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Via electronic mail

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Re: PG&E Multiple Region Operations and Maintenance Habitat Conservation Plan and Draft Environmental Assessment (FWS–R8–ES–2019–N162)

Dear Mr. Tattersall:

These comments are submitted on behalf of the Center for Biological Diversity (the “Center”) regarding the Draft Environmental Assessment (“Draft EA”) for the proposed Pacific Gas & Electric Company Operations and Maintenance Habitat Conservation Plan (the “HCP”). (85 Fed. Reg. 12319-21 (March 2, 2020)). Electronic copies of cited references will follow in the mail. The Center is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has 1.7 million members and online activists throughout California and the United States. The Center has worked for many years to protect imperiled plants and wildlife and their habitats, open space, air and water quality, and overall quality of life for people in the Sacramento Valley, Sierra Nevada foothills, North Coast and Central Coast.

The Center appreciates the potential value of PG&E adopting a habitat conservation plan for the listed species that are affected by its operations and maintenance activities in the 34 California counties and obtaining an incidental take permit (“ITP”) to cover incidental take of those listed species. However, the Center has significant concerns regarding the lack of specificity in the HCP regarding the potential impacts arising from activities proposed to be covered by the HCP (the “Covered Activities”) to species listed under the Endangered Species Act (“ESA”) including both Covered Species and other listed species. This lack of detail and specificity in the HCP is reflected in the Draft EA’s identification and analysis of all environmental impacts. The Center is also concerned that the Covered Species list is too narrow and specifically fails to include avian species that are most vulnerable to impacts from PG&E power line infrastructure including electrocution as well as anadromous fish. The omitted avian species include federally listed birds, birds protected under the Migratory Bird Treaty Act

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(“MBTA”) and Bald and Golden Eagle Protection Act (“BGEPA), and birds protected under California state laws. The HCP and Draft EA cannot ignore impacts to these species or push off evaluation of those impacts to some other process—the Service’s environmental review and biological opinion must address all impacts to listed species and other imperiled species from the Covered Activities.

The National Environmental Policy Act (“NEPA”) requires federal agencies to assess the direct, indirect and cumulative environmental impacts of proposed actions by taking a “hard look” at environmental consequences of the action at issue. (42 U.S.C. § 4321; *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).) However, the Draft EA does not adequately identify or analyze the impacts over the term of the HCP on imperiled wildlife from all Covered Activities.

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Due to the shortcomings in the HCP and Draft EA, detailed below and elsewhere, the Center urges U.S. Fish and Wildlife Service (“USFWS” or “Service”) and the applicant to revise the HCP and prepare a Draft Environmental Impact Statement (“EIS”) for the revised HCP that includes all listed species that may be affected by the Covered Activities as Covered Species. The applicant and the Service must adequately identify and analyze the significant impacts of the Covered Activities on all listed species and their habitats and provide a habitat conservation plan that ensures potential impacts are first avoided, and then provides for enforceable measures to minimize and fully mitigate any remaining impacts.

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I. The draft HCP fails to comply with the ESA.

A. ESA Background Law

The ESA, by way of its “language, history, and structure . . . indicates beyond doubt that Congress intended endangered species to be afforded the *highest* of priorities,” for protection under the law. (*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) [emphasis added].) Thus, the ESA prohibits the “take” of a listed species where “take” of a species is includes to “harass, harm, pursue, hunt, shoot, wound kill, trap, capture, or collect, or to attempt to engage in any conduct.” (16 U.S.C. § 1532(19).) The ESA provides exceptions that in narrow circumstances allow for incidental take under Section 7 and Section 10. (16 U.S.C. §§ 1536(a)(2), 1539(a)(1)(B).) As relevant to the proposed HCP here, the ESA Section 10 provides an exception to the take prohibition by allowing the issuance of an incidental take permit (“ITP”) for an HCP where “such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” (16 U.S.C. § 1539(a)(1)(B).) In issuing an HCP, the Service must also comply with Section 7 obligations and undertake formal consultation to ensure that that granting the permit “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species . . . ” (16 U.S.C. §§ 1536(a)(2); 50 C.F.R. § 402.14; 50 C.F.C. § 402.02.)

As discussed in more detail below, in addition to its obligations under the ESA, FWS also must satisfy its obligations under the National Environmental Policy Act (“NEPA”) before it may issue an ITP. NEPA requires that all federal agencies carrying out “major Federal actions

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significantly affecting the quality of the human environment” produce a “detailed statement” that specifies the impact the proposed action will have on the environment, the adverse effects resulting from the proposed action that cannot be avoided, and any alternative actions. 42 U.S.C. § 4332(C)(i–iii.) Under NEPA, the agency must also consider “any irreversible . . . commitments of resources,” such as the loss of a protected species caused by the proposed action. (*Id.* at § 4332(c)(iv–v).) All Federal agencies must prepare an environmental impact statement, (“EIS”) prior to engaging in “major Federal actions” that significantly affects the environment. (42 U.S.C. § 4332(c).) Because the proposed Covered Activities under the HCP would cause significant direct, indirect and cumulative impacts to the environment, the Service must prepare an EIS before granting an ITP for those activities.

