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December 19, 2005

VIA MESSENGER

Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

FILED
OFFICE OF THE
SECRETARY
DEC 19 2 3 11
FEDERAL ENERGY
REGULATORY COMMISSION

**Re: Copies Of Pacific Gas And Electric Company's Submittal To The
USFS Of Alternative Conditions For Certain Final Section 4(e)
Conditions Submitted By The USFS For The Upper North Fork
Feather River Hydroelectric Project, FERC Project No. 2105**

Dear Secretary Salas:

Enclosed for filing in the above-referenced proceeding are an original and eight copies of Pacific Gas and Electric Company's Submittal Of Alternative Conditions ("Submittal") for certain § 4(e) conditions filed with the Commission by the United States Forest Service for inclusion in the new license for the Upper North Fork Feather River Hydroelectric Project, FERC Project No. 2105. The Submittal was submitted today to the Deputy Chief National Forest Systems - Forest Service.

As indicated in the Certificate of Service attached to the Submittal, copies of the Submittal have been served on the parties listed on the Secretary's official service list for this relicensing proceeding.

If you have any questions regarding this filing or require additional information, please contact me at the phone number or mailing address noted above.

WINSTON & STRAWN LLP

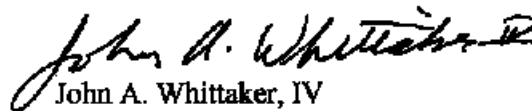
Honorable Magalie R. Salas

December 19, 2005

Page 2

Thank you for your assistance in this matter.

Sincerely,



John A. Whittaker, IV

ATTORNEY FOR PACIFIC GAS AND ELECTRIC COMPANY

Enclosures

cc: Service List for FERC Project No. 2105 (enclosure) Via U.S. Mail

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December 19, 2005

VIA MESSENGER

Deputy Chief
National Forest Systems, Forest Service
Washington Office (WO) Lands Staff, Mail Stop 1124
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0003

**Re: Pacific Gas And Electric Company's Submittal Of Alternative
Conditions For Certain Final Section 4(e) Conditions Submitted By
The United States Forest Service For The Upper North Fork Feather
River Hydroelectric Project, FERC Project No. 2105**

Dear Deputy Chief of the National Forest Systems:

Pursuant to the provisions of § 33 of the Federal Power Act (added by § 241 of the Energy Policy Act of 2005) and 7 C.F.R. §§ 1.604, 1.671, Pacific Gas and Electric Company submits to the Deputy Chief National Forest Systems - Forest Service, the attached Submittal Of Alternative Conditions ("Submittal") for certain § 4(e) conditions filed with the Federal Energy Regulatory Commission ("FERC") by the United States Forest Service for inclusion in the new license for the Upper North Fork Feather River Hydroelectric Project, FERC Project No. 2105.

As indicated in the Certificate of Service attached to the Submittal, copies of the Submittal have been served on FERC and on each "license party" to the FERC relicensing proceeding.

If you have any questions regarding this filing or require additional information, please contact me at the phone number or mailing address noted above.

WINSTON & STRAWN LLP

Deputy Chief of the National Forest Systems

December 19, 2005

Page 2

Thank you for your assistance in this matter.

Sincerely,



John A. Whittaker, IV

ATTORNEY FOR PACIFIC GAS AND ELECTRIC COMPANY

Enclosure

cc: Federal Energy Regulatory Commission (with enclosure) (an original and 8 copies) Via
Messenger
Service List for FERC Project No. 2105 (with enclosure) Via U.S. Mail

**UNITED STATES OF AMERICA
BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE**

**Attention: Deputy Chief
National Forest Systems, Forest Service
Washington Office, Lands Staff
Mail Stop 1124
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0003**

Pacific Gas and Electric Company

)
)

**Project No. 2105
(Upper North Fork
Feather River)**

**PACIFIC GAS AND ELECTRIC COMPANY'S SUBMITTAL OF ALTERNATIVE
CONDITIONS FOR CERTAIN FINAL § 4(E) CONDITIONS SUBMITTED BY THE
UNITED STATES FOREST SERVICE FOR THE UPPER NORTH FORK FEATHER
RIVER PROJECT NO. 2105**

Pursuant to the provisions of § 33 of the Federal Power Act ("FPA") (added by § 241 of the Energy Policy Act of 2005 (Pub. Law 109-58)), and 7 C.F.R. § 1.604, § 1.671 (promulgated Nov. 17, 2005; 70 Fed. Reg. 69804), Pacific Gas and Electric Company ("PG&E"), existing licensee and applicant for new license for the Upper North Fork Feather River Hydroelectric Project (Federal Energy Regulatory Commission ("FERC") No. 2105) ("UNFFR" or "Project"), hereby submits to the Deputy Chief, National Forest Systems, Forest Service ("NFS") alternative conditions for 12 of the Final Conditions submitted to FERC by the United States Forest Service ("USFS") by letter dated November 4, 2004, for inclusion in the new license for UNFFR pursuant to § 4(e) of the FPA, 16 U.S.C. § 797(e). PG&E requests that the USFS adopt the alternative conditions submitted by PG&E herein in lieu of the comparable conditions included in the November 4, 2004 Final Conditions and, as specified in 7 C.F.R.

§ 1.672, expeditiously file these adopted PG&E alternative conditions with FERC as USFS "modified conditions." As discussed herein, PG&E's alternative conditions will provide for the adequate protection and utilization of the affected "reservations" (the Lassen and Plumas National Forests ("NFs")) and will cost significantly less to implement than the comparable conditions included in the Final Conditions. Consequently, pursuant to § 33 of the FPA and 7 C.F.R. § 1.673(b), the USFS, acting on behalf of the Secretary of Agriculture, is required to adopt PG&E's alternative conditions.

As an initial matter, PG&E notes that it has been involved in discussions with the USFS regarding certain USFS § 4(e) conditions. However, it is unlikely that PG&E and the USFS will reach an agreement prior to the deadline set in the new regulations for submitting alternative conditions. Consequently, PG&E is submitting these alternative conditions to preserve its legal options in the event mutually agreeable § 4(e) language cannot be reached.

PG&E'S RIGHT TO SUBMIT ALTERNATIVE CONDITIONS

Section 1.604 of the USFS regulations (7 C.F.R. § 1.604) provides that in cases where the USFS "has filed a preliminary condition or condition with FERC before November 17, 2005 and FERC has not issued a license as of that date," a license applicant or other license party may submit alternative conditions to the NFS pursuant to 7 C.F.R. § 1.671 by December 19, 2005. In the case of UNFFR, PG&E's application for new license was filed on October 23, 2002, and FERC has not yet issued a new license for the Project. As noted above, the USFS filed its Final Conditions with FERC on November 4, 2004. Accordingly, pursuant to 7 C.F.R. § 1.604, PG&E has the right to submit alternative conditions.

**THE FINAL CONDITIONS FOR WHICH PG&E IS SUBMITTING
ALTERNATIVE CONDITIONS**

The USFS' November 4, 2004 § 4(e) Final Conditions submittal included 47 conditions to be included in the new FERC license for UNFFR. PG&E is submitting alternative conditions for 12 of those conditions. The 12 USFS conditions for which PG&E is submitting alternative conditions are as follows:

- Condition No. 4 - Approval of Changes
- Condition No. 6 - Surrender of License or Transfer of Ownership
- Condition No. 9 - Fire Prevention, Response, and Investigation
- Condition No. 10 - Road Use by Government
- Condition No. 11 - Road Use
- Condition No. 17 - Compliance with Regulations
- Condition No. 19 - Indemnification
- Condition No. 20 - Surveys, Land Corners
- Condition No. 21 - Damage to Land, Property, and Interests of the United States
- Condition No. 22 - Risks and Hazards
- Condition No. 44 - Special Status Species
- Condition No. 46 - Invasive Weed Management Plan

PG&E'S PROPOSED ALTERNATIVE CONDITIONS

I. Condition No. 21 - Damage to Land, Property, and Interests of the United States

USFS Condition:

The Licensee has an affirmative duty to protect the land, property, and interests of the United States from damage arising from occupancy and use of the license.

In addition to the general requirements of Articles 22 and 24, the Licensee is strictly liable for and shall pay all damages, costs and expenses associated with damage to the land, property and interests of the United States caused by or in connection with the occupancy or use authorized by the license, including but not limited to damages, costs, and expenses resulting from fire. Such damages, costs and expenses shall include, but not be limited to:

- 1. Fire suppression costs*
- 2. Rehabilitation and restoration costs*
- 3. Value of lost resources*
- 4. Abatement costs*
- 5. Investigation and administrative expenses*
- 6. Attorneys' fees*

Damages will be determined by the value of the resources lost or impaired, as determined by the Forest Service. The basis for damages will be provided to the Licensee. The licensee shall accept transaction registers certified by the appropriate Forest Service official as evidence of costs and expenses. The Licensee shall promptly pay to the United States such damages, costs and expenses upon written demand by the United States.

PG&E's Alternative Condition (Blackline Of USFS Condition):¹

The Licensee has an affirmative duty to protect the land, property, and interests of the United States from damage arising from the Licensee's occupancy and use of the National Forest System lands authorized by this license.

In addition to the general requirements of Articles 22 and 24, the Licensee is strictly liable for and shall pay ~~all~~promptly pay, after being afforded a reasonable opportunity to review and contest such charges as specified herein, all reasonable damages, costs, and expenses associated with damage to the land, property and interests of the United States ~~caused by or in connection with the occupancy or use authorized by the license, including~~caused by the construction, operation, or maintenance of Licensee's Project including, but not limited to, reasonable damages, costs, and expenses resulting from fire. ~~Such; provided, however, that (1) the Licensee shall be so strictly liable only if the Forest Service first prepares in accordance with established agency procedures a specific risk assessment finding that one or more activities at the Project is a high risk use and occupancy, and (2) the Licensee's maximum strict liability shall not exceed that specified in the risk assessment but in no event shall exceed \$1,000,000 for any one occurrence. Any liability in excess of this specified amount shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage occurred.~~ Such reasonable damages, costs, and expenses shall include, but not be limited to:

¹ A clean version of USFS Condition No. 21 incorporating the changes proposed by PG&E is appended hereto as Attachment A.

1. *Fire suppression costs*
2. *Rehabilitation and restoration costs*
3. *Value of lost resources*
4. *Abatement costs*
5. *Investigation and administrative expenses*
6. *Attorneys' fees*

~~Damages will be determined by the~~The Licensee's liability under this condition shall not extend to acts or omissions of the United States or other third parties outside of the Licensee's control. The value of the resources lost or impaired, as determined by the Forest Service, lost resources and rehabilitation and restoration costs collectively shall not exceed the commercial value of any timber lost. The basis for damages will be provided to the Licensee. The licensee shall accept, along with transaction registers of costs and expenses certified by the appropriate Forest Service official as evidence of costs and expenses. The Licensee shall promptly pay to the United States such damages, costs and expenses upon written demand by the United States. The Licensee shall have an opportunity to review and contest the basis for the Forest Service's claimed damages, costs, and expenses.

Discussion

USFS Condition No. 21 would impose unlimited strict liability (*i.e.*, liability without proof of negligence) upon PG&E for all damages to land, property, and interests incurred by the United States "in connection with" the occupancy or use of NFs lands by the Project, together with all costs and expenses incurred by the USFS related thereto, irrespective of their reasonableness. Further, for all such charges, PG&E would not be provided with any opportunity to review or contest such charges.

These provisions of Condition No. 21 are contrary to law and USFS regulations and wholly unreasonable and inappropriate. The alternative Condition No. 21 submitted by PG&E would limit PG&E's strict liability exposure consistent with law and USFS regulations, limit the USFS' recovery to "reasonable" damages, costs, and expenses, provide PG&E with a fair opportunity to review and contest USFS charges, and provide that PG&E's liability does not extend to the acts or omissions of the United States or other third parties. PG&E's alternative Condition No. 21 would provide for the adequate protection and utilization of the NFs and, in

comparison to USFS Condition No. 21, would cost significantly less to implement. Consequently, pursuant to § 33(a)(2) of the FPA and 7 C.F.R. § 1.673(b), the USFS must adopt PG&E's alternative Condition No. 21.

A. **USFS Condition No. 21's Unlimited Strict Liability Is Contrary To Law And USFS Regulations**

The USFS Condition No. 21 proposal to subject PG&E to unlimited strict liability is inconsistent with the provisions of the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701, *et seq.*, and the USFS' regulations implementing FLPMA. The unlimited strict liability provision is also inconsistent with the FPA.

