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Pacific Gas and Electric Company

STATE WATER RESOURCES CONTROL BOARD

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DIV OF WATER RESOURCES CONTROL
SACRAMENTO

July 3, 2013

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**Re: Kilarc-Cow Creek Hydroelectric Project, FERC Project No. 606
PG&E's Response to Select Draft EIR Scoping Comments**

Dear Mr. Parks:

Pacific Gas and Electric Company ("PG&E") respectfully offers this response to comments submitted by Erik Poole, Tetrick Ranch, and Robert and Debra Stanton (collectively the "Water Rights Holders") concerning the State Water Board's Notice of Preparation ("NOP") of a Draft Environmental Impact Report ("DEIR") on the proposed decommissioning of the Kilarc-Cow Creek hydroelectric facilities ("Project").¹ PG&E appreciates Staff's consideration of the following points. We hope this response is helpful in focusing the issues appropriate for consideration in the DEIR.

A. Most of the Issues Raised in the Water Rights Holders' Comment Are Irrelevant to the CEQA Environmental Review Process.

The Water Rights Holders' comments are devoted predominantly to presenting one side of an ongoing legal dispute concerning water rights and supposed contractual rights concerning the delivery of water.² The comments are not properly addressed, much less resolved, through the California Environmental Quality Act ("CEQA") environmental review process.

¹ County Counsel for the County of Shasta submitted comments that repeated, almost verbatim, the comments authored by Tetrick Ranch and ostensibly submitted by the "Coalition." Compare County Counsel's letter dated April 20, 2013 with Tetrick Ranch's "Comments from the Coalition" document with the same date. Because County Counsel appears to have simply reiterated the comments by the "Coalition" (i.e., Tetrick Ranch), PG&E does not separately respond to County Counsel's comments.

² While PG&E disagrees with many of the statements offered in the comments of the Water Rights Holders, it does not attempt to address each objectionable statement here. Suffice it to say that PG&E has been negotiating in good faith with the Water Rights Holders, collectively and individually, over the past several years in an ongoing effort to



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The Water Rights Holders' comments seek to embroil the State Water Board in an ongoing dispute concerning alleged interference with their water rights and alleged breach of asserted contractual arrangements to deliver water to Hooten Gulch. Commenters Poole and Tetrick Ranch engaged in a similar effort before the Federal Energy Regulatory Commission ("FERC") with respect to FERC's decommissioning proceedings.³

Through their comments, the Water Rights Holders attempt to convert the legitimate environmental protection functions of the CEQA process into an informal *ad hoc* dispute resolution process administered by the State Water Board. In effect, their proposed "Technical Solution" is not a mitigation measure for Project impacts,⁴ nor is it a feasible alternative that would avoid or reduce impacts "caused" by the proposed Project.⁵ Rather, it is an effort to exact a multi-million dollar form of damages – one that would not be available in a court of law – for alleged, but unproven, prospective injuries. This is improper. Whether the Water Rights Holders are entitled to any damages for their purported claims is properly addressed in state court and not in the course of a CEQA proceeding.

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understand and address their private legal claims, as appropriate. While PG&E has refused to yield to unreasonable demands, this refusal does not constitute a lack of good faith.

³ Commenters Poole and Tetrick Ranch attempt to incorporate a massive amount of documentation from the FERC proceeding into the State Water Board's administrative record. PG&E suggests that these attempts are insufficient because the vague references to dozens of FERC filings do not offer any information regarding the multiple steps required to access each of these documents. *See Consol. Irr. Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 725 [vague references to documents by general website address are insufficient for making the documents "readily available to lead agency personnel" for the purpose of including the documents in the CEQA administrative record]. Thus, PG&E questions the propriety of the request to incorporate wholesale the FERC documentation into the CEQA record for the Project.

⁴ *See Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445 ["A 'mitigation measure' is a suggestion or change that would reduce or minimize significant adverse impacts on the environment caused by the project as proposed"], emphasis added.

⁵ We discuss these points further below.



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B. The Project Would Not be the Cause of Any Interference with the Lawful Exercise of Water Rights.

