem Wintu Tribe
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