1. **FLPMA And The USFS Implementing Regulations**

Pursuant to the provisions of FLPMA, entities that want to use USFS lands must obtain a right-of-way authorization (a "Special Use Authorization" or "SUA") from the USFS for such use. Pursuant to 43 U.S.C. § 1761(a)(4), the USFS is authorized to grant SUAs for, *inter alia*, "systems for generation, transmission, and distribution of electric energy." In 1992, with Pub. Law 102-486, Congress amended 43 U.S.C. § 1761 to clarify that licensees of FERC-licensed hydroelectric projects occupying USFS lands generally had to obtain SUAs from the USFS, but that licensees of existing projects that had not obtained SUAs for their projects prior to 1992 did not have to obtain SUAs for continued operation under new licenses so long as the projects would not use additional USFS lands.

FLPMA also specifies that the USFS, in issuing SUAs, shall include therein: (1) terms and conditions that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment" (43 U.S.C. § 1765(a)); and (2):

such terms and conditions as the Secretary concerned deems necessary to (i) *protect Federal property and economic interests;* (ii) *manage efficiently the lands which are subject to the right-of-*

way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage of the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

See 43 U.S.C. § 1765(b) (emphasis added).

While requiring the USFS to include in SUAs terms necessary to protect and allow other utilization of the affected and adjacent USFS lands, Congress also enacted provisions regarding the liability of entities using USFS lands under SUAs that specifically limit such entities' strict liability. Specifically, 43 U.S.C. § 1764(h) provides as follows (emphasis added):

(h) Liability for damage or injury incurred by United States for use and occupancy of rights-of-way; indemnification of United States; no-fault liability; amount of damages

(1) The Secretary concerned shall promulgate regulations specifying the extent to which holders of rights-of-way under this subchapter shall be liable to the United States for damage or injury incurred by the United States caused by the use and occupancy of the rights-of-way. The regulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liabilities, damages, or claims caused by their use and occupancy of the rights-of-way.

(2) *Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.*

The USFS regulations implementing this provision of FLPMA generally mirror the statute, but specify that the maximum strict liability exposure of an entity shall not exceed the amount specified in the SUA, which amount shall be based on a specific risk assessment, with a

maximum \$1 million per occurrence cap on strict liability. See 36 C.F.R. § 251.56(d)(1) and (2)

(emphasis added):

(d) *Liability.* Holders shall pay the United States for all injury, loss or damage, including fire suppression costs, in accordance with existing Federal and State laws.

(1) Holders shall also indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy.

(2) *Holders of special use authorizations for high risk use and occupancy, such as, but not limited to, powerlines and oil and gas pipelines, shall be held liable for all injury, loss or damage, including fire suppression costs, caused by the holder's use or occupancy, without regard to the holder's negligence, provided that maximum liability shall be specified in the special use authorization as determined by a risk assessment, prepared in accordance with established agency procedures, but shall not exceed \$1,000,000 for any one occurrence. Liability for injury, loss, or damage, including fire suppression costs, in excess of the specified maximum shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage or injury occurred.*

Thus, Congress, while providing that the USFS was to condition SUAs so as to protect federal property and economic interests, minimize damage to the environment, and protect other users and the public interest generally, nevertheless limited the USFS' ability to impose strict liability ("a maximum limitation on damages commensurate with the foreseeable risks or hazards presented") and specified that any liability in excess of that amount was to be determined by ordinary rules of negligence. The USFS in turn by regulation has imposed strict liability only on "high risk use," has required risk assessments before strict liability is imposed, and has limited such liability to \$1 million per occurrence.

The USFS proposal in § 4(e) Condition No. 21 to impose unlimited strict liability on PG&E with regard to UNFFR's use of NFs lands is clearly contrary to Congress' intent when

enacting FLPMA to limit the imposition of strict liability on users of USFS lands. The fact that in this case the USFS is relying upon § 4(e) instead of FLPMA as the mechanism to promulgate conditions imposing unlimited strict liability is irrelevant. First, the overall purpose of the conditioning authority vested in the USFS by FLPMA is comparable to the overall purpose of the conditioning authority vested in the USFS by § 4(e) of the FPA: to protect the federal lands and allow for their utilization by others. Clearly, if unlimited strict liability is not necessary to protect federal lands pursuant to FLPMA, it is equally unnecessary under § 4 (e). Second, to avoid acting arbitrarily and capriciously, the USFS would have to use § 4(e) authority to impose unlimited strict liability on all licensees. However, such uniform application would result in a direct conflict with FLPMA and the USFS regulations for certain licensees. Specifically, for hydroelectric projects that had received a SUA prior to 1992 or that at relicensing would use additional USFS lands, the owners of such projects eventually would have to obtain a new SUA from the USFS after receiving a new license from FERC,² and the USFS, in issuing such SUAs, could not impose strict liability obligations in excess of that permitted by FLPMA and the USFS regulations, as discussed above. Any attempt by the USFS to use mandatory § 4(e) conditioning authority to impose on such projects strict liability provisions in excess of the limits established in these SUAs would be a violation of FLPMA and the USFS regulations.

The USFS proposal to impose unlimited strict liability via § 4(e) conditions would also result in unsupportable liability variations among comparable users. For example, interstate transmission lines not included in FERC Part I licenses and coal- and gas-fired generating facilities are not subject to § 4(e) mandatory conditioning authority (and the USFS' exercise of that authority to impose unlimited strict liability), but are subject to the requirement to obtain

² SUAs have set terms and at some point would expire and have to be renewed or reissued.

SUAs if they are to be located on USFS lands. Thus, the strict liability exposure of the owners of such facilities would be limited as specified in FLPMA and the USFS regulations as discussed above. However, the "risks" their facilities create are no different than those created by hydroelectric projects -- both types of facilities have transformers/transmission lines, all types of generating facilities use water, etc. There is simply no non-arbitrary and capricious way to justify imposing different strict liability obligations on these comparable types of facilities.

2. The FPA

The USFS' attempt in Condition No. 21 to impose unlimited strict liability on PG&E as to UNFFR is also contrary to the FPA itself.

Specifically, in *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988) ("*SCPSA*"), the court overturned a FERC order which added to a license a condition imposing strict liability on a licensee for any damages caused to downstream landowners from a failure of the licensee's dam, finding that FERC's authority under § 10(c) of the FPA (16 U.S.C. § 803(c)) to impose conditions "for the protection of life, health, and property" did not give it authority to impose strict liability and oust the states of their traditional authority to determine the rules of liability in tort. In reaching its conclusion, the court examined court decisions interpreting, and the legislative history of, a different portion of § 10(c) that provides as follows:

Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or necessary thereto, constructed under the license, and in no event shall the United States be liable therefor.

As noted by the court, most courts that had interpreted this provision had found that it did not create a new federal tort cause of action against licensees but rather simply preserved any existing causes of action under state law. *Id.* at 794.

As to the legislative history, the court noted that the history supported the principle that property damages caused by licensees should be determined in accordance with state law. *Id.* at 795. The court concluded with respect to this portion of § 10(c) as follows (*id.*):

Assuming, as the legislative history suggests we should, that Congress intended for § 10(c) merely to preserve existing state laws governing the damage liability of licensees, it follows that the Commission may not encroach upon this state domain by engrafting its own rules of liability. In particular, the Supreme Court has explicitly warned against interpretations of the Act that establish "futile duplication of two authorities over the same subject matter." *First Iowa*, 328 U.S. at 170, 55 S.Ct. at 914. In *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 168, 66 S.Ct. 906, 913, 90 L.Ed 1143 (1946), the Supreme Court observed that

In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue.

Applying these general principles to the issue before us leads to the conclusion that Congress did not intend for the Commission to "share" in the determination of when licensees would be liable to their neighbors for property damages, a decision which "remain[s] under the jurisdiction of the States."

Thus, under *SCPSA*, *FERC* is prohibited from encroaching upon state authority by engrafting its own rules of liability.

The Ninth Circuit, in its recent decision in *Skokomish Indian Tribe, et al. v. Tacoma Public Utilities, et al.*, 410 F.3d 506 (9th Cir. 2005), followed *SCPSA* and held that an Indian Tribe could not use the above-quoted portion of § 10(c) to sue a licensee for damages to its lands caused by the construction of the licensee's project because § 10(c) did "not create a

federal private right of action, but instead preserves only existing state-law claims against licensees." *Id.*, at 519. More importantly, the Ninth Circuit endorsed the concept that FERC cannot engraft its own rules of liability (*id.*):

As the D.C. Circuit explained, since "Congress intended for [the statute] merely to preserve existing state laws governing the damage liability of licensees, it follows that the Commission may not encroach upon this state domain by engrafting its own rules of liability." *Id.* We believe this interpretation of section 803(c) is the correct one and thus see no cause for parting company with our sister circuits.

Thus, the two circuits that could review any attempt by the USFS to impose unlimited strict liability on PG&E as to UNFFR (the Ninth and D.C. Circuits) have ruled that FERC cannot engraft its own rules of liability.

While *SCPSA* involved a FERC attempt to impose strict liability on a licensee, the portion of § 10(c) relied upon by the court to hold that FERC could not so act is *not* limited to FERC; it merely references licensees being liable (pursuant to state law only, as interpreted by the courts). Thus, the holding of *SCPSA* is equally applicable to attempts by other federal agencies such as the USFS to condition licenses to impose strict liability on licensees. Indeed, the relevant portion of § 10(c) was included in the original Federal Water Power Act of 1920 (41 Stat. 1063) and under that Act the Federal Power Commission was composed of the Secretaries of Agriculture, Interior, and War. See *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 773 (1984) ("*Escondido*").³ Thus, Congress, in originally drafting this provision, intended it to specifically apply to the Secretary of Agriculture (and thus to its delegate the USFS). Further, the legislative history relied upon by the *SCPSA* court was the legislative history of the Federal Water Power Act of 1920.

³ The Commission was not reorganized into a five-person independent body separate from the Secretaries until 1930. *Escondido*, 466 U.S. n.14 at 773.

Uniform application of the prohibition on engrafting rules of liability is consistent, not only with original Congressional intent, but also with the structure of the FPA: if FERC cannot impose strict liability provisions pursuant to its authority under the first part of § 10(c) to impose conditions "for the protection of life, health, and property," the USFS should not be able to impose strict liability provisions pursuant to its authority under § 4(e) to impose conditions for the "adequate protection and utilization of such reservation." While Congress, in enacting 43 U.S.C. § 1764(h) of FLPMA, did in effect create a limited exception to the proposition that state tort laws -- not federal administrative agency determinations -- are to govern liability for some licensees (those needing SUAs), it also made clear that "ordinary rules of negligence" were to govern liability in excess of the maximum strict liability amount allowed in 43 U.S.C. § 1764(h).

B. USFS Condition No. 21 Would Inappropriately Require PG&E To Reimburse The USFS For All USFS Damages, Costs, And Expenses Regardless Of Their Reasonableness

USFS Condition No. 21 as currently written would require PG&E to reimburse the USFS for all damages, costs, and expenses claimed by the USFS in relation to an incident at UNFFR irrespective of their reasonableness. The only obligation imposed on the USFS by the condition is to provide PG&E with "the basis for damages" and with transaction registers for costs and expenses. No opportunity is provided for PG&E to review or contest the reasonableness of any assessment for damages, costs, or expenses; rather, PG&E is simply required to "promptly pay" such charges on written demand.

The obligation imposed by this condition on PG&E to pay all damages, costs, and expenses irrespective of their reasonableness and without the opportunity to review and contest such charges is patently inappropriate and contrary to law. Requiring PG&E to pay such charges

without affording it an opportunity to review and contest them violates the Fifth Amendment's prohibition on the taking of property by the government without due process of law. PG&E is not aware of any other federal agency that violates due process rights by requiring parties to forego all opportunity to review and contest the reasonableness of assessed charges. This USFS provision also clearly undermines the accountability of government personnel and creates the opportunity for abuse.