Pursuant to the CEQ NEPA regulations, “significantly” is broadly defined such that as EIS is required whenever one of the conditions enumerated in the regulations is met which include both context and “intensity” factors. (40 CFR §1508.27.) Many of these factors are present in this instance including, but not limited to: effects to wetlands and ecologically critical areas, the presence of significant controversy, uncertain effects, cumulatively significant effects, and adverse effects to listed species. (40 CFR §1508.27 (b)(3),(4)(5)(6) &(9).) Courts have found that where any significance factor is shown, an EIS may be required. For example,

Agencies must prepare environmental impact statements whenever a federal action is "controversial," that is, when "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor," [], or there is "a substantial dispute [about] the size, nature, or effect of the major Federal action." [].

(*National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (internal citations omitted).) Based on these factors, the Service must prepare an EIS for this proposed HCP and ITP.

1. ESA Section 10

Section 10 of the ESA (16 U.S.C. § 1539(a)(1)(B)), provides an exception to the take prohibition for issuance of an ITP only where the applicant provides a conservation plan and the Service makes a determination that the “impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts . . . will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” 16 U.S.C. § 1539(a)(2)(A)(i–iv). Before issuing an ITP, FWS must make a finding that the application and conservation plan provide:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met

(16 U.S.C. § 1539(a)(2)(B).) The term “measures” in subsection (v) refers to “any additional measures the Secretary may require as being necessary or appropriate for the purposes of the plan.” (*Id.* at § 1539 (a)(2)(A)(iv).)

Pursuant to the regulations, 50 C.F.R. § 17.22(b)(1), an ITP and corresponding HCP are required by law to include:

- (i) A complete description of the activity sought to be authorized;
- (ii) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known;
- (iii) A conservation plan that specifies:
 - (A) The impact that will likely result from such taking;
 - (B) What steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances;
 - (C) What alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be utilized; and
 - (D) Such other measures that the Director may require as being necessary or appropriate for purposes of the plan

After considering the statutory and regulatory elements required for an ITP application and HCP, it is clear that the HCP here fails to provide a complete account of the proposed activities and sufficient information related to the number, age, and sex of the listed species to be included in the permit or how the use of habitat loss as proxy will adequately address impacts to these listed species. The applicant also fails to include sufficient information related to the anticipated take for all listed species under the permit, as well as detailed steps that the applicant will take to monitor, minimize, and mitigate, the impacts. There simply is not enough information in the HCP regarding the Covered Activities and where they will occur to satisfy the requirements for an ITP and its corresponding HCP as set forth under the Section 10(a)(2)(A) of the ESA and the corresponding regulations.

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An applicant for an ITP and HCP must include a description of the activities that will be covered by the permits. The description of the activities should include those: (1) likely to cause incidental take of a listed species; (2) “reasonably certain” to arise during the existence of the permit and (3) are within the applicant’s control. Whether impacts are reasonably certain to occur is a low bar. The proposed HCP does not fully describe all of the activities that will be covered by the ITP or specify where such activities will occur. Instead, large discretion is left to the applicant to determine what activities will be included among the range of operations and maintenance activities it undertakes as well as “minor new construction” projects. The applicant has not provided sufficient detailed information to determine what activities the permits will cover, the likely impacts to all listed species in the Plan Area including the number of individuals of each listed species that will be impacted.

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2. ESA Section 7

Prior to granting an ITP application, FWS must also undergo the consultation process with itself, as outlined in Section 7 of the ESA, to assure that granting the permit “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” (16 U.S.C. § 1536(a)(2).) As the Ninth Circuit has explained, the inclusion of both survival and recovery in this definition requires, consideration of recovery, and is not reasonably susceptible to a "survival only" interpretation. (*NWF v. NMFS*, 524 F.3d 917, 932 (9th Cir. 2007); *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004).) A no jeopardy determination is arbitrary and capricious when the agency fails to articulate a rational connection between the facts found and the no jeopardy conclusion. (*Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 516 (9th Cir. 2010).) The burden of proof is on the agency to show that an action will not harm the protected species.

When engaging in Section 7 consultation to determine whether the approval of an ITP will cause jeopardy, FWS is required to render its decision by evaluating the “best scientific and commercial data available.” (16 U.S.C. § 1536(a)(2).) If FWS determines the project is unlikely to cause jeopardy to the species or adverse modification of its habitat, the agency must: provide a statement specifying the impact of the incidental take on the listed species, outlining “reasonable and prudent measures” to minimize the impact from incidental take, and setting forth any conditions the agency and applicant must follow in accordance with the ITP. (16 U.S.C. § 1536(b)(4)(A–C).)