In general, an EIR is required to identify and focus on direct and indirect environmental impacts caused by a project. Significant impacts typically involve changes in the existing environment caused by a project.⁶

As explained above, the issue of whether the Project will interfere with the exercise of water rights or breach an asserted agreement between PG&E (or its predecessor) and the Water Rights Holders is irrelevant to the CEQA environmental review process for the Project. Nonetheless, PG&E wishes to address briefly the assertions concerning the Project's effect on flows in Hooten Gulch. We offer this explanation to dispel the notion that the Project would "cause" impacts to the use of South Cow Creek water by the Water Rights Holders.

The 1969 Decree⁷ verified and conclusively established South Cow Creek water rights. The Decree is clear: the ADUs and Tetrick Ranch have rights to divert water from the "east channel" of South Cow Creek.⁸ According to the SWRCB Map incorporated into the 1969 Decree, the "east channel" of South Cow Creek was a second channel of the creek that fed water into Hooten Gulch above the current confluence of South Cow Creek and Hooten Gulch.⁹

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⁶ *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 875, citing CEQA Guidelines, § 15126.2(a).

⁷ *See* Cow Creek Adjudication, Decree of the Superior Court of Shasta County, In the Matter of the Determination of Rights of the Various Claimants to the Water of Cow Creek Stream System Excepting Clover Creek, Oak Run Creek and North Cow Creek in Shasta County, California, No. 38577 ("1969 Decree"), available at: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/judgments/docs/cowcreek_jd.pdf.

⁸ *See* Exh. 1, excerpts from 1969 Decree, pp. 20, 138. As acknowledged in the NOP comments of Tetrick Ranch, Wagoner is the predecessor in interest to the water rights held by Tetrick Ranch. *See* Tetrick Ranch comments re NOP, p. 2, § 2(a).

⁹ *See* Exh. 2, portion of 1964 SWRCB map, as revised in 1969, referenced in 1969 Decree [depicting Diversion 72 (Wagoner Ditch) and Diversion 73 (Abbott Ditch)].



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Apparently, the east channel of South Cow Creek no longer conveys water to Hooten Gulch.¹⁰ According to Tetrick Ranch’s NOP comments, the Army Corps of Engineers carried out modifications to South Cow Creek that channelized the main channel and prevented flows to the historic east channel.¹¹

Notably, and precisely to address future situations such as the Army Corps’ channelization effort, the 1969 Decree ensured that the ADUs and Tetricks may, if necessary, “extend their diversion works” to divert water from either the east or west channels of South Cow Creek.¹² Thus, the Water Rights Holders have been and continue to be assured of a means of self-help, in the event their existing point of diversion has inadequate natural flow.¹³ While the ADUs and Tetricks currently depend on artificial flows from the Project’s tailrace to supply water to Hooten Gulch, they have no right to the continuation of these artificial flows.¹⁴ Instead, under the 1969 Decree, they may take measures to ensure a viable long-term point of diversion from the natural flow of South Cow Creek. Their failure to do so in the past (or in the future) is the proximate cause of any injury they may suffer, not the Project decommissioning.¹⁵ Consequently, no mitigation for this type of impact is required.

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¹⁰ Based on their NOP comments, the Water Rights Holders apparently consider the stream reach that connects Hooten Gulch with the main channel of SCC to be the “east channel” of South Cow Creek even though the upper portion of this “east channel” no longer carries any water from South Cow Creek.

¹¹ See Tetrick Ranch comments re NOP, p.3, § 2(r).

¹² See Exh. 1, excerpts from 1969 Decree, p. 20.

¹³ For example, the Water Rights Holders could attempt to restore the historic east channel of South Cow Creek so that it once again delivers water to Hooten Gulch; that is, under the Decree, they themselves could carry out the “Technical Solution” they are now proposing that PG&E pay for.

¹⁴ The ADUs and Tetricks have not offered any proof that PG&E or its predecessors contracted to divert water through its Project for their benefit for any specified time period, much less in perpetuity.