C. The Provisions Of PG&E's Alternative Condition No. 21

As discussed previously, the FPA generally prevents the USFS from engrafting its own rules of liability and subjecting PG&E to unlimited strict liability. Nevertheless, in recognition of Congress' authorization of limited strict liability in FLPMA, PG&E's proposed alternative Condition No. 21 imposes strict liability on PG&E if the USFS determines pursuant to a risk assessment prepared in accordance with established agency procedures that one or more activities at UNFFR is a "high risk use and occupancy." However, consistent with Congress' intent in enacting FLPMA and the USFS implementing regulations, PG&E's proposed alternative Condition No. 21 limits PG&E's strict liability exposure to that determined by such risk assessment, with such risk exposure limited to \$1 million per any one occurrence, and provides that any liability in excess of the amount specified in the risk assessment shall be determined by the laws governing ordinary negligence in the local jurisdiction.

PG&E's proposed alternative Condition No. 21 also limits PG&E's liability to "reasonable" damages, costs, and expenses, and provides PG&E with a fair opportunity to review and contest the validity of all such charges. Further, to avoid the possibility of abuse in the assessment of charges for the "value of lost resources" and "rehabilitation and restoration costs," and given the inherent uncertainty in determining "value" and appropriate rehabilitation and

restoration costs, the proposed alternative condition specifies that charges for such items "shall not exceed the commercial value of lost timber." In addition, to ensure that PG&E is not inappropriately made strictly liable for the acts of the United States or other third parties outside of its control, the proposed alternative condition specifies that PG&E's liability thereunder shall not extend to acts or omissions of such third parties.

D. PG&E's Alternative Condition No. 21 Will Provide For The Adequate Protection And Utilization Of The NFs

It is clear that imposing unlimited strict liability on PG&E is not necessary "for the adequate protection and utilization" of the NFs (§ 4(e)) and therefore that PG&E's alternative Condition No. 21 providing for limited strict liability will provide for the "adequate protection and utilization" of those reservations as specified in § 33 (a)(2)(A) of the FPA.

Specifically, and as noted above, Congress in FLPMA gave the USFS the authority to condition SUAs for the same general purposes for which Congress in the FPA gave the USFS the authority to impose mandatory § 4(e) conditions in FERC licenses: to provide for the protection and utilization of the federal lands involved. Yet, Congress determined in FLPMA that these purposes could be met with strict liability capped at a maximum limit commensurate with the foreseeable risks or hazards, while the USFS, in promulgating FLPMA's implementing regulations, limited strict liability to "high risk use and occupancy, such as, but not limited to, powerlines and oil and gas pipelines," capped the maximum liability at \$1 million per occurrence, and required a prior specific risk assessment. Further, both FLPMA and the USFS regulations provide that ordinary rules of negligence in the local jurisdiction are to govern liability above these strict liability limits. Clearly, if unlimited strict liability is not necessary to provide for the protection and utilization of federal lands under FLPMA, unlimited strict liability is not necessary to provide for the protection and utilization of the NFs under § 4(e) of the FPA.

The USFS cannot justify imposing radically different strict liability provisions (unlimited) on PG&E given these prior determinations by Congress and the USFS itself. The UNFFR Project does not pose any greater risk than these other types of uses, and the USFS cannot explain why PG&E should be subject to unlimited strict liability for events PG&E did not cause (*e.g.*, a fire caused by a powerline being hit by a drunken driver or by a tree uprooted by a storm) while these other users are not. UNFFR's primary transmission lines certainly cannot be viewed as posing a greater risk justifying unlimited strict liability, given that the USFS has already made the determination that "powerlines" carry a maximum strict liability exposure of \$1 million per occurrence. The mere existence of UNFFR also cannot be viewed as posing a greater risk, since most jurisdictions, including California, do not classify hydro plants as ultrahazardous activities to which strict liability attaches. *See 78 Am Jur. 2d Waters* § 266. Further, the USFS cannot justify imposition of strict liability on UNFFR without first preparing a specific risk assessment for the Project given both Congress' and the USFS' prior determinations that such assessments are a condition precedent to the imposition of strict liability.

The fact that additional recreation might take place on the NFs as a result of the existence of UNFFR also does not provide any justification for unlimited strict liability. The USFS is authorized under its regulations to grant SUAs for "hotels, resorts, and other structures and facilities for recreation" (36 C.F.R. § 251.53(d)), "recreation events and other specialized recreation uses" (36 C.F.R. § 251.53(k)), and "operation of nordic and alpine ski areas and facilities" (36 C.F.R. § 251.53(n)). The USFS regulations governing strict liability (and the limits thereon) are equally applicable to SUAs issued for these activities. Indeed, the USFS regulations themselves indicate that SUAs are *not* even required for (and thus the imposition of strict liability provisions through SUA terms cannot occur as to) "noncommercial recreational

activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating" (36 C.F.R. § 251.50(c)). In light of this, the USFS clearly cannot use increased recreation as a justification for unlimited strict liability.

Finally, PG&E notes that limiting the strict liability exposure of PG&E and other licensees consistent with the provisions of FLPMA and the USFS implementing regulations is certainly not an unusual or unprecedented action for the USFS. The USFS, in its November 14, 2003 final § 4(e) conditions for PG&E's Pit 3, 4, 5 Hydroelectric Project No. 233, included a strict liability provision therein (Condition No. 9) that limited PG&E's strict liability to "high risk use or occupancy" covered by the license, capped PG&E's strict liability exposure at \$1 million per occurrence, excluded from its scope damages resulting from acts of the United States or third parties, and specified that PG&E's liability in excess of the cap was to be determined according to the laws governing ordinary negligence. In other words, the USFS has already endorsed a strict liability provision generally comparable to PG&E's alternative Condition No. 21.

In summary, and as verified by the USFS' own actions in establishing § 4(e) conditions for PG&E's Project No. 233, there is simply no reason why imposing unlimited strict liability on PG&E is in any way necessary for the adequate protection and utilization of the NFs. PG&E's alternative Condition No. 21 providing for limited strict liability and containing the other limited constraints discussed above will provide for the adequate protection and utilization of the NFs.

E. PG&E's Alternative Condition No. 21 Will Cost Significantly Less To Implement Than USFS Condition No. 21

PG&E's alternative Condition No. 21 will clearly cost significantly less to implement than USFS Condition No. 21. PG&E's alternative, by providing for limited strict liability with a maximum exposure of \$1,000,000 per occurrence (assuming the required risk

assessment determines that one or more activities at the Project is a high risk use), limiting PG&E's exposure to "reasonable" damages, etc., capping certain costs at the commercial value of any timber lost, providing PG&E with a fair opportunity to review and contest charges, and excluding the acts of the United States and other third parties from the scope of liability, obviously will cost PG&E significantly less to implement in the event some incident causing damage to United States lands or interests occurs than if USFS Condition No. 21, with its unlimited strict liability and absence of the above-discussed reasonable constraints, were in the license.

II. Condition No. 19- Indemnification

USFS Condition:

The Licensee shall indemnify, defend, and hold the United States harmless for any damages or losses sustained by the United States and for judgments, claims, or demands assessed against the United States, in connection with the Licensee's use or occupancy authorized by this license. The licensee's indemnification of the United States, shall include, but not be limited to, any loss by personal injury, loss of life and damage to property in connection with the occupancy or use authorized by this license. Indemnification shall include, but not be limited to, the value of resources damaged or destroyed; the costs of restoration, cleanup, and other mitigation; fire suppression and other types of abatement costs; third party claims and judgments; and all administrative costs, interest, and other legal expenses. This paragraph shall survive the termination of this license, regardless of cause.

PG&E's Alternative Condition (Blackline Of USFS Condition):⁴

The Licensee shall indemnify, defend, and hold the United States harmless for any damages or losses sustained by the United States and for judgments, claims, or demands assessed against the United States, in connection with the Licensee's use or occupancy authorized by this license; provided, however, that the provisions of this condition do not apply to any damages, judgments, claims, or demands arising out of the negligence, recklessness, or willful misconduct of the United States or other third parties or to damages, judgments, claims, or demands arising out of any activity initially occurring outside the Project boundary or outside National Forest System lands. The licensee's indemnification of the United States; shall include, but not be limited to, any loss by

⁴ A clean version of USFS Condition No. 19 incorporating the changes proposed by PG&E is appended hereto as Attachment B.

personal injury, loss of life and damage to property in connection with the occupancy or use of National Forest System lands authorized by this license. Indemnification shall include, but not be limited to, the value of resources damaged or destroyed; the costs of restoration, cleanup, and other mitigation; fire suppression and other types of abatement costs; third party claims and judgments; and all administrative costs, interest, and other legal expenses. ~~This paragraph shall survive the termination of this license, regardless of cause. The Licensee's liability hereunder shall be limited to reasonable damages, costs, claims, and judgments. Upon surrender, transfer, or termination of the license, the Licensee's obligation to indemnify, defend, and hold the United States harmless shall survive for all valid claims that arose prior to such surrender, transfer, or termination.~~

Discussion

USFS Condition No. 19 would require PG&E to "indemnify, defend, and hold the United States harmless" for any damages or losses sustained by it and for judgments, claims, and demands against the United States "in connection with" UNFFR's use or occupancy of NF's lands. Given its vagueness and broad wording, this indemnification provision presumably would require PG&E to indemnify the government for actions stemming from the negligence, recklessness, and even willful misconduct of USFS personnel and other third parties in connection with the Project and for activities that initially occur outside of Project boundaries or outside Forest Service lands. Further, this condition would require PG&E to pay for all charges irrespective of their reasonableness, since the condition does not limit PG&E's liability to "reasonable" charges, claims, etc.

USFS Condition No. 19 is void for vagueness, contrary to law, USFS regulations, and public policy, and unreasonable. Alternative Condition No. 19 submitted by PG&E would clarify that it is the actions of PG&E, as opposed to actions by the USFS or some other entity or individual, that are covered by the condition, would exclude from its coverage the negligence, recklessness, and willful misconduct of USFS personnel and other third parties, and would exclude from its coverage activities that initially occur outside of Project boundaries or outside Forest Service lands. PG&E's alternative Condition No. 19 also would limit PG&E's exposure to

"reasonable" charges, claims, etc., and state with more clarity PG&E's post-license obligations with respect to prior claims. PG&E's alternative Condition No. 19 would provide for the adequate protection and utilization of the NFs and, in comparison to USFS Condition No. 19, would cost significantly less to implement. Consequently, pursuant to § 33(a)(2) of the FPA and 7 C.F.R. § 1.673(b), the USFS must adopt PG&E's alternative Condition No. 19.

A. USFS Condition No. 19 Is Void For Vagueness, Contrary To Law, USFS Regulations, And Public Policy, And Unreasonable

USFS Condition No. 19, by failing to specify which entity's actions it is intended to cover (*i.e.*, PG&E, the USFS, or some other entity or individual) is void on its face for vagueness. In order to be valid, the entity whose actions are covered must be set forth clearly.

USFS Condition No. 19's provision making PG&E liable for actions of USFS personnel and other third parties is contrary to law and USFS regulations. Specifically, under FLPMA, entities that want to use USFS lands for any purpose must obtain a SUA from the USFS for such use. As discussed in more detail, *supra*, FLPMA specifies that the USFS is to include in SUAs conditions for the protection and utilization of the federal lands involved. With regard to indemnification, 43 U.S.C § 1764(h)(1) (set forth previously) provides that the USFS regulations implementing FLPMA "shall ... specify the extent to which *holders* shall indemnify or hold harmless the United States for liabilities, damages, or claims *caused by their use and occupancy*" (emphasis added). The USFS implementing regulations mirror the requirement that the indemnification be limited to liability "caused by the holder's use or occupancy." *See* 36 C.F.R. § 251.56 (d)(1) (set forth previously). Clearly, both Congress in enacting FLPMA and the USFS in promulgating its implementing regulations, intended to limit indemnification to liability caused by the activities of the holder of the SUA, not the activities of USFS personnel or other third parties.

As discussed in more detail *supra*, it is appropriate to construe Congress' intent as to the type of conditions that can be included in SUAs as governing the type of conditions that can be imposed in a license pursuant to § 4(e) of the FPA. Accordingly, given Congress' determination in FLPMA to limit indemnification to liability caused by the activities of users of federal lands, USFS § 4(e) Condition No. 19, to the extent it attempts to require PG&E to indemnify the United States for the negligence, recklessness, and willful misconduct of USFS personnel and other third parties is contrary to law.

