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May 22, 2000

James Lyons, Under Secretary for
Natural Resources and Environment
United States Department of Agriculture
1400 Independence Avenue, S.W., Room 217-E
Washington, DC 20250

Dear Under Secretary Lyons:

In response to the February 22, 2000 Federal Register notice, 65 Fed. Reg. 8833, East Bay Municipal Utility District ("EBMUD") submits the following comments on the proposed "Unified Federal Policy for Ensuring a Watershed Approach to Federal Land and Resource Management."

Introduction

EBMUD endorses the proposal for a unified federal watershed management policy. The policies of consistency and uniformity among federal agencies and cooperation with states and tribes are important. As a member of the Western Urban Water Coalition ("WUWC"), we support the comments regarding the proposal submitted by WUWC in this matter. Our comments in this letter cover our own more specific points of emphasis and concern.

With respect to watershed protection measures, we endorse the proposals for: (1) Assessing the function and condition of watersheds; (2) Improving monitoring; (3) Restoring watersheds; and (4) Identifying waters of exceptional value. Each of these four areas should reflect the nation's interest in the protecting the quality of source waters for potable use. We believe it is appropriate that the Forest Service consider not only the Clean Water Act, but also the source water assessment requirements of the Safe Drinking Water Act ("SDWA") in developing a unified watershed policy.[1]

Under existing law, the Forest Service and other federal land agencies can take important actions to protect and enhance the quality of source water for potable

[1] The source water assessment requirements of the Safe Drinking Water Act were enacted in 1996. See P.L. 104-182; 110 Stat. 1673, codified at 42 U.S.C. 300j-13.

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municipal supplies. For example the upper Mokelumne watershed, in the El Dorado and the Stanislaus National Forests, is the source of 95 percent of EBMUD's potable water supply. This watershed has exceptional value to EBMUD because it flows directly to Pardee Reservoir, our principal water source. We are particularly concerned with protecting the quality of flows from the upper Mokelumne in light of major changes in the electric generation industry. These concerns are reflected in the report, "Protecting the Mokelumne," adopted by EBMUD Board in December 1999, and available on our web site at: http://www.ebmud.com/pubs/Technical/technical.html. Click on PG&E Hydropower Divestiture.

Watershed protection is a core interest of drinking water supply agencies like EBMUD. Protection of beneficial use of water is required by article X, Section 2 of the California Constitution. This self-executing constitutional provision requires all branches of California government, including EBMUD, to ensure that "waste or unreasonable use or unreasonable method of use of water be prevented and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." The quality of EBMUD's source water from the upper Mokelumne watershed in the El Dorado and the Stanislaus National Forests is generally very good. Under current SDWA regulations, EBMUD can treat water from Pardee Reservoir for potable use with simple filtration and minimal disinfection. Our interest is in watershed management actions that protect, and, where possible, enhance this high quality source water. The Forest Service has the clear duty and legal authority to against guard against degradation, and where possible, improve the quality of the water that enters EBMUD's water system for potable service to 1.2 million EBMUD customers.

1) A core purpose of the National Forest reservations is to protect and secure favorable water quality for potable use.

The Forest Service is responsible for protecting and managing National Forest System ("NFS") lands and resources throughout the western United States and within the State of California. Protection of municipal water supplies has always been a basis for the reservation of national forest lands. Beginning in 1960, the Congress has added additional multiple-use mandates to manage the forests for protection of favorable conditions of water flow, and for outdoor recreation, range, timber, watershed, wildlife and fish purposes.[2]

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In the 1897 Organic Act that established the National Forests, a foundational purpose was to "improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flow . . . for the use and necessities of the citizens of the United States."[3] At the time of the Organic Act, the western United States was fast developing, and the congress foresaw the importance of providing reliable and clean supplies for the cities of the future. "It was the view of several of the Congressmen who spoke on the floor of the House that national forests were necessary 'not so much to save the timber for future use as to preserve the water supply.'"[4] In addition, "Congress has evidenced its continuing concern with enhancing water supply by specifically authorizing the President to set aside and protect national forest lands as needed as sources of municipal water supplies."[5] Several of the cities envisioned by congress in 1897 are in EBMUD's service area. The 1.2 million customers in those cities are served by EBMUD with water that originates in the El Dorado and the Stanislaus National Forests. Proper management of the upper Mokelumne drainage, that will "secure favorable conditions of water flow" requires that EBMUD and the El Dorado and the Stanislaus National Forests cooperate to protect source water quality.