¹⁵ While the EIS prepared by FERC concluded that the Project would cause impacts to the ADUs and to Tetrick Ranch, that analysis apparently did not consider the intervening cause – the Army Corps’ channelization effort that prevented flows to the historic east channel of South Cow Creek. (See FEIS, pp. 32-33, 74, 213-213, 264-265.)



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The Water Board, therefore, should not consider the so-called “Technical Solution” presented by the Water Rights Holders, or any variants thereof, as mitigation for asserted impacts to water rights.¹⁶

C. Neither the “Community Proposal” nor the “Technical Solution” Should be Evaluated by the State Water Board as Project Alternatives.

The State Water Board should decline to consider either the “Community Proposal” or the “Technical Solution” presented in the Scoping comments as alternatives to the Project. Pursuant to CEQA Guidelines, § 15126.6, subd. (a), an EIR need only present those alternatives that would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project....” Cases interpreting this provision, and its statutory counterpart, have held that the “requirements for consideration of alternatives must be judged against a rule of reason.”¹⁷ Neither the “Community Proposal” nor the “Technical Solution” presented in the Scoping comments meet these requirements.

Contrary to assertions by one of the Water Rights Holders,¹⁸ FERC carefully considered and then rejected an alternative to the Project that would involve a third-party owning and operating the South Cow Creek hydroelectric facilities. The EIS prepared by FERC explains the basis for FERC staff’s determination that the “Community Proposal” alternative proposed by Tetrick Ranch and others did not meet basic project objectives and therefore should be eliminated from further consideration.¹⁹

¹⁶ To the extent that decommissioning would result in changes to the hydrology of Hooten Gulch, and cause related impacts to riparian habitat and species that depend upon flows in Hooten Gulch, the DEIR can evaluate these types of impacts in comparison to the benefits to riparian habitat and species that will result from increased flows in South Cow Creek through the historically bypassed Wagoner Canyon stretch. PG&E anticipates that Water Board staff will conclude, as did FERC, that the Project results in net benefits to biological resources and that no mitigation is required for these types of impacts as well. See FEIS, pp. 105-106 [“The benefit of returning full natural flow to the bypassed reach far outweighs the loss of the limited poor-quality habitat in the canal.... The removal of project features and the cessation of diversions would return the bypassed reaches to more natural conditions of flow and sediment transport and deposition, which is expected to result in major long-term benefits for aquatic species, both resident and anadromous.”],

¹⁷ *Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910.

¹⁸ See Poole comments re NOP, p. 3.

¹⁹ FEIS, pp. 39 - 42.



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Further, because no party timely submitted an application to FERC for a license to operate the hydroelectric facilities, FERC cannot now issue a license for a substitute operator. Thus, the “Community Proposal” alternative, now re-submitted to the State Water Board, is not a feasible alternative and should not be evaluated in the DEIR.

Finally, the “Technical Solution” proposed by the Water Rights Holders is not properly characterized as a Project alternative under CEQA. It does not constitute a modification, re-design or re-engineering of the Project designed to “avoid or substantially lessen any of the significant effects of the project.” In fact, it does not address at all PG&E’s surrender of its license, its decommissioning of the hydroelectric facilities, or otherwise engage with Project objectives. Instead, it is a free-standing project that has nothing to do with the Project proposed by PG&E; it could be implemented wholly independently of the proposed decommissioning. Moreover, even if it were a proper “alternative” to the Project for CEQA purposes, the “Technical Solution” is not a “feasible” alternative since, among other failings, it is not clear that the State Water Board has the authority to impose it.²⁰ Consequently, the “Technical Solution” should not be evaluated in the DEIR.

Thank you very much for your consideration of these comments. If you have any questions, please contact me at (415) 973-7475.

Very truly yours,

Matthew A. Fogelson

MAF:bd
Dictated but not read.

cc: Ms. Lisa Whitman, License Project Manager – Hydro Licensing, PG&E

²⁰ See CEQA Guidelines, § 15126.4(a)(5). See also Pub. Resources Code, §§ 21061.1, § 21081(a)(3); CEQA Guidelines, § 15126.4(a)(4); *City of Marina v. Bd. of Trustees of the Calif. State University* (2006) 39 Cal.4th 341, 356, citing CEQA Guidelines, § 15364.