Requiring such indemnification is also contrary to public policy. As courts have explained in the past, provisions purporting to require entities to indemnify others for their intentional or willful wrongful acts are against public policy. *See, e.g., Equitex, Inc. & Fong v. Ungar*, 60 P.3d 746 (Colo. App. 2002). *See also Titan Steel Corp. v. Walton*, 365 F.2d 542, 548 (10th Cir. 1966) ("Much has been said concerning the enforceability of so-called release-from-negligence contracts whereby one possessed of superior bargaining power is enabled to contract against liability for his own negligence. The federal view is that they are contrary to public policy, especially contracts affected with a public interest and involving the performance of a public duty."), and Cal. Civil Code § 1668 ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.").

It is also clearly inappropriate and unreasonable to make PG&E, as a condition of a license for UNFFR, indemnify the United States for activities that initially occur outside the Project boundary or outside Forest Service lands (*e.g.*, a fire started by a third party on non-Project lands or on non-Forest Service lands within the Project boundary that spreads to Forest

Service lands). Such activities have no direct relationship to the Project or to PG&E activities and PG&E should not be required to bear indemnification responsibilities for such events. Equally inappropriate and unreasonable is the failure of USFS Condition No. 19 to limit PG&E's liability thereunder to "reasonable" damages, costs, claims, and judgments. In the absence of a "reasonable" limitation, PG&E would be required to pay all damages, claims, etc., no matter how unreasonable, thus potentially subjecting PG&E to inflated claims, unsupportable charges, and the results of ill-advised and inappropriate settlements entered into by the United States.

B. PG&E's Alternative Condition No. 19 Will Provide For the Adequate Protection And Utilization Of The NFs

As discussed previously, Congress in FLPMA gave the USFS the authority to condition SUAs for the same general purposes for which Congress in the FPA gave the USFS the authority to impose mandatory § 4(e) conditions in licenses: to provide for the protection and utilization of the federal lands involved. Also as discussed previously, Congress in enacting FLPMA, and the USFS in promulgating the FLPMA implementing regulations, specified that, in conditioning SUAs, indemnification and hold harmless provisions were to be limited to liabilities, damages, or claims *caused by* the holder's use and occupancy.

Given that Congress in enacting FLPMA determined that limiting indemnification provisions to liabilities caused by the SUA holder's use and occupancy would provide for the adequate protection and utilization of the federal lands involved, it is clear that a comparably limited § 4(e) indemnification condition would also provide for the adequate protection and utilization of the affected reservations (the NFs). PG&E's alternative Condition No. 19, while appropriately eliminating PG&E's indemnification liability for actions taken by USFS personnel and other third parties, clearly provides that PG&E shall indemnify and hold the United States harmless for all liabilities, damages, and claims *caused by* UNFFR 's use and occupancy of the

NFs. Accordingly, and since the other clarifications and limited constraints of PG&E's alternative Condition No. 19 are clearly reasonable, that condition will provide for the "adequate protection and utilization" of the NFs as specified in § 33(a)(2)(A) of the FPA.

C. PG&E's Alternative Condition No. 19 Will Cost Significantly Less To Implement Than USFS Condition No. 19

PG&E's alternative Condition No. 19 will clearly cost significantly less to implement than USFS Condition No. 19. PG&E's alternative, by excluding from indemnification liability claims arising out of negligence, recklessness, and willful misconduct of USFS personnel and other third parties and activities initially occurring outside the Project's boundary or outside Forest Service lands, and limiting liability to "reasonable" damages, claims, etc., obviously will cost PG&E significantly less to implement in the event such excluded activities or unreasonable damages, claims, etc. occur than if the unconstrained indemnification provisions of USFS Condition No. 19 were in the license.

III. Condition No. 9 - Fire Prevention, Response, and Investigation

USFS Condition:

A. Fire Prevention And Response Plan

Within one year of license issuance the Licensee shall file with the Commission a Fire Prevention and Response Plan that is approved by the Forest Service, and developed in consultation with appropriate State and local fire agencies. The plan shall set forth in detail the Licensee's responsibility for the prevention (excluding vegetation treatment as described in Condition No. 41), reporting, control, and extinguishing of fires in the vicinity of the Project.

At a minimum the plan shall address the following categories:

1. Fuels Treatment/Vegetation Management

Identification of fire hazard reduction measures to prevent the escape of project-induced fires.

2. Prevention

Availability of fire access roads, community road escape routes, helispots to allow aerial firefighting assistance in the steep canyon, water drafting sites and other fire suppression strategies.

Address fire danger and public safety associated with project-induced recreation, including fire danger associated with dispersed camping, existing and proposed developed recreation sites, trails, and vehicle access.

3. Emergency response preparedness

Analyze fire prevention needs including equipment and personnel availability.

4. Reporting

Licensee shall report any project related fires to the Forest Service within 24 hours.

5. Fire control/Extinguishing

Provide the Forest Service a list of the locations of available fire suppression equipment and the location and availability of fire suppression personnel.

Include appropriate measures from Condition 41 and assure fire prevention measures will conform to water quality protection practices as enumerated in USDA, Forest Service, Pacific Southwest Region, Water Quality Management for National Forest System Lands in California-Best Management Practices.

B. Investigation of Project Related Fires

The Licensee agrees to fully cooperate with the Forest Service on all fire investigations. The Licensee shall produce upon request all material and witnesses, over which the Licensee has control, related to the fire and its investigation including:

All investigation reports

All witness statements

All photographs

All drawings

All analysis of cause and origin

All other, similar materials and documents regardless of how collected or maintained

The Licensee shall preserve all physical evidence, and give custody to the Forest Service of all physical evidence requested.

PG&E's Alternative Condition (Blackline Of USFS Condition):⁵

A. Fire Prevention And Response Plan

Within one year of license issuance the Licensee shall file with the Commission a Fire Prevention and Response Plan that is approved by the Forest Service, and developed in consultation with appropriate State and local fire agencies. The plan shall set forth in detail the Licensee's responsibility for the prevention (excluding vegetation treatment as described in Condition No. 41), reporting, control, and extinguishing of fires in the vicinity of National Forest System lands within the Project boundary.

At a minimum the plan shall address the following categories:

1. Fuels Treatment/Vegetation Management

Identification of fire hazard reduction measures to prevent the escape of project-induced fires.

2. Prevention

Availability of fire access roads, community road escape routes, helispots to allow aerial firefighting assistance in the steep canyon, water drafting sites and other fire suppression strategies.

Address fire danger and public safety associated with project-induced recreation, including fire danger associated with dispersed camping, existing and proposed developed recreation sites, trails, and vehicle access.

3. Emergency response preparedness

Analyze fire prevention needs including equipment and personnel availability.

4. Reporting

Licensee shall report any project related fires to the Forest Service within 24 hours.

5. Fire control/Extinguishing

Provide the Forest Service a list of the locations of available fire suppression equipment and the location and availability of fire suppression personnel.

⁵ A clean version of USFS Condition No. 9 incorporating the changes proposed by PG&E is appended hereto as Attachment C.

Include appropriate measures from Condition 41 and assure fire prevention measures will conform to water quality protection practices as enumerated in USDA, Forest Service, Pacific Southwest Region, Water Quality Management for National Forest System Lands in California-Best Management Practices.

B. Investigation of Project Related Fires

The Licensee agrees to fully cooperate with the Forest Service on all fire investigations to the same extent and in the same manner as the Forest Service cooperates with the Licensee on such investigations. The Licensee shall produce upon request all ~~material~~ materials not subject to the attorney-client or attorney work product privileges and witnesses, over which the Licensee has control, related to the fire and its investigation including:

All investigation reports

All witness statements

All photographs

All drawings

All analysis of cause and origin

All other, similar materials and documents regardless of how collected or maintained.

The Licensee shall preserve all physical evidence, and give custody to the Forest Service of all physical evidence requested; provided, however, that the Licensee is not obligated to give custody of any physical evidence to the Forest Service if the Forest Service fails to provide the Licensee with reasonable access to the physical evidence, documents, and other materials the Licensee, in its reasonable discretion, determines it requires in order to defend any and all claims against it that arise from a fire within the Project boundaries.

Discussion

USFS Condition No. 9 would require PG&E to prepare a plan for the prevention, reporting, control, and extinguishment of fires "in the vicinity of the Project." Further, it would require PG&E to provide the USFS with "all material" (documents, witness statements, etc.) related to the fire and its investigation, and require PG&E to preserve and give custody of all physical evidence to the USFS upon request.

USFS Condition No. 9 is contrary to law and unreasonable. Alternative Condition 9 submitted by PG&E would appropriately limit the scope of the required plan to

USFS lands within the Project boundaries, would clarify that PG&E is not required to provide the USFS with materials subject to the attorney-client or attorney work product privileges, and would condition PG&E's obligation to cooperate with and provide physical evidence to the USFS on the USFS providing similar cooperation to PG&E. PG&E's alternative Condition No. 9 would provide for the adequate protection and utilization of the NFs and, in comparison to USFS Condition No. 9, would cost significantly less to implement. Consequently, pursuant to § 33(a)(2) of the FPA and 7 C.F.R. § 1.673(b), the USFS must adopt PG&E's alternative Condition No. 9.

A. USFS Condition No. 9 Is Contrary To Law And Unreasonable

USFS Condition No. 9 is contrary to law in two respects. First, as the Supreme Court made clear in its *Escondido* decision, the USFS' § 4(e) mandatory conditioning authority does not extend to non-Forest Service lands or to Forest Service lands not within the boundaries of a licensed project (466 U.S. at 781): "The section [§ 4(e)] imposes no obligation on the Commission or power upon the Secretary, with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works." *See also Upper Peninsula Power Co.*, 110 FERC ¶ 61,141 (2005) ("*Upper Peninsula*"), where FERC refused to include in a license § 4(e) conditions pertaining to non-Forest Service lands or to lands not within the project's boundaries and where it held as follows (*id.* at p. 61,555):

[W]e are not required to include in licenses conditions pertaining to reservations that are affected by a project, but contain no project works. Nor may the Forest Service impose conditions on projects or portions of projects that are not located on reservations under its supervision. For this reason, the Forest Service's conditioning authority does not extend to portions of the project that do not occupy, but are merely adjacent to, national forest lands.

The requirement of USFS Condition No. 9 that the fire plan cover fires "in the vicinity of the Project" clearly is contrary to law, since it would impermissibly apply to fires on lands outside

UNFFR's boundaries and on non-Forest Service lands within those boundaries, and thus is not limited to fires as to which the USFS has authority to impose conditions under § 4(e) pursuant to the above precedent: fires on USFS lands within the Project's boundaries. This provision suffers from the additional defect of being void for vagueness, since "in the vicinity" is undefined and indefinable.

Second, USFS Condition No. 9, by specifying that PG&E is to provide the USFS with "all materials," would require PG&E to produce all documents and other materials in its possession, including those covered by the attorney-client and attorney work product privileges. However, the courts have made clear that the First Amendment's guarantee of free speech encompasses the right of an entity to consult with an attorney on any legal matter, and that it is a violation of that right for the government to require, as a condition of a contract, that an entity waive its attorney-client and related privileges. *See, e.g., Denius v. Dunlap*, 209 F.3d 944, 953-955 (7th Cir. 2000), where the court, citing *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971), noted (209 F.3d at 954) that the First Amendment prohibits the government from interfering with individuals seeking legal advice and retaining legal counsel and (*id.*) that the ability to maintain confidentiality in attorney-client communications is an important component of the right to obtain legal advice (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). The court concluded (*id.*):

Because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client's First Amendment right to obtain legal counsel.

The court therefore held that a state's requirement that an employee as a condition of his employment contract waive his attorney-client privilege violated the First Amendment.

Accordingly, the requirement of USFS Condition No. 9 that PG&E produce "all materials" without an exception for materials covered by the attorney-client or attorney work product privileges violates the First Amendment's guarantee of free speech. While the government can infringe on First Amendment rights in certain cases if it has a compelling reason for doing so, the USFS has not presented, and PG&E is not aware of, any such justification in the case of USFS Condition No. 9.

USFS Condition No. 9 is also unreasonable. First, it would make PG&E responsible for preventing, controlling, and extinguishing fires on non-Project lands that it did not cause and for which it has no responsibility. Second, it would require PG&E to cooperate with the USFS on fire investigations and to provide the USFS with all physical evidence related thereto, but fails to impose on the USFS reciprocal obligations to cooperate with PG&E on fire investigations and to provide PG&E with any physical evidence and documents it might need to defend claims arising from a fire within the Project's boundaries.