When FWS undergoes formal consultation, it shall provide information related to: 1) the action to be considered; 2) the specific area that will be affected by the action; 3) a description of the threatened and endangered species and/or critical habitat that may be affected by the action; 4) a description of the effects the action may have on the listed species, critical habitat, and an analysis of any cumulative effects; 5) relevant reports including biological assessments and/or environmental impact statements that have been prepared related to the action; and 6) any relevant information related to the listed species, critical habitat, and proposed action. (*Id.* § 402.14(c)(1–6).) When considering the adverse effects, FWS must also quantify the amount of take and habitat loss that it has authorized to date and analyze the impact of those authorizations on the survival and recovery of the species. (*Id.* § 402.14.)

An Incidental Take Statement ("ITS") must set forth a trigger that, when reached, results in an unacceptable level of incidental take, requiring the parties to re-initiate consultation. (*Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1249 (9th Cir. 2001).) Preferably, the trigger is numerical, but the Service may use a surrogate—for example, changes in ecological conditions affecting the species. (*Id.* at 1250.) If a surrogate is used, the agency must articulate a rational connection between the surrogate and the taking of the species. (*Id.* at 1250-51.) The Ninth Circuit has rejected a surrogate trigger so vague that it failed to "provide a clear standard for determining when the authorized level of take has been exceeded," (*id.* at 1251.) and a surrogate so broad – “all spotted owls” associated with the project -- that it “could not adequately trigger reinitiation of consultation.” (*Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1038 (9th Cir. 2007).) Here, the Service appears to be relying on approximations of habitat acres for a

truncated set of listed species that will be affected as a proxy for the take from the Covered Activities which is inadequate. The Service has failed to justify the need to utilize habitat rather than a numeric for the permitted take or to show that the surrogate used will provide the needed trigger for reinitiation of consultation.

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The ESA's implementing regulations provide that “[i]n order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement.” (50 C.F.R. § 402.14(i)(3).) The Service is responsible for specifying in the statement how the applicant is to monitor and report the effects of the action on listed species. (*Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531-32 (9th Cir. 2010).) The amount of take must be linked to a practical method to determine if that limit has been exceeded.

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In the Biological Opinion for the HCP and ITP, the FWS will need to address all of these factors and account for all of those species in the action area including providing a full explanation why the take of some listed species that may be impacted is not covered and its use of habitat acres rather than numeric limits for take of listed species. The Service cannot authorize an HCP for Covered Activities that may take listed species that are not covered in the ITP or another already existing take authorization under section 7 or section 10 because the Service cannot authorize activities for take of one species which would lead to unauthorized take of another species – to do so would violate the core of the ESA’s prohibition on take.

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3. 2016 HCP Handbook

In December 2016 the Service and NMFS adopted a new joint HCP Handbook. To the extent that this handbook is consistent with the ESA and other laws, it can provide helpful guidance to the Service in reviewing and approving HCPs.

For example, the 2016 HCP Handbook makes is clear that all listed species affected by Covered Activities must be addressed in the HCP. Regarding listed species in the plan area, the 2016 HCP Handbook states:

Helpful Hint: All ESA-listed species that will be taken through implementation of covered activities must be included as covered species, or we cannot issue the incidental take permit (unless covered by another ESA mechanism). *The applicant must adjust covered activities to avoid take of ESA-listed species that are not covered by the HCP.*

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(2016 HCP Handbook at 7-3; emphasis added.) FWS must also fully consider listed species that are managed by NMFS in considering a proposed HCP, this is particularly important for listed anadromous fish – many of which are present in the HCP plan area.

7.4.3 Anadromous Fish

Close collaboration between the Services is required when an applicant’s proposed covered activities *are likely to cause take of both FWS and NMFS listed species, such as salmon and sturgeon*. When both agencies are working with an

applicant on development of an HCP, careful planning is necessary to ensure efficient development of the plan. Any differences the two agencies have about minimizing or mitigating take for a species or a life stage of a species in an HCP should be discussed early in the process so issues can be resolved.

(2016 HCP Handbook at 7-9; emphasis added.) The 2016 HCP Handbook also emphasizes the need for coordination with NMFS, other Federal and State agencies, tribes and local officials. (See, e.g., 2016 HCP Handbook at 4-2 to 4-6 (“Identifying Stakeholders”).)

While the 2016 HCP Handbook provides useful guidance in many areas, the Center remains concerned that reliance on the no net loss policy could lead to ESA violations. According to the 2016 HCP Handbook, for take to be fully offset, the Services must determine that “the biological value that has been lost (from covered activities) will be at least replaced (through implementation of conservation measures) with equivalent biological value.” The Center agrees that this is the correct conceptual approach towards offsetting harm. However, this is at tension with the idea that all an applicant must demonstrate is “no-net-loss,” which is biologically meaningless. It is worth noting that the 1996 HCP Handbook did not use the “nonet-loss” goal at all, and instead framed this in terms of the requirements of Section 10 — to minimize and mitigate to the maximum extent practicable which clearly supports the objectives of conservation including recovery. The Service must ensure that the HCP is truly a conservation plan and supports both survival and recovery of the affected listed species.

