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Subject: PG&E's Comments Re Draft EIR for Kilarc-Cow Creek Hydroelectric Project License Surrender (FERC Project No. 606)
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Attachments: [PGEs Comments Re DEIR for Kilarc-Cow Creek Hydroelectric Project License Surrender FERC Project No. 606 5-23-19.pdf](#)

To: State Water Resources Control Board
Division of Water Rights

Attached is Pacific Gas and Electric Company's comments regarding Draft Environmental Impact Report for Kilarc-Cow Creek Hydroelectric Project License Surrender (FERC Project No. 606); State Clearinghouse # 2013032029.

Thank you,

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Ms. Michelle Siebal
State Water Resources Control Board Division of Water Rights
Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000

**RE: Draft Environmental Impact Report for Kilarc-Cow Creek Hydroelectric Project
License Surrender (FERC Project No. 606); State Clearinghouse # 2013032029**

Dear Ms. Siebal:

On April 8, 2019, the State Water Resources Control Board (SWRCB or Board) issued a Draft Environmental Impact Report (DEIR) for Pacific Gas and Electric Company's (PG&E) Kilarc-Cow Creek Hydroelectric Project License Surrender (Kilarc or Project) in connection with PG&E's License Surrender Application (LSA) to the Federal Energy Regulatory Commission (FERC). PG&E is submitting this letter to provide comments on the DEIR.

On April 5, 2019, the SWRCB issued a Denial Without Prejudice of Water Quality Certification for the Kilarc LSA. In its Denial letter, the Board encouraged PG&E to submit a new formal request for certification. See Attachment A. Then on April 8, 2019, although no active water quality certification request was on file, the Board issued the DEIR. PG&E is unclear why the SWRCB has issued the DEIR at this time when there is no active request in place.

PG&E notes that it filed its first request for water quality certification with the Board on August 13, 2009 and has reapplied every year through 2018. However, since the SWRCB's recent Denial Without Prejudice, PG&E has not reapplied for certification and is uncertain if it will submit a tenth certification request. PG&E notes that on May 15, 2019, it filed with FERC a Petition For Declaratory Order Requesting Waiver of Water Quality Certification for the Project (FERC Petition).

Although there is uncertainty surrounding the process, PG&E reviewed the DEIR for Kilarc and, to preserve its rights in light of the SWRCB's DEIR comment deadline, is submitting these comments. However, PG&E reserves all rights and, by making this submittal, does not waive any rights including, without limitation, the matters raised in the FERC Petition.



These comments provide recommended clarifications and corrections to certain statements made in the DEIR, and to address specific recommendations regarding alternatives and mitigation measures for the proposed license surrender conditions.

General Comment

1. In many instances the DEIR refers to the water present in Hooten Gulch due to PG&E's discharge of water from the tailrace of Cow Creek Powerhouse as "augmented flows" or describes the portion of Hooten Gulch below the Cow Creek Powerhouse as the "augmented reach of Hooten Gulch" or "the augmented segment of Hooten Gulch." (See DEIR, pp. xxviii, xxxvi, 4-43, 4-44, 4-45, 4-86, 4-138, 4-169, 4-170, 4-171, 4-172, 4-176, 4-270, 4-292, 4-334, 5-9.) However, this water is more accurately described as "artificial flow" – as it is referred to in the DEIR on pages 4-22, 4-37, 4-42 – since the water is present in Hooten Gulch solely as a result of PG&E's diversion, transmission, use and then discharge of that water at its Cow Creek Powerhouse. For this reason, all references to augmented flows and related concepts throughout the DEIR should be revised to refer to "artificial flows" or "artificially augmented flows."

Specific Comments

PG&E provides the following specific comments:

1. *Section 2.5 Existing Project Facilities and Operations, Table 2-1 Existing Facilities and Characteristics of the Kilarc and Cow Creek Developments page 2-6:*

Comment: For the Kilarc Development, note that Kilarc Unit 2 turbine was retired after it was damaged in a flooded powerhouse (See 162 FERC ¶ 62,004 Order Revising Annual Charges [Issued January 4, 2018], ¶ 4).