E. PG&E's Alternative Condition No. 9 Will Provide For The Adequate Protection And Utilization Of The NFs

Since the USFS' authority under § 4(e) is limited to Forest Service lands within UNFFR's boundaries, limiting the scope of the required fire plan so that it coincides with the scope of the USFS' § 4(e) authority as proposed in PG&E's alternative Condition 9 does not in any way adversely affect the NFs, and the alternative condition with this limitation will provide for the adequate protection and utilization of the NFs. The other changes to USFS Condition No. 9 proposed by PG&E -- exempting from production materials covered by the attorney-client and attorney work product privileges so as to not violate the First Amendment, and requiring reciprocal cooperation by the USFS -- also do not in any way adversely affect the NFs. Indeed, PG&E notes in this regard that the USFS, in submitting to FERC its final § 4(e) conditions for

Southern California Edison Company's Portal Hydroelectric Project No. 2174 less than three months ago, specifically excepted materials subject to the attorney-client and attorney work product privileges from the requirement to provide fire investigation materials to the USFS and obligated the USFS to cooperate with the licensee by providing it with evidence and documents it needs to defend actions. See the September 30, 2005 final § 4(e) conditions for Project No. 2174 (Condition No. 16A, at pp. 18-19). Accordingly, PG&E's alternative Condition No. 9 will provide for the "adequate protection and utilization" of the NFs as specified in § 33(a)(2)(A) of the FPA.

C. PG&E's Alternative Condition No. 9 Will Cost Significantly Less To Implement Than USFS Condition No. 9

PG&E's alternative Condition No. 9 will clearly cost significantly less to implement than USFS Condition No. 9. PG&E's alternative, by excluding non-Project and non-Forest Service lands from the scope of PG&E's obligation under the fire plan to control and extinguish fires, obviously will cost PG&E significantly less to implement in the event a fire on such excluded lands occurs than if the provisions of USFS Condition No. 9 were in the license. Similarly, even if such a fire were never to occur, PG&E's alternative would cost significantly less to implement, since under it PG&E would not be required to incur expenses to prevent fires on non-Project lands.

IV. Conditions With Impermissible Geographic Scope

Condition No. 4 - Approval of Changes

USFS Condition:

Notwithstanding any Commission approval or license provisions to make changes to the Project, the Licensee shall obtain written approval from the Forest Service prior to making any changes in the location of any constructed Project features or facilities, or in the uses of Project lands and waters, or any departure from the requirements of any approved exhibits filed with the Commission. Following receipt of such approval from

the Forest Service, and at least 60 days prior to initiating any such changes or departure, the Licensee shall file a report with the Commission describing the changes, the reasons for the changes, and showing the approval of the Forest Service for such changes. The Licensee shall file an exact copy of this report with the Forest Service at the same time it is filed with the Commission. This article does not relieve the Licensee from the amendment or other requirements of Article 2 or Article 3 of this license.

PG&E's Alternative Condition (Blackline Of USFS Condition):⁶

Notwithstanding any Commission approval or license provisions to make changes to the Project, when such changes are to occur on National Forest System lands the Licensee shall obtain written approval from the Forest Service prior to making any changes in the location of any constructed Project features or facilities, or in the uses of Project lands and waters, or any departure from the requirements of any approved exhibits filed with the Commission. Following receipt of such approval from the Forest Service, and at least 60 days prior to initiating any such changes or departure, the Licensee shall file a report with the Commission describing the changes, the reasons for the changes, and showing the approval of the Forest Service for such changes. The Licensee shall file an exact copy of this report with the Forest Service at the same time it is filed with the Commission. This article does not relieve the Licensee from the amendment or other requirements of Article 2 or Article 3 of this license.

Condition No. 6 - Surrender of License or Transfer of Ownership

USFS Condition:

Prior to any surrender of this license, the Licensee shall provide assurance acceptable to the Forest Service that Licensee shall restore National Forest System resources to a condition satisfactory to the Forest Service upon or after surrender of the license, as appropriate. The restoration plan shall identify the measures to be taken to restore National Forest System resources and shall include adequate financial assurances such as a bond or letter of credit, to ensure performance of the restoration measures.

In the event of any transfer of the license or sale of the Project, the Licensee shall guarantee or assure that, in a manner satisfactory to the Forest Service, the Licensee or transferee will provide for the costs of surrender and restoration. If deemed necessary by the Forest Service to assist it in evaluating the Licensee's proposal, the Licensee shall conduct an analysis, using experts approved by the Forest Service, to estimate the potential costs associated with surrender and restoration of the Project area to Forest Service specifications. In addition, the Forest Service may require the Licensee to pay for an independent audit of the transferee to assist the Forest Service in determining whether the transferee has the financial ability to fund the surrender and restoration work specified in the analysis.

⁶ A clean version of USFS Condition No. 4 incorporating the changes proposed by PG&E is appended hereto as Attachment D.

PG&E's Alternative Condition (Blackline of USFS Condition):⁷

Prior to any surrender of this license, the Licensee shall provide assurance acceptable to the Forest Service that Licensee shall restore National Forest System resources within the Project boundary to a condition satisfactory to the Forest Service upon or after surrender of the license, as appropriate. The restoration plan shall identify the measures to be taken to restore such National Forest System resources and shall include adequate financial assurances such as a bond or letter of credit, to ensure performance of the restoration measures.

In the event of any transfer of the license or sale of the Project, the Licensee shall guarantee or assure that, in a manner satisfactory to the Forest Service, the Licensee or transferee will provide for the costs of surrender and restoration. If deemed necessary by the Forest Service to assist it in evaluating the Licensee's proposal, the Licensee shall conduct an analysis, using experts approved by the Forest Service, to estimate the potential costs associated with surrender and restoration of National Forest System lands within the Project area boundary to Forest Service specifications. In addition, the Forest Service may require the Licensee to pay for an independent audit of the transferee to assist the Forest Service in determining whether the transferee has the financial ability to fund the surrender and restoration work on National Forest System lands within the Project boundary specified in the analysis.

Condition No. 10 - Road Use by Government

USFS Condition:

The United States shall have unrestricted use of any road within the project area for all purposes deemed necessary and desirable in connection with the protection, administration, management, and utilization of National Forest System lands or resources and shall have the right to extend rights and privileges of use of such road to States and local subdivisions thereof, as well as to other users, including members of the public, except contractors, agents, and employees of the Licensee; provided that the agency having jurisdiction shall control such use so as not to unreasonably interfere with the safety or security uses, or cause the Licensee to bear a share of the costs of maintenance greater than the Licensee's use bears to all use of the road.

PG&E's Alternative Condition (Blackline Of USFS Condition):⁸

The United States shall have unrestricted use of any road over which it has jurisdiction within the project area for all purposes deemed necessary and desirable in connection with the protection, administration, management, and utilization of National Forest

⁷ A clean version of USFS Condition No. 6 incorporating the changes proposed by PG&E is appended hereto as Attachment E.

⁸ A clean version of USFS Condition No. 10 incorporating the changes proposed by PG&E is appended hereto as Attachment F.

System lands or resources and shall have the right to extend rights and privileges of use of such road to States and local subdivisions thereof, as well as to other users, including members of the public, except contractors, agents, and employees of the Licensee; provided that the agency having jurisdiction shall control such use so as not to unreasonably interfere with the safety or security uses, or cause the Licensee to bear a share of the costs of maintenance greater than disproportionate to the Licensee's use bears in comparison to all the use of the road by others.

Condition No. 11 - Road Use

USFS Condition:

The Licensee shall confine all project vehicles, including but not limited to administrative and transportation vehicles and construction and inspection equipment, to roads or specifically designed access routes, as identified in the Road Management and Maintenance Plan (refer to Condition No. 42). The Forest Service reserves the right to close any and all such routes where damage is occurring to the soil or vegetation, or, if requested by Licensee, to require reconstruction/construction by the Licensee to the extent needed to accommodate the Licensee's use. The Forest Service agrees to provide notice to the Licensee and the Commission prior to road closures, except in an emergency, in which case notice will be provided as soon as practicable.

PG&E's Alternative Condition (Blackline Of USFS Condition):⁹

~~The~~On National Forest System lands within the Project boundary, the Licensee shall confine all project vehicles, including but not limited to administrative and transportation vehicles and construction and inspection equipment, to roads or specifically designed access routes, as identified in the Road Management and Maintenance Plan (refer to Condition No. 42). The Forest Service reserves the right to close any and all such routes where damage is occurring to the soil or vegetation, or, if requested by Licensee, to require reconstruction/construction by the Licensee to the extent needed to accommodate the Licensee's use. The Forest Service agrees to provide notice to the Licensee and the Commission prior to road closures, except in an emergency, in which case notice will be provided as soon as practicable.

Condition No. 17 - Compliance with Regulations

USFS Condition:

The Licensee shall comply with the regulations of the Department of Agriculture and all federal, state, county, and municipal laws, ordinances, or regulations in regards to the area or operations covered by this license, to the extent those laws, ordinances, or regulations are not preempted by federal law.

⁹ A clean version of USFS Condition No. 11 incorporating the changes proposed by PG&E is appended hereto as Attachment G.

PG&E's Alternative Condition (Blackline Of USFS Condition):¹⁰

The Licensee shall comply with the regulations of the Department of Agriculture and all federal, state, county, and municipal laws, ordinances, or regulations in regards to the area or operations covered by this license on National Forest System lands, to the extent those laws, ordinances, or regulations are not preempted by federal law.

Condition No. 20 - Surveys, Land Corners

USFS Condition:

The Licensee shall avoid disturbance to all public land survey monuments, private property corners, and forest boundary markers. In the event that any such land markers or monuments are destroyed by an act or omission of the Licensee, in connection with the use and/or occupancy authorized by this license, depending on the type of monument destroyed, the Licensee shall reestablish or reference same in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the County Surveyor, or (3) the specifications of the Forest Service.

Further, the Licensee shall ensure that any such official survey records affected are amended as provided by law.

PG&E's Alternative Condition (Blackline Of USFS Condition):¹¹

The Licensee shall avoid disturbance to all public land survey monuments, private property corners, and forest boundary markers. In the event that any such land markers or monuments on National Forest System lands within the Project boundary are destroyed by an act or omission of the Licensee, in connection with the use and/or occupancy authorized by this license, depending on the type of monument destroyed, the Licensee shall reestablish or reference same in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the County Surveyor, or (3) the specifications of the Forest Service.

Further, the Licensee shall ensure that any such official survey records affected are amended as provided by law.

¹⁰ A clean version of USFS Condition No. 17 incorporating the changes proposed by PG&E is appended hereto as Attachment H.

¹¹ A clean version of USFS Condition No. 20 incorporating the changes proposed by PG&E is appended hereto as Attachment I.

Condition No. 22 - Risks and Hazards

USFS Condition:

As part of the occupancy and use of the license area, the Licensee has a continuing responsibility to identify and report all hazardous conditions within the project boundary that would affect the improvements, resources, or pose a risk of injury to individuals. Licensee will abate those conditions, except those caused by third parties not related to the occupancy and use authorized by the License. Any non-emergency actions to abate such hazards on National Forest System lands shall be performed after consultation with the Forest Service. In emergency situations, the Licensee shall notify the Forest Service of its actions as soon as possible, but not more than 48 hours, after such actions have been taken. Whether or not the Forest Service is notified or provides consultation; the Licensee shall remain solely responsible for all abatement measures performed. Other hazards should be reported to the appropriate agency as soon as possible.

PG&E's Alternative Condition (Blackline Of USFS Condition):¹²

As part of the occupancy and use of the license area, the Licensee has a continuing responsibility to identify and report all known or observed hazardous conditions on National Forest System lands within the Project boundary that would affect the improvements, resources, or pose a risk of injury to individuals. Licensee will abate those conditions, except those caused by third parties or not related to the occupancy and use authorized by the License. Any non-emergency actions to abate such hazards on National Forest System lands shall be performed after consultation with the Forest Service. In emergency situations, the Licensee shall notify the Forest Service of its actions as soon as possible, but not more than 48 hours, after such actions have been taken. Whether or not the Forest Service is notified or provides consultation; the Licensee shall remain solely responsible for all abatement measures performed. Other hazards should be reported to the appropriate agency as soon as possible.

Condition No. 44 - Special Status Species

USFS Condition:

The Licensee shall, beginning the first full calendar year after license issuance, in consultation with the Forest Service, annually review the current list of special status plant and wildlife species (species that are Federal Endangered or Threatened, Forest Service Sensitive, or Lassen and Plumas National Forest Watch Lists) that might occur within the Project Boundary. When a species is added to one or more of the lists, the Forest Service in consultation with the Licensee shall determine if the species or un-surveyed suitable habitat for the species is likely to occur within the Project Boundary. For such newly added species, if the Forest Service determines that the species is likely to occur, the Licensee shall develop and implement a study plan in consultation with the Forest Service to reasonably assess the effects of the Project on the species. The

¹² A clean version of USFS Condition No. 22 incorporating the changes proposed by PG&E is appended hereto as Attachment J.