2) Source water quality within the El Dorado and the Stanislaus National Forests watershed may be adversely affected by changes in hydroelectric projects operations.

The proposed watershed policy suggests a focus on watersheds where Federal land and resource management activities can meaningfully influence water quality. Many of the watersheds in California, including the upper Mokelumne, may be affected by California electric energy restructuring legislation and the resultant divestiture of hydropower facilities.[6] In these watersheds, particularly those with ongoing FERC relicensing proceedings, federal land agencies exercising their legal authorities can make a difference.

PG&E Company has applied to the California Public Utilities Commission ("CPUC") for authority to auction its hydroelectric assets, many of which are located on NFS land. One of the hydroelectric facilities proposed for auction is PG&E's Project 137, located in the El Dorado and the Stanislaus National Forests. Project 137 and the associated watershed lands that PG&E Company proposes to auction to the highest bidder are private inholdings within the exterior boundaries of the Forests. A change in

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ownership and/or management of these lands and hydropower facilities without adequate protection measures could adversely impact National Forest resources, water quality of flows downstream from those hydroelectric projects, drinking water quality, and the public interest.[7] Even modest changes in flow regimes and land use can, over time produce significant adverse impacts on downstream beneficial uses.

Statewide, PG&E Company proposes to transfer ownership of its hydroelectric generating assets and approximately 140,000 acres of land based on an auction process in which those assets are sold to the highest bidder. While this process maximizes the net revenue to PG&E Company, it potentially undermines the public interest values of those assets. A successful high bidder will have incentives to select water operations and land uses that generate sufficient revenue to recover its investment. The high bidder will have little direct incentive to consider impact on adjacent NFS lands, downstream water quality, and the public interest.

Associated watershed and other project-related lands are, in most cases, undeveloped, with little active management. In the upper Mokelumne, PG&E Company's filings in the CPUC indicate that there are 2138 acres of lands outside FERC jurisdiction, and 5053 acres within the FERC license. These lands are all within the critical upper Mokelumne watershed that provides clean source water for potable use by EBMUD's customers. In most cases, there is no evidence of a boundary between these lands and the adjacent public lands. The sale of these lands to the highest bidder fails to account for the high public interest values now associated with these lands, and ignores the potential for adverse impact on downstream drinking water quality. While PG&E contends that local ordinance or FERC oversight is adequate to protect these resources, the public interest requires additional protection of source waters, as regulated under the SDWA.

3) The Forest Service should exercise its authority and responsibility to protect watershed water quality through 4(e) conditions in the FERC relicensing process specifically in Project 137.

The Forest Service in coordination with other Federal agencies can make a difference in protection of watersheds like the upper Mokelumne through appropriate exercise its authority in the relicensing process for hydroelectric projects on Forest Service lands. See 16 U.S.C. 797(e), commonly referred to as section 4(e) of the Federal Power Act; *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). Under Section 4 (e), the Federal Energy Regulatory Commission

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(FERC) relicensing decision must include all conditions that the Secretary of Agriculture deems necessary for the adequate protection and utilization of the National Forest.

Generally, under federalism principles governing water quality, the states, rather than federal agencies, have principle responsibility for protection of water quality. The states exercise this authority through issuance of water quality certificates in connection with federal agency actions. See 33 U.S.C. 1341, PUD *No 1 of Jefferson County v. Washington Dept. Of Ecology*, 511 U.S. 700 (1994). However, in the specific circumstances of FERC Project 137, the 1976 water quality certificate is out of date with respect to the concerns which the Forest Service should address in the current stage of the relicensing proceeding. As FERC has noted:

> "PG&E filed an application for Water Quality Certification (WQC) for the Mokelumne River Project on April 3, 1973. The application was processed by the California State Water Resources Control Board, and on July 27, 1976, the State issues a WQC. It certified that the project to be relicensed would not contravene existing state water quality standards. The certificate contained no conditions. Based on the revised application, PG&E filed again for a certificate on March 15, 1983. The board determined on April 4, 1983 that a new certificate was not required for the amended project." FERC, *Draft Environmental Assessment for Hydropower license, Mokelumne River Hydroelectric Project,* December 19, 1996.

In short, the state provided an *unconditional* water quality certificate more than twenty years ago for a relicensing process that is still incomplete. Obviously, this water quality certificate could not have considered the water quality impacts of Project 137 in light of the tectonic changes that have occurred within PG&E and the electric industry in California over the subsequent 24 years. Moreover, federal and state water quality constraints on the Mokelumne have become much more stringent since 1983 and especially since 1976.