2. *Section 2.6.1.3 Kilarc Main Canal Proposal for Disposition, pages 2-15 to 2-16:*

Comment: This section has omitted mention of tunnels that are part of the Kilarc Development and should include a discussion of these tunnels, similar to the discussion of tunnels on the Cow Creek Development.

3. *Section 4.7.4.1 Kilarc Development, page 4-166, second paragraph of the DEIR states:*

"Valley Elderberry Longhorn Beetle

Potential effects from decommissioning activities to elderberry shrubs, the host plant for VELB, would be minimized by the implementation of PM&E Measure WILD-4, which provides pre-construction surveys for elderberry shrubs, and if shrubs providing appropriate habitat for VELB are found, measures provided in the Biological Opinion (NMFS 2011) covering the Licensee's service area would be implemented."

Comment: First, PG&E notes that USFWS is the lead agency for Valley Elderberry Longhorn Beetle (VELB), not NMFS. Second, the DEIR evaluation for VELB relied on WILD-4. However, the Project is outside of USFWS' 2014 revised range for VELB (79 Fed. Reg. 55874 (Sept. 17, 2014), 55879-55917).



4. *Section 3.3.2, Alternative 2 – Retaining Flows to the Abbott Ditch Users, pages 3-3 to 3-7:*

Comment: Alternative 2 and its four options (Alternatives 2A, 2B, 2C, and 2D) should not be included in the DEIR as they do not reduce the significant impacts of the Proposed Project. Under the California Environmental Quality Act (CEQA), an alternative must avoid or substantially lessen the significant impacts of a project. (Pub. Resources Code, § 21002; CEQA Guidelines, 14 CCR § 15126.6(a)-(b).) However, as discussed in Specific Comments 6, 7, 20, 21, 23, and 24, below, the Proposed Project involves no cognizable significant impacts to the Abbott Ditch Users (ADU) under CEQA because the “impacts” identified are too speculative to warrant consideration for CEQA purposes. Therefore, Alternative 2 and its four options (Alternatives 2A, 2B, 2C, and 2D) do not reduce any significant impacts of the Proposed Project and it is improper to include this as an alternative in the Final EIR.

Notwithstanding the above comment, if Alternative 2 and its four options (Alternatives 2A, 2B, 2C, and 2D) will be retained in the Final EIR, the terminology must be revised to ensure they accurately reflect the nature of that alternative. The description of Alternative 2 and its four options (Alternatives 2A, 2B, 2C, and 2D) as “Retaining Flow to the Abbott Ditch Users” is inaccurate. As discussed in General Comment 1 above, the flows in Hooten Gulch that the ADU divert into the Abbott Ditch are artificial flows that result from the discharge of water from PG&E’s Cow Creek Powerhouse. Therefore, Alternative 2 requires the continuation of diversions, transmission, and discharge of water into Hooten Gulch to create artificial flows.

However, the ADU water right does not authorize diversion of water from Hooten Gulch; their water right authorizes diversion of water from South Cow Creek.¹ The operation of PG&E’s Cow Creek Powerhouse may be physically convenient for the ADU because it obviates their need to establish a diversion facility to directly divert from South Cow Creek in order to lawfully exercise their right. However, the cessation of artificial flows in Hooten Gulch does not deprive the ADU of any vested right to take water since their right authorizes diversions from South Cow Creek, not Hooten Gulch. Accordingly, the naming and description of Alternative 2 and its four options (Alternatives 2A, 2B, 2C, and 2D) should be recast to reflect that this Alternative involves continuing artificial flows to Hooten Gulch.²

¹ The ADU’s adjudicated water right is expressly to divert water from South Cow Creek, not from Hooten Gulch. (See Cow Creek Adjudication, Decree § 27, p. 20. If the Board does not have a copy of the Adjudication, PG&E will provide one.) In a recent court ruling pursuant to the Cow Creek Adjudication and specifically addressing correction of the coordinates that identify the location of the point of diversion (POD) for the ADU’s water right, the court confirmed that the ADU’s water right entitles them to divert water from South Cow Creek. (Ruling on Motion to Amend or Modify Cow Creek Adjudication Decree, Schedule 2 (Jan. 31, 2012).) Enclosed as Attachment B is the January 31, 2012 Ruling on Motion to Amend or Modify Cow Creek Adjudication Decree.