Licensee shall prepare a report on the study including objectives, methods, results, recommended resource measures where appropriate, and a schedule of implementation, and shall provide a draft of the final report to the Forest Service for review and approval. The Licensee shall file the report, including evidence of consultation, with the Commission and shall implement those resource management measures required by the Commission.

In addition, areas within the Project Boundary that have suitable habitat or known occurrences of selected special status wildlife or plant species shall be resurveyed every ten years in order to (a) determine if special status plant or wildlife species have changed in location (i.e. migrated into or moved within the Project Boundary), and (b) monitor for impacts caused by on-going Project activities. The licensee shall consult with the Forest Service to determine which species need to be resurveyed. The survey interval may be adjusted based on the amount of movement or impacts to the species that are observed. Survey results shall be provided to the Forest Service. If the Forest Service determines that negative impacts have occurred, the Licensee shall submit a proposal for actions to reduce or eliminate impacts to special status species. The Licensee shall file the report, including evidence of consultation, with the Commission and shall implement those resource management measures required by the Forest Service and approved by the Commission.

PG&E's Alternative Condition (Blackline Of USFS Condition):¹³

The Licensee shall, beginning the first full calendar year after license issuance, in consultation with the Forest Service, annually review the current list of special status plant and wildlife species (species that are Federal Endangered or Threatened, Forest Service Sensitive, or Lassen and Plumas National Forest Watch Lists) that might occur on National Forest System lands within the Project Boundary. When a species is added to one or more of the lists, the Forest Service in consultation with the Licensee shall determine if the species or un-surveyed suitable habitat for the species is likely to occur on National Forest System lands within the Project Boundary. For such newly added species, if the Forest Service determines that the species is likely to occur on such National Forest System lands, the Licensee shall develop and implement a study plan in consultation with the Forest Service to reasonably assess the effects of the Project on the species. The Licensee shall prepare a report on the study including objectives, methods, results, recommended resource measures where appropriate, and a schedule of implementation, and shall provide a draft of the final report to the Forest Service for review and approval. The Licensee shall file the report, including evidence of consultation, with the Commission and shall implement those resource management measures required by the Commission.

¹³ A clean version of USFS Condition No. 44 incorporating the changes proposed by PG&E is appended hereto as Attachment K.

In addition, areas National Forest System lands within the Project Boundary that have suitable habitat or known occurrences of selected special status wildlife or plant species shall be resurveyed every ten years in order to (a) determine if special status plant or wildlife species have changed in location (i.e. migrated into or moved within the Project Boundary), and (b) monitor for impacts caused by on-going Project activities. The licensee shall consult with the Forest Service to determine which species need to be resurveyed. The survey interval may be adjusted based on the amount of movement or impacts to the species that are observed. Survey results shall be provided to the Forest Service. If the Forest Service determines that negative impacts have occurred, the Licensee shall submit a proposal for actions to reduce or eliminate impacts to special status species. The Licensee shall file the report, including evidence of consultation, with the Commission and shall implement those resource management measures required by the Forest Service and approved by the Commission.

Discussion¹⁴

USFS Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44 purport to impose requirements or obligations on PG&E with respect to activities or facilities on non-Forest Service lands within the Project's boundaries and/or on Forest Service lands located outside those boundaries. Further, one of the conditions (USFS Condition No. 22) purports to require PG&E to undertake investigative activities for which it otherwise has no responsibility, while another of the conditions (USFS Condition No. 10) inaccurately attempts to allocate road maintenance costs between PG&E and other users.

These USFS conditions are contrary to law and inappropriate. The alternative conditions thereto submitted by PG&E would appropriately limit the scope of these conditions to activities and facilities on Forest Service lands within the Project boundaries, would eliminate the inappropriate obligation to undertake investigative activities, and would appropriately clarify

¹⁴ The § 4(e) conditions submitted by the USFS for this Project contain a number of additional conditions that may be construed as applying to non-Forest Service lands within the Project boundary and/or Forest Service lands outside the Project boundary. Consistent with the legal precedent discussed herein and the modifications to the USFS conditions made by PG&E's alternative conditions, the USFS should indicate that none of its conditions are intended to apply to non-Forest Service lands within the Project boundary or to Forest Service lands outside the Project boundary.

the cost allocation language. PG&E's alternative conditions would provide for the adequate protection and utilization of the NFs and, in comparison to the referenced USFS conditions, would cost significantly less to implement. Consequently, pursuant to § 33(a)(2) of the FPA and 7 C.F.R. § 1.673(b), the USFS must adopt PG&E's alternative Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44.

A. USFS Condition Nos. 4, 6, 10, 11, 17, 20, 22, And 44 Are Contrary To Law And Inappropriate

As discussed previously (*see* Section III A, *supra*), § 4(e) of the FPA does *not* provide the USFS with any authority to impose requirements or obligations with respect to facilities or activities on non-Forest Service lands within a project's boundaries or on Forest Service lands not within those boundaries. *See Escondido and Upper Peninsula, supra*. USFS Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44 all attempt to address activities or facilities on either non-Forest Service lands and/or Forest Service lands not within UNFFR's boundaries and therefore exceed the scope of the USFS' authority under § 4(e).

Specifically: USFS Condition No. 4 would require PG&E to obtain USFS approval prior to making any change to the Project, including changes to facilities not located on Forest Service lands; USFS Condition No. 6 would require PG&E to undertake or make commitments as to restoration activities of "National Forest System resources" in the event of a license surrender, but does not limit such work/commitments to Forest Service lands within the Project's boundaries; USFS Condition No. 10 purports to reserve to the United States the right to unrestricted use of "any" road within the Project area, presumably including those that are not subject to PG&E's ownership or control in association with the Project (*e.g.*, local and state roads) and those not located on Forest Service lands; USFS Condition No. 11 purports to control PG&E vehicular use of all roads, presumably including roads not located on Forest Service

lands; USFS Condition No. 17 purports to require PG&E to comply with Department of Agriculture regulations and other legal requirements "in regards to the area or operations covered by this license" even though some of the Project "area" is not located on Forest Service lands; USFS Condition No. 20 imposes requirements regarding survey and property line monuments and markers that would apply to non-Forest Service lands; USFS Condition No. 22 would require PG&E to take actions with regard to hazardous conditions "within the Project boundary" even though not all of the Project is located on Forest Service lands; and USFS Condition No. 44 imposes special status species requirements that are not limited to Forest Service lands. Clearly, these provisions of USFS Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44 exceed the USFS' authority under § 4(e) and are contrary to law.

Two of these conditions are also inappropriate for additional reasons. First, USFS Condition No. 10 purports to reserve to the United States "the right to extend rights and privileges for use of the right-of-way and road thereon to states and local subdivisions thereof, as well as to other users," and indicates that such roads could include those under the jurisdiction of the state and local subdivisions. PG&E believes it is inappropriate for the USFS to use a § 4(e) condition as a means to affect relations between the USFS and the state and local subdivisions. More importantly, while the USFS recognizes that the use by others of roads within the Project area for which PG&E is responsible for maintaining will likely increase maintenance costs and includes language in the last sentence of the condition (the licensee shall not be caused "to bear a share of the costs of maintenance greater than the Licensee's use bears to all use of the road") that attempts to ensure that PG&E's financial responsibility for road maintenance is commensurate with its use of the roads, the language as currently drafted does not express this intent clearly.

Second, USFS Condition No. 22 provides that PG&E is to have "a continuing responsibility to *identify* and report all hazardous conditions" (emphasis added). This requirement to "identify" hazardous conditions is clearly inappropriate, since it would impose an affirmative obligation on PG&E to investigate for hazardous conditions, rather than simply report known or observed hazardous conditions. Such an obligation would impose an unreasonable burden on PG&E to "police" all activities and conditions in the area, and could have the effect of creating third party liability for failure to "identify" hazardous conditions in a timely manner.

B. PG&E's Alternative Condition Nos. 4, 6, 10, 11, 17, 20, 22, And 44 Will Provide For The Adequate Protection And Utilization Of The NFs

PG&E's alternative Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44 limit the scope of the conditions to activities and facilities on Forest Service lands within the Project's boundaries, while PG&E's alternative Condition No. 10 limits the scope of the condition to roads "over which [the United States] has jurisdiction." Since the USFS' authority under § 4(e) is limited to Forest Service lands within UNFFR's boundaries (and, as to roads, limited to those over which the USFS has jurisdiction), the geographic limitations included in these PG&E alternative conditions will not in any way adversely affect the NFs, and these alternative conditions containing these limitations will provide for the adequate protection and utilization of the NFs. The other changes in these conditions made by PG&E -- modifying USFS Condition No. 10 to more clearly express the intent regarding the costs of road maintenance, and modifying USFS Condition No. 22 to eliminate the inappropriate requirement that PG&E seek out and "identify" hazardous conditions -- also do not in any way adversely affect the NFs. Accordingly, PG&E's alternative Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44 will provide for the "adequate protection and utilization" of the SNF as specified in § 33(a)(2)(A) of the FPA.

C. PG&E's Alternative Condition Nos. 4, 6, 10, 11, 17, 20, 22, And 44 Will Cost Significantly Less To Implement Than USFS Condition Nos. 4, 6, 10, 11, 17, 20, 22, And 44

PG&E's alternative Condition Nos. 4, 6, 10, 11, 17, 20, 22, and 44 will clearly cost significantly less to implement than the corresponding USFS conditions, since the geographic reach of PG&E's alternatives is limited to facilities and activities on Forest Service lands within the Project's boundaries, thus limiting PG&E's financial exposure to those areas. Similarly, the other changes made by PG&E (to USFS Condition Nos. 10 and 22) will result in lower implementation costs.

V. Condition No. 46 - Invasive Weed Management Plan

USFS Condition:

Within one year of license issuance, Licensee shall file with the Commission an Invasive Weed Management Plan, approved by the Forest Service, for the purpose of controlling and containing the spread of Project-related invasive weeds on Licensee and National Forest System lands, which might be related to the Licensee's activities. The Invasive Weed Management Plan shall include and address the following elements:

- *Actions to be taken to ensure that Project staff is aware of the current location of invasive weeds and identifying characteristics of the invasive weeds likely to occur in the Project area.*
- *Treatment measures to be adopted for the control of invasive weeds (aquatic and terrestrial) located within the project boundary and adjacent to project features including recreation facilities, roads, and distribution and transmission lines within the project boundary.*
- *Inventory and mapping of new populations of invasive weeds within the area affected by project related operations or activities using a Forest Service compatible database and GIS software. The invasive weed GIS data layer will be updated periodically and shared with resource agencies.*
- *Actions or strategies that will be undertaken to prevent and control the spread of known populations or introductions of new populations within the area affected by project related operations or activities, such as vehicle/equipment wash stations.*
- *A schedule for eradication of all A, B, Q and selected other rated invasive weed species within the area affected by project related operations or activities, designated by resource agencies.*
- *Actions to be taken to eradicate A and B rated weed infestations within 12 months of detection. (A, B, C, & Q ratings refer to the California Department of Food & Agriculture Action Oriented Pest Rating System).*

- *A plan to treat all classes of invasive weeds located at sensitive sites such as recreation facilities. The list of sensitive sites shall be developed in consultation with the Forest Service.*
- *A plan for the inventory of noxious weeds at Project facilities and other possible points of introduction every five years using the current list of noxious weeds of concern to the Lassen and Plumas National Forests. This frequency may be adjusted based on the results of these inventories. This inventory will be used to help prevent the spread of noxious weeds and will also serve as monitoring for the weed introduction prevention measures.*
- *Monitoring information, in database and GIS formats, shall be provided to the Forest Service as part of the annual consultation on affected National Forest resources.*
- *Guidelines for restoration or revegetation of areas where treatment has eliminated invasive weeds to prevent the reintroduction of invasive weed species.*
- *Use of certified weed-free straw for all construction or restoration needs. If certified weed-free straw is not available, rice straw may be substituted. The Licensee shall use an approved mix of plant species native to the Lassen or Plumas National Forests as appropriate for restoration or erosion control purposes.*
- *Adoption of procedures to thoroughly clean all construction equipment and other equipment, including Licensee owned and rental equipment, that operates off the roads or moves soil, before entering the Project vicinity, and using reasonable cleaning methods to reasonably ensure that seeds of noxious weeds are not introduced.*
- *Monitoring of project-induced ground disturbing activities annually for the first 3 years after disturbance to detect and map new populations of noxious weeds.*
- *An adaptive management element to implement methods for prevention of aquatic noxious weeds, as necessary. These actions may include, but may not be limited to: 1) public education and signing of public boat access, 2) preparation of an Aquatic Plant Management Plan approved by the Forest Service, and in consultation with other agencies, and 3) boat cleaning stations at boat ramps for the removal of aquatic noxious weeds.*

PG&E's Alternative Condition (Blackline Of USFS Condition): ¹⁵

Within one year of license issuance, Licensee shall file with the Commission an Invasive Weed Management Plan, approved by the Forest Service, for the purpose of controlling and containing the spread of Project-related invasive weeds on ~~Licensee and National Forest System lands within the Project boundary~~, which might be related to the Licensee's activities. The Invasive Weed Management Plan, which shall apply only to National Forest System lands within the Project boundary, shall include and address the following elements:

- *Actions to be taken to ensure that Project staff is aware of the current location of invasive weeds and identifying characteristics of the invasive weeds likely to occur in the Project area.*

¹⁵ A clean version of USFS Condition No. 46 incorporating the changes proposed by PG&E is appended hereto as Attachment L.