Under its 4(e) conditioning authority, the Forest Service may impose conditions in the FERC relicensing process that will protect water quality in a municipal drinking water source watershed. In other proceedings, the FS has imposed 4(e) conditions intended to address water quality concerns.[8] In the unique circumstance of Project 137,

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[8] For example, in *Southern California Edison Co.*, 83 FERC ¶ 62,241 (1998), Order Issuing New License (Major Project), the license included the following Forest Service § 4(e) condition:

> Condition No. 22. The licensee shall discharge no waste or by-product if it contains any substance in concentrations that would result in violation of water quality standards set forth by the State; would impair present or future beneficial uses of water; would cause pollution, nuisance, or

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those 4(e) conditions should reflect the source water assessment and monitoring requirements of the SDWA.

4) Source water monitoring and assessment are the cornerstones of good stewardship and effective watershed management.

The 1996 amendments to the Safe Drinking Water Act ("SDWA") require states, (and by extension potable water purveyors like EBMUD) to prepare source water quality assessments. This requires monitoring and identification of critical contaminants. See 42 U.S.C. 300j-13. The watershed policy should incorporate these requirements in watersheds where they apply.

Monitoring: With respect to monitoring, the source water assessment must "Delineate the boundaries of the assessment areas . . . using all reasonably available hydrogeological information on the sources of the supply of drinking water . . . and the water flow . . . and any other information" to adequately delineate the boundaries of source water assessment areas. See 42 U.S.C. 300j-13(a)(2)(A). The Forest Service should assist in monitoring and compiling hydrogeological information on the sources of the supply of drinking water and water flows. In the upper Mokelumne, in El Dorado and the Stanislaus National Forests, the USFS should require comprehensive monitoring in the Project 137 relicensing process presently pending before FERC through its 4(e) conditioning authority.

Identification of Critical Contaminants: The SDWA requires the source water assessment to "identify the contaminants regulated . . . which may present a threat to public health, and to the extent practical, the origins within each delineated area of such contaminants to determine the susceptibility of public water systems to such contaminants." See 42 U.S.C. 300j-13(a)(2)(B). The Forest Service should assist in identifying regulated contaminants that present a threat to public health. In the upper Mokelumne, in the El Dorado and the Stanislaus National Forests, the USFS should require identification of contaminants by the Project 137 licensee through its 4(e) conditioning authority.

In cooperation with local water agencies, EBMUD has undertaken a preliminary survey of sanitary risks in the upper Mokelumne watershed potentially affected by Project 137.[9] Pursuant to SDWA requirements, EBMUD will undertake more extensive

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source assessments in the near future. We look forward to cooperation with Forest Service, as well as FERC and other federal agencies, in preserving the highest possible quality of source water for potable use.

We commend your efforts to coordinate watershed management, and look forward to cooperation with the Forest Service with regard to the upper Mokelumne and the El Dorado and the Stanislaus National Forests. Should you have further questions about these comments, or about EBMUD and its mission, do not hesitate to contact me at 510-287-1615. Should you have questions about the legal analysis please contact Peter Sly in our Office of General Counsel, at 510-287-2013.

Very truly yours

Michael J. Wallis

MJW/PWS/spb

cc: Members, Federal Advisory Committee on FERC relicensing
Charles Fox, EPA Assistant Administrator for Water
Cynthia Dougherty, EPA office of Ground Water and Drinking Water
Bradley Powell, Regional Forester
Gordon Smith, PG&E Corporation
Karen Solari, USFS, Salt Lake City, Content Analysis Enterprise Team
Email to: cleanwater/wo_caet-slc@fs.fed.us.

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Water District and Calaveras Public Utility District, November 1995. The focus of this initial survey, which predated electric market restructuring legislation, was on potential for contamination from septic systems.

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EAST BAY
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source assessments in the near future. We look forward to cooperation with Forest Service, as well as FERC and other federal agencies, in preserving the highest possible quality of source water for potable use.

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Very truly yours

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cc: Members, Federal Advisory Committee on FERC relicensing
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Karen Solari, USFS, Salt Lake City, Content Analysis Enterprise Team
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Water District and Calaveras Public Utility District, November 1995. The focus of this initial survey, which predated electric market restructuring legislation, was on potential for contamination from septic systems.