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B. The draft HCP fails to provide needed information regarding impacts to listed Species

1. Impacts to Covered Species included in the HCP from Covered Activities are not Adequately Identified or Analyzed

The HCP Covered Activities go beyond simple O&M type activities and also include system upgrades and “minor new construction”. This last category is explicitly intended to support extending service for new customers for up to 2 miles.

Minor new construction. Includes installing new or replacement structures to upgrade existing facilities or to extend service to new customers. These covered activities when in natural vegetation are limited to 2 miles or less of new electric or gas line extensions from an existing line, 1.0 acre or less of new gas pressure limiting stations, and 0.5 acre or less per electric substation expansion

(HCP at 10-7.) The likely location of this “minor new construction” is unknown and therefore the potential impacts to listed species are likewise unknown. The HCP’s attempts to estimate the impacts from an unlimited number of such so-called “minor” expansions throughout the 34 counties appear to be little more than guess work. Moreover, extending electric and gas service to new customers as far as 2 miles from existing facilities is highly likely to support sprawl in and across natural habitats and open areas that leads to fragmentation of habitat and increased edge effects—a cascading set of impacts to Covered Species and their habitats that is not addressed in the HCP.

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In addition, for many of the Covered Species the HCP fails to identify all of the impacts from existing PG&E infrastructure O&M or from the potential expansion that would be allowed as “minor new construction.”

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2. The Covered Activities may affect listed species in the Action Area that are not included as Covered Species and the HCP does not ensure that impacts are fully avoided.

The list of Covered Species in the proposed HCP is far smaller than the list disclosed in the 2006 scoping. The HCP provides no clear explanation for omitting many other listed species that in the Plan Area that may be affected by PG&E O&M activities and/or the “minor new construction” including many avian species. The draft HCP and draft EA provide no explanation of how FWS reached a “no effect” finding in chart A-1 for many listed species are not proposed to be covered by the HCP but that may be affected by PG&E operation and maintenance of power lines, pipelines, and other facilities included in the covered activities. For example, listed steelhead and salmon species, marbled murrelet, California least tern, western snowy plover, northern spotted owl, and western yellow-billed cuckoo are all found within the Plan Area. The draft HCP provides no basis for a finding of “no” impact to these listed species or many other special status species. Because many of these species share habitat with the Covered Species FWS cannot simply assume that impacts to some species in these habitats may occur while impacts to others will be fully avoided, FWS is required to fully explain and analyze whether and how all listed species in the plan area may be affected by the HCP but has not.

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a) Listed Birds

A glaring omission in the Covered Species list is the omission of any avian species that are most vulnerable to impacts from PG&E power line infrastructure including electrocution. The omitted avian species include federally *listed* birds (as detailed below), and birds protected under the Migratory Bird Treaty Act (“MBTA”) and Bald and Golden Eagle Protection Act (“BGEPA”), and birds protected under California state law such as Tricolored blackbirds. The HCP and Draft EA cannot ignore impacts to these species or push off evaluation of those impacts to some other process—the Service’s environmental review and biological opinion must address all impacts to listed species and other imperiled species from the Covered Activities.

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2. Key Information About Covered Activities and Mitigation Measures is Absent.

The proposed HCP covers a very large area and fails to explain where impacts or conservation will occur. The Service should require a revised HCP to clarify the total area that will be impacted from the Covered Activities and additional specific information about where the impacts are going to occur. The lack of specific information makes it impossible for the Service or the public to discern if the Covered Activities identified in the plan are consistent with the conservation needs of the Covered Species and other listed species as set forth in their individual recovery plans and as otherwise required by the ESA, other permits, or other existing conservation efforts. Additional information is also needed on where conservation will occur and how the applicant will coordinate that required conservation with other ongoing conservation efforts in the Plan Area.

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Critically, the Covered Activities that could be included within the “minor new construction projects” are not adequately mapped or addressed. The cumulative impact of “minor new construction projects” could be quite large and impact other listed species and habitats that are not included in the HCP provided to the public.

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ESA Section 10(a)(2)(8) requires the Secretary to provide opportunity for public comment addressing each one of the Secretary's findings under that section. In *Gerber v. Norton*, 294 F.3d 173, 178-184 (DC Cir. 2002), the D.C. Circuit considered the Secretary's approval of an HCP application which was based in large part on a map describing the placement of a road. The Court rejected the Secretary's approval in part because he failed to provide the map for public inspection prior to public comment. The court held that “opportunity for public comment must be a meaningful opportunity,” which was not provided where information relied upon by the Secretary was not publicly available.