- *Treatment measures to be adopted for the control of invasive weeds (aquatic and terrestrial) located on National Forest System lands within the project boundary and adjacent to project features including recreation facilities, roads, and distribution and transmission lines within the project boundary.*
- *Inventory and mapping of new populations of invasive weeds within the area affected by project related operations or activities using a Forest Service compatible database and GIS software. The invasive weed GIS data layer will be updated periodically and shared with resource agencies.*
- *Actions or strategies that will be undertaken to prevent and control the spread of known populations or introductions of new populations within the area affected by project related operations or activities, such as vehicle/equipment wash stations.*
- *A schedule for eradication/control of all A, B, Q and selected other rated invasive weed species within the area affected by project related operations or activities, designated by resource agencies.*
- *Actions to be taken to eradicate/control A and B rated weed infestations within 12 months of detection- or as soon thereafter as is reasonable. (A, B, C, & Q ratings refer to the California Department of Food & Agriculture Action Oriented Pest Rating System).*
- *A plan to treat all classes of invasive weeds located at sensitive sites such as recreation facilities. The list of sensitive sites shall be developed in consultation with the Forest Service.*
- *A plan for the inventory of noxious weeds at Project facilities and other possible points of introduction every five years using the current list of noxious weeds of concern to the Lassen and Plumas National Forests. This frequency may be adjusted based on the results of these inventories. This inventory will be used to help prevent the spread of noxious weeds and will also serve as monitoring for the weed introduction prevention measures.*
- *Monitoring information, in database and GIS formats, shall be provided to the Forest Service as part of the annual consultation on affected National Forest resources.*
- *Guidelines for restoration or revegetation of areas where treatment has eliminated invasive weeds to prevent the reintroduction of invasive weed species.*
- *Use of certified weed-free straw for all construction or restoration needs. If certified weed-free straw is not available, rice straw may be substituted. The Licensee shall use an approved mix of plant species native to the Lassen or Plumas National Forests as appropriate for restoration or erosion control purposes.*
- *Adoption of procedures to thoroughly clean all construction equipment and other equipment, including Licensee owned and rental equipment, that operates off the roads or moves soil, before entering the Project vicinity, and using reasonable cleaning methods to reasonably ensure that seeds of noxious weeds are not introduced.*
- *Monitoring of project-induced ground disturbing activities annually for the first 3 years after disturbance to detect and map new populations of noxious weeds.*
- *An adaptive management element to implement methods for prevention of aquatic noxious weeds, as necessary. These actions may include, but may not be limited to: 1) public education and signing of public boat access, 2) preparation of an Aquatic Plant Management Plan approved by the Forest Service, and in consultation with*

other agencies, and 3) boat cleaning stations at boat ramps for the removal of aquatic noxious weeds.

Discussion

USFS Condition No. 46 would require PG&E to develop a plan to, *inter alia*, "eradicate" populations of invasive weeds. Further, its requirements as to weed eradication or control would not be limited to Forest Service lands within the Project boundaries; rather, it specifically states that its requirements would extend to "Licensee" lands within the Project boundaries. Further, those requirements would also extend to Forest Service lands outside the Project boundary.

USFS Condition No. 46 is arbitrary and capricious and contrary to law. Alternative Condition No. 46 submitted by PG&E would appropriately change the requirement to "eradicate" invasive weeds to "control" such weeds. PG&E's alternative condition would also limit PG&E's obligation to take action as to weeds to Forest Service lands within the Project boundaries. PG&E's alternative Condition No. 46 would provide for the adequate protection and utilization of the NFs and, in comparison to USFS Condition No. 46, would cost significantly less to implement. Consequently, pursuant to § 33(a)(2) of the FPA and 7 C.F.R. § 1.673(b), the USFS must adopt PG&E's alternative Condition No. 46.

A. USFS Condition No. 46 Is Arbitrary And Capricious

The requirement of USFS Condition No. 46 that PG&E "eradicate" invasive or noxious weed populations is clearly arbitrary and capricious. As the USFS should be fully aware, the eradication of invasive weeds (*i.e.*, permanent elimination of all plants) over large landscape areas is made extremely unlikely due to the immediate and continuous reintroduction of these plants from various sources beyond practical control. Weed vectors include such things as seed dissemination by wildlife, wind, water, livestock, and the many legitimate activities of

people that create conditions favorable for weed establishment, or result in weed seeds and other plant parts being carried from one location and deposited in another. In most cases, the best that can be legitimately expected is "control" of those populations. However, in some cases (e.g., cheatgrass), even efforts to control such populations meet with only limited success. In other words, USFS Condition No. 46 imposes a standard ("eradication") that in most cases will be extremely difficult, if not impossible, to meet. Further, its requirement to eradicate new infestations of weeds within 12 months of detection is clearly unreasonable in most cases given the nature of these weeds.

B. USFS Condition No. 46 Is Contrary To Law

As discussed previously (*see* Sections III A and IV A, *supra*), § 4(e) of the FPA does *not* provide the USFS with any authority to impose requirements or obligations with respect to activities either on non-Forest Service lands within a project's boundary or on Forest Service lands not within the boundaries of a project. *See Escondido and Upper Peninsula, supra*. USFS Condition No. 46 clearly exceeds the scope of the USFS' authority under § 4(e) of the FPA and therefore is contrary to law, since its scope is not limited to Forest Service lands within the Project boundary, and it specifically requires PG&E to take action as to noxious weeds on PG&E's own lands.

C. PG&E's Alternative Condition No. 46 Will Provide For The Adequate Protection And Utilization Of The NFs

PG&E's alternative Condition No. 46 substitutes the reasonable obligation to "control" populations of invasive weeds for the unreasonable and unobtainable standard to "eradicate" such populations, and allows actions to control new infestations of weeds to take longer than 12 months if necessary. PG&E's alternative Condition No. 46 also clarifies that

PG&E's obligations under the condition are limited to Forest Service lands within the Project boundary consistent with the scope of the USFS' § 4(e) authority.

Since the USFS' authority under § 4(e) is limited to Forest Service lands within UNFFR's boundaries, limiting the scope of USFS Condition No. 46 as proposed in PG&E's alternative Condition No. 46 will not in any way adversely affect the NFs. Nor will the replacement of the unreasonable and unobtainable "eradicate" standard with a "control" standard. Accordingly, PG&E's alternative Condition No. 46 will provide for the "adequate protection and utilization" of the NFs as specified in § 33(a)(2)(A) of the FPA.

D. PG&E's Alternative Condition No. 46 Will Cost Significantly Less To Implement Than USFS Condition No. 46

PG&E's alternative Condition No. 46 will clearly cost significantly less to implement than USFS Condition No. 46. PG&E's alternative, by limiting the scope of invasive weed work under the condition to Forest Service lands within the Project boundaries and by eliminating the patently unreasonable and unobtainable "eradicate" standard, will clearly cost PG&E much less to implement than if the provisions of USFS Condition No. 46 were in the license.

STATEMENT REGARDING THE FACTORS SET FORTH IN 7 C.F.R. § 1.671(b)(4)


The 12 alternative conditions proposed by PG&E herein would not affect energy supply, distribution, or use, flood control, navigation, water supply, air quality, or any other aspect of environmental quality any differently than would the USFS conditions they would replace. However, PG&E's 12 alternative conditions likely would result in slightly lower-cost power from UNFFR in comparison to the USFS conditions they would replace, since PG&E's alternative conditions will cost significantly less to implement than the comparable USFS conditions.

CONCLUSION

PG&E respectfully requests that the USFS, acting on behalf of the Secretary of Agriculture, adopt PG&E's 12 alternative conditions as proposed herein pursuant to 7 C.F.R. § 1.673(b) and expeditiously file these adopted PG&E alternative conditions with FERC as USFS "modified conditions" pursuant to 7 C.F.R. § 1.672.

Respectfully submitted,

PACIFIC GAS AND ELECTRIC COMPANY

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ATTORNEYS FOR PACIFIC GAS AND ELECTRIC COMPANY

Dated: December 19, 2005

Attachment A

PG&E's Alternative To USFS Condition No. 21

The Licensee has an affirmative duty to protect the land, property, and interests of the United States from damage arising from the Licensee's occupancy and use of National Forest System lands authorized by this license.

In addition to the general requirements of Articles 22 and 24, the Licensee is strictly liable for and shall promptly pay, after being afforded a reasonable opportunity to review and contest such charges as specified herein, all reasonable damages, costs, and expenses associated with damage to the land, property and interests of the United States caused by the construction, operation, or maintenance of Licensee's Project including, but not limited to, reasonable damages, costs, and expenses resulting from fire; provided, however, that (1) the Licensee shall be so strictly liable only if the Forest Service first prepares in accordance with established agency procedures a specific risk assessment finding that one or more activities at the Project is a high risk use and occupancy, and (2) the Licensee's maximum strict liability shall not exceed that specified in the risk assessment but in no event shall exceed \$1,000,000 for any one occurrence. Any liability in excess of this specified amount shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage occurred. Such reasonable damages, costs, and expenses shall include, but not be limited to:

*Fire suppression costs
Rehabilitation and restoration costs
Value of lost resources
Abatement costs
Investigation and administrative expenses
Attorneys' fees*

The Licensee's liability under this condition shall not extend to acts or omissions of the United States or other third parties outside of the Licensee's control. The value of lost resources and rehabilitation and restoration costs collectively shall not exceed the commercial value of any timber lost. The basis for damages will be provided to the Licensee, along with transaction registers of costs and expenses certified by the appropriate Forest Service official. The Licensee shall have an opportunity to review and contest the basis for the Forest Service's claimed damages, costs, and expenses.

Attachment B

PG&E's Alternative To USFS Condition No. 19

The Licensee shall indemnify, defend, and hold the United States harmless for any damages or losses sustained by the United States and for judgments, claims, or demands assessed against the United States, in connection with the Licensee's use or occupancy authorized by this license; provided, however, that the provisions of this condition do not apply to any damages, judgments, claims, or demands arising out of the negligence, recklessness, or willful misconduct of the United States or other third parties or to damages, judgments, claims, or demands arising out of any activity initially occurring outside the Project boundary or outside National Forest System lands. The licensee's indemnification of the United States shall include, but not be limited to, any loss by personal injury, loss of life and damage to property in connection with the occupancy or use of National Forest System lands authorized by this license. Indemnification shall include, but not be limited to, the value of resources damaged or destroyed; the costs of restoration, cleanup, and other mitigation; fire suppression and other types of abatement costs; third party claims and judgments; and all administrative costs, interest, and other legal expenses. The Licensee's liability hereunder shall be limited to reasonable damages, costs, claims, and judgments. Upon surrender, transfer, or termination of the license, the Licensee's obligation to indemnify, defend, and hold the United States harmless shall survive for all valid claims that arose prior to such surrender, transfer, or termination.