² References to Alternative 2 and its four options (Alternatives 2A, 2B, 2C, and 2D) appear throughout the DEIR. (See pp. iv, xvii [Section 3.3.2 title], 3-2, 3-3 to 3-7 [description of alternatives], 4-43 to 4-46, 4-293, 5-15 to 5-16 [Alternative 2 option headings in chart], 5-17.) If this Alternative is retained, changes to terminology should be adjusted in all other such places in the DEIR. For example, all references in the DEIR to “retaining flow to the Abbott Ditch Users,” “retaining flow to the Abbott Ditch Users Point of Diversion,” and “retaining flow to ADU” should be recast as “continuing artificial flows to the Abbott Ditch Users,” “continuing artificial flows to the Abbott Ditch Users Point of Diversion” and “continuing artificial flows to ADU,” respectively. This change in terminology is consistent with how these flows were described in the EIS for Hydropower License Surrender, Kilarc-Cow Creek Hydroelectric Project – FERC Project No. 606, California (License Surrender EIS). (See License Surrender FEIS, pp. 157, 195, 202, 213, 254, and 256.)

5. *Section 3.3.2.1. Alternative 2, Option A – Retaining Flow to ADU via Existing Point of Diversion, page 3-4, third paragraph:*

Comment: PG&E notes that for Alternative 2A, the access roads would also need to be maintained by whatever entity takes over operation and maintenance of other Cow Creek facilities.

6. *Section 4.4.4.2, Agricultural and Forestry Resources, Cow Creek, pages 4-42 and 4-43:*

Comment: The DEIR's conclusion that, as a result of PG&E's surrender of its FERC License, "Significant and Unavoidable" impacts will result due to conversion of "Prime Farmland, Unique Farmland, or Farmland of State Importance" (Classified Farmland) to non-agricultural use (IMPACT 4.4-6) is unsupported by substantial evidence. Relatedly, the conversion of such Classified Farmland to non-agricultural use is speculative and, therefore, cannot be considered as a project impact.³ The DEIR offers no evidence to support the conclusion that the elimination of PG&E's discharges that provide artificial flows in Hooten Gulch will result in the conversion of existing Classified Farmland to non-agricultural use. To the contrary, the DEIR acknowledges that the Proposed Project would not prevent the continued use of the existing Classified Farmland owned by the ADU for agricultural purposes, such as dryland pasture (DEIR, p. 4-43)⁴. In fact, no such evidence could exist because such a conversion of this land to non-agricultural use is highly speculative. Not only does the DEIR acknowledge that dryland farming is possible (DEIR, p. 4-43), but it is highly speculative that the ADU will not continue to conduct irrigated agricultural use, either relying upon the exercise of their already existing water right to divert water from South Cow Creek (which is in no way diminished by the Proposed Project's cessation of the discharges that create artificial flows in Hooten Gulch) or using other water sources that may be available.⁵

Indeed, in discussing the Proposed Project's consistency with land use plans, policies and regulation in the DEIR's Land Use and Planning section (IMPACT 4.14-5), the DEIR correctly states that impacts to land use would be Less than Significant because implementation of the Proposed Project does not affect the ADU's water right or ability to divert water from another location nor does it prevent the continued use of these private lands for agricultural purposes, such as for dryland farming. (DEIR, p. 4-334.) The discussion in the Agricultural and Forestry Resources section of the DEIR, however, is inconsistent with the Land Use and Planning section's discussion.

³ According to the CEQA Guidelines, an indirect impact should be considered only if it is a *reasonably foreseeable impact caused by a project*. (CEQA Guidelines, § 15064(d)(3) [emphasis added].) *An environmental impact that is speculative ... is not reasonably foreseeable*. (CEQA Guidelines, § 15064(d)(3) [emphasis added].) An EIR need not speculate about the effect of contingent future events. When future actions that may follow from a project are uncertain, the EIR need not address the environmental consequences that might result. (*Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal.App.4th 1036, 1058.)

⁴ Dryland agriculture, particularly dryland pasture, is a large component of commercial agriculture in Shasta County. The License Surrender EIS notes that there are 390,800 acres of land in farms in Shasta County of which only 48,700 acres are irrigated. (See License Surrender FEIS, p. 208.)