For all species there is no specific location information overlaid with habitat making it impossible to analyze the impacts on designated critical habitat or habitat critical for species survival. There is also no indication of what specific activities will occur in habitat areas, making it impossible to analyze the impacts those activities will have on the covered species; for example, it is much more detrimental to the Ohlone tiger beetle if its habitat is dug up for a pipeline installation, due to larvae and pupae being underground throughout the year, as opposed to vegetation clearing, which actually could be beneficial to the beetle. Unfortunately, from the “Likelihood of Specific Activities to Directly Impact Covered Wildlife Species Habitat” (Table 4-12) in the HCP, it appears the new pipeline installation is an activity expected to “possibly” impact the covered insects (HCP pg. 4-27). Each species has specific requirements and will respond differently to different activities depending on the type, location, and quality of habitat impacted and thus that information must be disclosed to determine impacts to species.

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Ohlone tiger beetle (*Cicindela ohlone*)

It is expected that 30 acres (7.5 permanent and 22.5 temporary) of Ohlone tiger beetle habitat will be impacted over the 30-year coverage of this HCP (Table 4-25, pg. 4-67). However, it is unclear where habitat loss will occur. The location of habitat loss is of utmost importance for the Ohlone tiger beetle due to its very restricted range and reliance on only five generally healthy populations in Santa Cruz County (Cornelisse 2013). In addition to not disclosing the locations of habitat loss, the information contained in the HCP about the Ohlone tiger beetle is out of date. The most recently cited materials for the Ohlone tiger beetle are from 2009 and there has been substantial work published on the Ohlone tiger beetle's occurrence, population viability, habitat requirements, and metapopulation dynamics since 2009 (Cornelisse 2013; Cornelisse & Duane 2013; Cornelisse et al. 2013b, 2013a). For example, the map in the HCP (figure 4-12) is missing occupied habitat (Cornelisse 2013). At the very least, this new information needs to be incorporate in the analysis as the best available science to determine the impact of the activities on the Ohlone tiger beetle's survival and recovery.

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The HCP indicates that the impacts to the Ohlone tiger beetle (OHTB) are similar to the Mount Hermon June Beetle but that “because OHTB adults likely spend more time on the

ground surface, they may be slightly more likely to be crushed by activities” (pg. 4-74). This is a gross understatement and shows lack of understanding of the OHTB and Mount Hermon June beetle behavior, as the June beetle spends a lot of time underground in the sand, the OHTB spends its entire adult life on the ground surface, running around hunting and mating (Cornelisse et al. 2013b). Further, while the minimization measures listed on page 4-73 may reduce the crushing of adults, the real harm to the Ohlone tiger beetle will come from the digging up of the land, as the tiger beetles are present as eggs, larvae, and pupae throughout the year (Cornelisse et al. 2013b, 2013a), resulting in significant mortality or take of individuals due to ground disturbing activities, such as installation of new pipelines.

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The minimization measures for the indirect impacts to habitat- to use weed-free seed mixes and straw in revegetation (pg. 4-74) would be extremely detrimental to the Ohlone tiger beetle due to the destruction of bare ground habitat. Any vegetation cover, whether through seed mixes or ground cover (e.g. straw, mulch, gravel) in the remaining Ohlone tiger beetle habitat reduces bare ground available for adult beetles to hunt, mate, and lay eggs and larvae to create burrows and hunt from those burrows (Cornelisse et al. 2013b). Thus, these minimization measures should be removed as they will destroy habitat. Instead, the HCP should commit to creating bare ground habitat within the grasslands by removing thatch and non-native grasses as mitigation.

Mount Hermon June beetle (*Polyphylla barbata*)

The June beetle has 577 acres in the Plan Area (pg. 4-72) but is only found in 10 square miles in Santa Cruz County on the rare sand hills (pg. HCP species appendix B1-18). Further, despite its tiny range, there are many recent “low-effect” HCPs or small scale HCPs that already cover this species ((Low-Effect HCP at the Menchine Residence (Arnold 2009); Interim-Programmatic HCP for small scale development (USFWS 2011); Low-Effect HCP for Santa Cruz Water Treatment Plant (Ebbin Moser & Skaggs LLP & Arnold 2013); Low-Effect HCP for Verizon Wireless (McGraw et al. 2017); Low-Effect HCP for Clements Property (McGraw & Henry 2017); Low-Effect HCP for Renovation of Juvenile Hall (McGraw et al. 2019)). The Service needs to examine this HCP in light of the cumulative impacts of all of these development and habitat altering activities.