Attachment C

PG&E's Alternative To USFS Condition No. 9

A. Fire Prevention and Response Plan

Within one year of license issuance the Licensee shall file with the Commission a Fire Prevention and Response Plan that is approved by the Forest Service, and developed in consultation with appropriate State and local fire agencies. The plan shall set forth in detail the Licensee's responsibility for the prevention (excluding vegetation treatment as described in Condition No. 42), reporting, control, and extinguishing of fires on National Forest System lands within the Project boundary.

At a minimum the plan shall address the following categories:

1. Fuels Treatment/Vegetation Management

Identification of fire hazard reduction measures to prevent the escape of project-induced fires.

2. Prevention

Availability of fire access roads, community road escape routes, helispots to allow aerial firefighting assistance in the steep canyon, water drafting sites and other fire suppression strategies.

Address fire danger and public safety associated with project-induced recreation, including fire danger associated with dispersed camping, existing and proposed developed recreation sites, trails, and vehicle access.

3. Emergency response preparedness

Analyze fire prevention needs including equipment and personnel availability.

4. Reporting

Licensee shall report any project related fires to the Forest Service within 24 hours.

5. Fire control/Extinguishing

Provide the Forest Service a list of the locations of available fire suppression equipment and the location and availability of fire suppression personnel.

Include appropriate measures from Condition 41 and assure fire prevention measures will conform to water quality protection practices as enumerated in USDA, Forest

Service, Pacific Southwest Region, Water Quality Management for National Forest System Lands in California-Best Management Practices.

B. Investigation of Project Related Fires

The Licensee agrees to fully cooperate with the Forest Service on all fire investigations to the same extent and in the same manner as the Forest Service cooperates with the Licensee on such investigations. The Licensee shall produce upon request all materials not subject to the attorney-client or attorney work product privileges and witnesses, over which the Licensee has control, related to the fire and its investigation including:

*investigation reports
witness statements
photographs
drawings
analysis of cause and origin
other, similar materials and documents.*

The Licensee shall preserve all physical evidence, and give custody to the Forest Service of all physical evidence requested; provided, however, that the Licensee is not obligated to give custody of any physical evidence to the Forest Service if the Forest Service fails to provide the Licensee with reasonable access to the physical evidence, documents, and other materials the Licensee, in its reasonable discretion, determines it requires in order to defend any and all claims against it that arise from a fire within the Project boundaries.

Attachment D

PG&E's Alternative To USFS Condition No. 4

Notwithstanding any Commission approval or license provisions to make changes to the Project, when such changes are to occur on National Forest System lands the Licensee shall obtain written approval from the Forest Service prior to making any changes in the location of any constructed Project features or facilities, or in the uses of Project lands and waters, or any departure from the requirements of any approved exhibits filed with the Commission. Following receipt of such approval from the Forest Service, and at least 60 days prior to initiating any such changes or departure, the Licensee shall file a report with the Commission describing the changes, the reasons for the changes, and showing the approval of the Forest Service for such changes. The Licensee shall file an exact copy of this report with the Forest Service at the same time it is filed with the Commission. This article does not relieve the Licensee from the amendment or other requirements of Article 2 or Article 3 of this license.

Attachment E

PG&E's Alternative To USFS Condition No. 6

Prior to any surrender of this license, the Licensee shall provide assurance acceptable to the Forest Service that Licensee shall restore National Forest System resources within the Project boundary to a condition satisfactory to the Forest Service upon or after surrender of the license, as appropriate. The restoration plan shall identify the measures to be taken to restore such National Forest System resources and shall include adequate financial assurances such as a bond or letter of credit, to ensure performance of the restoration measures.

In the event of any transfer of the license or sale of the Project, the Licensee shall guarantee or assure that, in a manner satisfactory to the Forest Service, the Licensee or transferee will provide for the costs of surrender and restoration. If deemed necessary by the Forest Service to assist it in evaluating the Licensee's proposal, the Licensee shall conduct an analysis, using experts approved by the Forest Service, to estimate the potential costs associated with surrender and restoration of National Forest System lands within the Project boundary to Forest Service specifications. In addition, the Forest Service may require the Licensee to pay for an independent audit of the transferee to assist the Forest Service in determining whether the transferee has the financial ability to fund the surrender and restoration work on National Forest System lands within the Project boundary specified in the analysis.

Attachment F

PG&E's Alternative To USFS Condition No. 10

The United States shall have unrestricted use of any road over which it has jurisdiction within the project area for all purposes deemed necessary and desirable in connection with the protection, administration, management, and utilization of National Forest System lands or resources and shall have the right to extend rights and privileges of use of such road to States and local subdivisions thereof, as well as to other users, including members of the public, except contractors, agents, and employees of the Licensee; provided that the agency having jurisdiction shall control such use so as not to unreasonably interfere with the safety or security uses, or cause the Licensee to bear a share of the costs of maintenance disproportionate to the Licensee's use in comparison to the use of the road by others.

Attachment G

PG&E's Alternative To USFS Condition No. 11

On National Forest System lands within the Project boundary, the Licensee shall confine all project vehicles, including but not limited to administrative and transportation vehicles and construction and inspection equipment, to roads or specifically designed access routes, as identified in the Road Management and Maintenance Plan (refer to Condition No. 42). The Forest Service reserves the right to close any and all such routes where damage is occurring to the soil or vegetation, or, if requested by Licensee, to require reconstruction/construction by the Licensee to the extent needed to accommodate the Licensee's use. The Forest Service agrees to provide notice to the Licensee and the Commission prior to road closures, except in an emergency, in which case notice will be provided as soon as practicable.

Attachment H

PG&E's Alternative To USFS Condition No. 17

The Licensee shall comply with the regulations of the Department of Agriculture and all federal, state, county, and municipal laws, ordinances, or regulations in regards to the area or operations covered by this license on National Forest System lands, to the extent those laws, ordinances, or regulations are not preempted by federal law.

Attachment I

PG&E's Alternative To USFS Condition No. 20

The Licensee shall avoid disturbance to all public land survey monuments, private property corners, and forest boundary markers. In the event that any such land markers or monuments on National Forest System lands within the Project boundary are destroyed by an act or omission of the Licensee, in connection with the use and/or occupancy authorized by this license, depending on the type of monument destroyed, the Licensee shall reestablish or reference same in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the County Surveyor, or (3) the specifications of the Forest Service.

Further, the Licensee shall ensure that any such official survey records affected are amended as provided by law.

Attachment J

PG&E's Alternative To USFS Condition No. 22

As part of the occupancy and use of the license area, the Licensee has a continuing responsibility to report all known or observed hazardous conditions on National Forest System lands within the Project boundary that would affect the improvements, resources, or pose a risk of injury to individuals. Licensee will abate those conditions, except those caused by third parties or not related to the occupancy and use authorized by the License. Any non-emergency actions to abate such hazards on National Forest System lands shall be performed after consultation with the Forest Service. In emergency situations, the Licensee shall notify the Forest Service of its actions as soon as possible, but not more than 48 hours, after such actions have been taken. Whether or not the Forest Service is notified or provides consultation; the Licensee shall remain solely responsible for all abatement measures performed. Other hazards should be reported to the appropriate agency as soon as possible.

Attachment K

PG&E's Alternative To USFS Condition No. 44

The Licensee shall, beginning the first full calendar year after license issuance, in consultation with the Forest Service, annually review the current list of special status plant and wildlife species (species that are Federal Endangered or Threatened, Forest Service Sensitive, or Lassen and Plumas National Forest Watch Lists) that might occur on National Forest System lands within the Project Boundary. When a species is added to one or more of the lists, the Forest Service in consultation with the Licensee shall determine if the species or un-surveyed suitable habitat for the species is likely to occur on National Forest System lands within the Project Boundary. For such newly added species, if the Forest Service determines that the species is likely to occur on such National Forest System lands, the Licensee shall develop and implement a study plan in consultation with the Forest Service to reasonably assess the effects of the Project on the species. The Licensee shall prepare a report on the study including objectives, methods, results, recommended resource measures where appropriate, and a schedule of implementation, and shall provide a draft of the final report to the Forest Service for review and approval. The Licensee shall file the report, including evidence of consultation, with the Commission and shall implement those resource management measures required by the Commission.

In addition, National Forest System lands within the Project Boundary that have suitable habitat or known occurrences of selected special status wildlife or plant species shall be resurveyed every ten years in order to (a) determine if special status plant or wildlife species have changed in location (i.e. migrated into or moved within the Project Boundary), and (b) monitor for impacts caused by on-going Project activities. The licensee shall consult with the Forest Service to determine which species need to be resurveyed. The survey interval may be adjusted based on the amount of movement or impacts to the species that are observed. Survey results shall be provided to the Forest Service. If the Forest Service determines that negative impacts have occurred, the Licensee shall submit a proposal for actions to reduce or eliminate impacts to special status species. The Licensee shall file the report, including evidence of consultation, with the Commission and shall implement those resource management measures required by the Forest Service and approved by the Commission.

Attachment L

PG&E's Alternative To USFS Condition No. 46

Within one year of license issuance, Licensee shall file with the Commission an Invasive Weed Management Plan, approved by the Forest Service, for the purpose of controlling and containing the spread of Project-related invasive weeds on National Forest System lands within the Project boundary, which might be related to the Licensee's activities. The Invasive Weed Management Plan, which shall apply only to National Forest System lands within the Project boundary, shall include and address the following elements:

- *Actions to be taken to ensure that Project staff is aware of the current location of invasive weeds and identifying characteristics of the invasive weeds likely to occur in the Project area.*
- *Treatment measures to be adopted for the control of invasive weeds (aquatic and terrestrial) located on National Forest System lands within the project boundary and adjacent to project features including recreation facilities, roads, and distribution and transmission lines within the project boundary.*
- *Inventory and mapping of new populations of invasive weeds within the area affected by project related operations or activities using a Forest Service compatible database and GIS software. The invasive weed GIS data layer will be updated periodically and shared with resource agencies.*
- *Actions or strategies that will be undertaken to prevent and control the spread of known populations or introductions of new populations within the area affected by project related operations or activities, such as vehicle/equipment wash stations.*
- *A schedule for control of all A, B, Q and selected other rated invasive weed species within the area affected by project related operations or activities, designated by resource agencies.*
- *Actions to be taken to control A and B rated weed infestations within 12 months of detection or as soon thereafter as is reasonable. (A, B, C, & Q ratings refer to the California Department of Food & Agriculture Action Oriented Pest Rating System).*
- *A plan to treat all classes of invasive weeds located at sensitive sites such as recreation facilities. The list of sensitive sites shall be developed in consultation with the Forest Service.*
- *A plan for the inventory of noxious weeds at Project facilities and other possible points of introduction every five years using the current list of noxious weeds of concern to the Lassen and Plumas National Forests. This frequency may be adjusted based on the results of these inventories. This inventory will be used to help prevent the spread of noxious weeds and will also serve as monitoring for the weed introduction prevention measures.*
- *Monitoring information, in database and GIS formats, shall be provided to the Forest Service as part of the annual consultation on affected National Forest resources.*
- *Guidelines for restoration or revegetation of areas where treatment has eliminated invasive weeds to prevent the reintroduction of invasive weed species.*
- *Use of certified weed-free straw for all construction or restoration needs. If certified weed-free straw is not available, rice straw may be substituted. The Licensee shall*

use an approved mix of plant species native to the Lassen or Plumas National Forests as appropriate for restoration or erosion control purposes.

- *Adoption of procedures to thoroughly clean all construction equipment and other equipment, including Licensee owned and rental equipment, that operates off the roads or moves soil, before entering the Project vicinity, and using reasonable cleaning methods to reasonably ensure that seeds of noxious weeds are not introduced.*
- *Monitoring of project-induced ground disturbing activities annually for the first 3 years after disturbance to detect and map new populations of noxious weeds.*
- *An adaptive management element to implement methods for prevention of aquatic noxious weeds, as necessary. These actions may include, but may not be limited to: 1) public education and signing of public boat access, 2) preparation of an Aquatic Plant Management Plan approved by the Forest Service, and in consultation with other agencies, and 3) boat cleaning stations at boat ramps for the removal of aquatic noxious weeds.*

CERTIFICATE OF SERVICE

Pursuant to the provisions of 7 C.F.R. § 1.670, I hereby certify that I have this day served a complete copy of the foregoing document on the Federal Energy Regulatory Commission and each "license party" in the relicensing proceedings for Project No. 2105 as set forth in the attached list, by first-class mail, postage prepaid.

Dated at Washington, DC, this 19th day of December 2005.


John A. Whittaker, IV

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