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Further, like the Ohlone tiger beetle, the science used to analyze the impacts to the Mount Hermon June beetle is out of data and there is at least one publication that discusses habitat requirements of the Mount Hermon June beetle not cited in the HCP (Hill & O’Malley 2010). The “Indirect Impacts” to the Mount Hermon June beetle (MHJB) are listed as “vegetation removal or introduction of invasive plant species, which may reduce MHJB habitat or productivity by reducing favorable food sources” (pg. 4-73). However, there are no minimization measures listed to reduce these indirect impacts; those measures should at least include an avoidance of habitat areas for vegetation removal unless it is removal invasive species.

Zayante band-winged grasshopper (*Trimerotropis infantilis*)

The Zayante band-winged grasshopper is known only from the Zayante sandhills of Santa Cruz County, California, where extant occurrences are distributed over an area of less than four

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square miles (10 square kilometers). The Zayante band-winged grasshopper has already lost 95% of its habitat (Service 2009). Recent estimates put the remaining open sand parkland habitat at 57 acres (23 hectares) (Service 2009). Despite its tiny range, there are many recent “low-effect” HCPs or small scale HCPs that already cover this species ((Interim-Programmatic HCP for small scale development (USFWS 2011); Low-Effect HCP for Santa Cruz Water Treatment Plant (Ebbin Moser & Skaggs LLP & Arnold 2013); Low-Effect HCP for Verizon Wireless (McGraw et al. 2017); Low-Effect HCP for Clements Property (McGraw & Henry 2017); Low-Effect HCP for Renovation of Juvenile Hall (McGraw et al. 2019)). The Service needs to examine this HCP in light of the cumulative impacts of all of these development and habitat altering activities.

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Smith’s blue butterfly (*Euphilotes enoptes smithi*)

The science used to analyze the impacts to the Smith’s blue butterfly must be updated. The Service currently has a draft Species Status Assessment that could be consulted. The minimization measures for the indirect impacts to habitat- to use weed-free seed mixes and straw in revegetation (pg. 4-75) would be extremely detrimental to the Smith’s blue butterfly due to the destruction of open and shifting dunes and potential introduction of novel vegetation that would stabilize dunes. Any vegetation cover, whether through seed mixes or ground cover (e.g. straw, mulch, gravel) in the remaining Smith’s blue habitat reduces open dune areas; coastal and seacliff buckwheat seedlings depend upon disturbances, such as fire and erosion (including landslides), for the development of site conditions favorable for germination and establishment (USFWS 2006). Thus, these minimization measures should be removed as they will destroy habitat. Instead, the HCP should commit to creating disturbed areas of dune to encourage growth of coastal and seacliff buckwheat.

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Valley elderberry longhorn beetle (VELB) (*Desmocerus californicus dimorphus*)

The HCP defines permanent take as that which removes elderberry stems >1 in diameter and temporary as that which prunes elderberry shrubs, however it states that “Shrubs in riparian and non-riparian habitats can be affected, and take of VELB beetles, pupae, larvae, or eggs could result regardless of whether the activity results in temporary or permanent impacts on VELB habitat.” (p. 4-39). Thus, permanent and temporary impacts should be combined to obtain the correct take estimate for this species. Further, due to the lack of information on where the impacts will take place it is impossible to analyze whether the 0.35 acres of critical habitat that will be impacted (p. 4-40) could be critical to the survival of the species, especially considering the VELB has only 515 acres of critical habitat (HCP appendix pg. B1-25).

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3. USFWS Did Not Comply With The Coordination Requirements.

b) Coordination with State Agencies

USFWS is required to coordinate with the State of California through a Section 6 Cooperative Agreement. The 2016 HCP Handbook further explains the requirements of this program:

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Section 6 directs the Services to cooperate with the States in carrying out the

ESA. Section 6(a) requires consulting with the States before acquiring any land or water for the conservation of listed species. Since mitigation measures in many HCPs include the permanent protection of habitat through acquisition of fee title or conservation easements, the Services must work with applicants to solicit affected States for early participation in the HCP development process.

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(2016 HCP Handbook at 1-9.) Over ten years have passed since the NOI was issued for the HCP. During that time, USFWS has prepared a Draft EA and the HCP. However, neither document demonstrates that USFWS or PG&E solicited the advice or guidance of CDFW or other state agencies in the HCP development process.

The Draft EA and HCP are also flawed because they do not show that the Service has considered State requirements in the development of the HCP or assured compliance with local and state laws and regulations.

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D. The HCP Does Not Contain An Adequate Enforcement Mechanism.

The HCP fails to include an adequate enforcement mechanism because too many of the key measure for avoidance and minimization of impacts are left to the discretion of the applicant with too little oversight and reporting to ensure they are applied as intended or have the anticipated effect. The HCP is “filled with ‘should’ and ‘may’ and imprecise language” and this “ambiguity can be cleared up in the permit terms.” (2016 HCP Handbook.) Here, the Draft EA and HCP are filled with such permissive and non-binding language and should be revised to ensure that the ITP provides clear terms.

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Overall, the HCP provides far too little information about Covered Activities, reporting and oversight to show that avoidance will be implemented first where possible and that needed minimization measures will be undertaken for Covered Activities in all cases before impacts occur and mitigation is needed. The Center suggests that the HCP be revised to include: additional prior notification to Service and public of all projects that go beyond existing O&M projects which also provide their location; additional on sight inspection by FWS for “hot zone” and “map book zone” projects; and that the Service require a qualified biologist to oversee the choices at key stages in application of the avoidance and minimization measures.

II. USFWS Failed To Comply With NEPA In Preparing The Draft EA And HCP.

USFWS failed to comply with NEPA by preparing a draft environmental review document that either omits entire categories of impacts or contains only conclusory analyses of such impacts.

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USFWS must prepare an environmental impact statement.

NEPA requires that USFWS prepare an environmental impact statement (“EIS”) for actions which significantly impact the environment. Courts have specifically required the preparation of an EIS in connection with the preparation of an HCP. (*See National Wildlife Fed’n v. Babbitt*, 128 F.Supp.2d 1274, 1301(E.D. Cal.2000) (holding that USFWS violated NEPA by preparing only an EA and not an EIS for an HCP).) The HCP in *National Wildlife Fed’n* only covered two species and 53,000 acres, as opposed to the 36 species and 565,781

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acres covered by the HCP in this case. Likewise, in *Jones v. Gordon*, 792 F.2d 821, 827-828(9th Cir. 1986), the Ninth Circuit faulted National Marine Fisheries Service (“NMFS”) for failing to prepare an EIS for a permit to capture killer whales in Alaska. The Court concluded that the NMFS had failed to “explain adequately its decision not to prepare an environmental impact stated.” (*Id.*)

Because the proposed HCP and ITP would cause significant direct, indirect and cumulative impacts to the environment, the Service must prepare an EIS. Pursuant to the CEQ NEPA regulations, “significantly” is broadly defined such that as EIS is required whenever one of the following conditions is met, especially one of the 10 “intensity” factors:

Significantly as used in NEPA requires considerations of both context and intensity: (a) Context. This means that the significance of an action must be analyzed in

in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or

threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

(40 CFR §1508.27.) The context is significant for several reasons including because the HCP will have both short- and long-term effects for a very large region. As for intensity, the project also meets many of the significance factors including, but not limited to: affecting wetlands, riparian areas, and ecologically critical areas; impacts to threatened or endangered species, as well as special status species, and other significant resources; the effects of the proposal are controversial with differences among experts as to the impacts to resources from the infrastructure and operations; the effects are highly uncertain and involve unique or unknown risks particularly as to the “minor new construction”; and the proposal threatens to violate requirements for environmental protection under both Federal laws (e.g., MBTA, BGEPA) and State wildlife laws (e.g. CESA and fully protected species laws). Courts have found that where any significance factor is shown, an EIS may be required. For example,

Agencies must prepare environmental impact statements whenever a federal action is "controversial," that is, when "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor," [], or there is “a substantial dispute [about] the size, nature, or effect of the major Federal action.” [].

(*National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (internal citations omitted).) Here, the many significance factors and context are more than sufficient to show that an EIS is needed.

USFWS cannot demonstrate that the Covered Activities in the HCP will not cause significant impacts – the proposed HCP is a 30-year program to authorize the take of 36 endangered to threatened species on over 565,781 acres of land and by its own terms, the HCP anticipates 5,501 acres of new construction in undeveloped areas. (HCP at Table 1-1.) The “minor new construction” covered by the HCP includes upgrades or extensions of facilities in “suitable habitat for covered species” as long as there are no more than 2 miles from an existing line which encompasses a large but unknown amount of habitat for listed species. Given PG&E’s expansive network of utility lines, this could encompass construction projects in many acres of high quality habitat for Covered Species over the 34 county area. The HCP also applies to the construction of new pipelines up to 2 miles in length, which involves ground disturbing activities including grading and erosion control. (Draft EA at 3-18.) Thus many of the significance factors are present in this instance including, but not limited to: effects to wetlands and ecologically critical areas, the presence of significant controversy, uncertain effects, cumulatively significant effects, and adverse effects to listed species. (40 CFR §1508.27 (b)(3),(4)(5)(6) &(9).) The anticipated impacts are clearly “significant” and an EIS is needed.

It is common for a large scale regional HCP to require an EIS, indeed, many regional HCPs in California have necessitated the preparation of an EIS. For instance, the following HCPs included an EIS: (1) East Contra Costa County Habitat Conservation Plan/Natural

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Community Conservation Plan; (2) Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan; (3) Western Riverside County Multiple Species Habitat Conservation Plan; and (4) Natomas Basin Habitat Conservation Plan.

I. USFWS failed to coordinate with other agencies as required by NEPA.

NEPA requires that agencies cooperate with state and local agencies “to the fullest extent possible.” (40 C.F.R. 1506.2(b).) Such cooperation must occur for (1) joint planning processes; (2) joint environmental research and studies; (3) joint public hearings; and (4) joint environmental assessments. *Id.* NEPA also requires a discussion of “[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned.” (40 C.F.R. § 1502.16(c).)

For example, USFWS has not demonstrated that it has engaged in the required coordination with the California Department of Fish and Wildlife (“CDFW”). California law prohibits the “take” of species protected by the California Endangered Species Act (“CESA”) absent a permit from CDFW. (Cal. Fish & Game Code § 2081.) CDFW further must make a “Consistency Determination” that the permit requirements are consistent with CESA. (*Id.*; *See also In re Consol. Delta Smelt Cases*, 812 F.Supp.2d 1133, 1195 (E.D.Cal.2011) (vacated on other grounds).) Despite these requirements, the Draft EA contains no mention of how PG&E has or intends to comply with section 2081.

III. Conclusion.

Thank you for the opportunity to submit comments on the Draft EA and HCP. The Center looks forward to working with the Service to assure that the HCP and environmental review conforms to the requirements of federal and state laws and to assure that the conservation plan provides a true benefit to all listed species affected and that all significant impacts to the environment are fully analyzed, avoided, minimized and mitigated. Please add the Center to the interested parties list for all future notices and meetings regarding this HCP (contact information is below) and do not hesitate to contact us with any questions about the matters raised in this letter. We look forward to reviewing the USFWS’s responses to these comments and a revised HCP and environmental documentation.

Sincerely,



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References (these electronic files will be sent by mail as they are too large to send via email)

Arnold RA. 2009. Low-Effect Habitat Conservation Plan for the Mount Hermon June Beetle at the Menchine Residence (APN 060-361-03) in Santa Cruz, Santa Cruz County, CA.

Cornelisse TM. 2013. Conserving extirpated sites: using habitat quality to manage unoccupied patches for metapopulation persistence. *Biodiversity and conservation* **22**:3171–3184. Springer.

Cornelisse TM, Bennett MK, Letourneau DK. 2013a. The implications of habitat management on the population viability of the endangered Ohlone tiger beetle (*Cicindela ohlone*) metapopulation. *PloS one* **8**. Public Library of Science.

Cornelisse TM, Duane TP. 2013. Effects of knowledge of an endangered species on recreationists' attitudes and stated behaviors and the significance of management compliance for Ohlone Tiger Beetle conservation. *Conservation biology* **27**:1449–1457. Wiley Online Library.

Cornelisse TM, Vasey MC, Holl KD, Letourneau DK. 2013b. Artificial bare patches increase habitat for the endangered Ohlone tiger beetle (*Cicindela ohlone*). *Journal of insect conservation* **17**:17–22. Springer.

Ebbin Moser & Skaggs LLP, Arnold R. 2013. Low-effect habitat conservation plan for the issuance of an incidental take permit under section 10(a)(1)(b) of the endangered species act for the federally endangered mount hermon june beetle zayante band winged grasshopper and ben lomond spineflower for the city of santa cruz graham hill water treatment plant operations, maintenance, and construction activities.

Hill KE, O'Malley R. 2010. A picky palate? The host plant selection of an endangered June beetle. *Journal of insect conservation* **14**:277–287. Springer.

McGraw J, Allen M, Henry MS. 2019. Low-Effect Habitat Conservation Plan for the Renovation of the County of Santa Cruz Juvenile Hall Felton, Santa Cruz County, California.

McGraw J, Fowler C, Henry MS. 2017. Low-Effect Habitat Conservation Plan for the Verizon Wireless Telecommunications Facility Expansion Project Felton, Santa Cruz County, California. Submitted to the US Fish and Wildlife Service **60**.

McGraw J, Henry MS. 2017. Low-Effect Habitat Conservation Plan for Endangered Sandhills Species at the Clements Property, Santa Cruz County California.

USFWS. 2009. Zayante band-winged grasshopper (*Trimerotropis infantilis*) and Mount Hermon June beetle (*Polyphylla barbata*). 5-Year Review: Summary and Evaluation.

Zayante band-winged grasshopper (*Trimerotropis infantilis*) and Mount Hermon June beetle (*Polyphylla barbata*). 5-Year Review: Summary and Evaluation. US Fish and Wildlife Service.

USFWS. 2006. Smith's Blue Butterfly (*Euphilotes enoptes smiti*) 5-Year Review: Summary and Evaluation. U.S. Fish and Wildlife Service, Ventura, CA.

USFWS. 2011. Interim-Programmatic Habitat Conservation Plan: Citizens of the City of Scotts Valley and County of Santa Cruz Proposing Small-Scale Residential Development Projects in the Zayante Sandhills, Santa Cruz County, California.