⁵ Indeed, as the DEIR acknowledges, it is unknown (and outside the scope of the analysis required of a CEQA review document to determine) if an alternative diversion facility for exercise of the ADU's water right to divert water from South Cow Creek would be feasible. (DEIR, p. 4-43.) This statement implicitly acknowledges that it is possible that an alternative diversion facility could be feasible, which would allow the ADU to continue exercising their water right and maintain a water supply for their agricultural lands from that water source. Similarly, the DEIR does not (and should not) speculate as to the availability of other water sources.

In sum, the conclusion in the Agricultural and Forestry Resources section that the cessation of discharges from the PG&E Cow Creek Powerhouse that create artificial flows in Hooten Gulch will lead to a Significant impact from conversion of agricultural use of Classified Farmland to non-agricultural use (IMPACT 4.4-6) is unsupported by substantial evidence, speculative, and inconsistent with the correct conclusion reached with respect to this impact in the Land Use and Planning section of the DEIR. This discussion should be revised to instead explain that any such analysis is too speculative to be included in the Final EIR.

7. *Section 4.4.4.2, Agricultural and Forestry Resources, Cow Creek, page 4-44:*

Comment: The DEIR's analysis regarding the question of whether the Proposed Project would conflict with existing agricultural zoning or a Williamson Act contract (IMPACT 4.4-7) does not address the impact question at issue. However, if the correct impact question is analyzed, the appropriate conclusion would be that there would be No Impact. The Significant and Unavoidable impact conclusion is unsupported by the evidence and based on speculation.

With respect to zoning, the Proposed Project does not propose a use of ADU lands that is inconsistent with that land's existing agricultural zoning. Therefore, no Significant impacts would be created by a zoning conflict. Whether the ADU seeks to change the use of this land in the future to a use not consistent with its current zoning is highly speculative and not a proper topic of impact analysis for the Proposed Project.

With respect to a conflict with a Williamson Act contract, the Proposed Project neither proposes a change in use of any lands subject to a Williamson Act contract nor does it propose or would it result in conversion of farmland subject to a Williamson Act contract to a use inconsistent with the Williamson Act.

As detailed in Specific Comment 6 above, it is highly speculative whether the cessation of artificial flows in Hooten Gulch due to the Proposed Project will result in the conversion of such agricultural lands to non-agricultural use. A conflict with a Williamson Act contract would only be created if farmland subject to a Williamson Act contract was converted to a use that is not a compatible use under the Williamson Act. Since the conversion of such farmland to a non-compatible use is speculative, and in any case is not a necessary result of the Proposed Project, the Proposed Project's creation of a conflict with the Williamson Act is also speculative.

Accordingly, it is inappropriate to conclude that the Proposed Project's impacts would be Significant and Unavoidable for IMPACT 4.4-7 and this section should be revised to eliminate the speculative discussion, and should instead explain that any such analysis is too speculative to be included in the Final EIR.

8. *Section 4.5, Air Quality, page 4-47, first paragraph, first sentence:*

Comment: PG&E suggests rewriting this sentence to clarify that the list of emissions are pollutants of concern, or updating the list to include the criteria pollutants that are defined by state and federal law.



9. *Section 4.5.1, Air Quality, Environmental Setting, page 4-47, first paragraph, fourth sentence of the DEIR states: "Criteria pollutants include ozone (O₃), nitrogen dioxide (NO₂), carbon monoxide (CO), sulfur dioxide (SO₂), respirable particulate matter (PM₁₀), and fine particulate matter (PM_{2.5}). These six most prevalent criteria pollutants are described below (USEPA 2013a).*

Comment: The web page cited in USEPA (2013a) no longer exists. PG&E would like to correct the list of criteria pollutants. Specifically, lead is a criteria pollutant, and is missing from this sentence. The six criteria pollutants are particulate matter (PM₁₀ and PM_{2.5}), carbon monoxide (CO), ground-level ozone (O₃), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), and lead (Pb). (See EPA's current National Ambient Air Quality Standards (NAAQS) table, <https://www.epa.gov/criteria-air-pollutants/naaqs-table> accessed on May 23, 2019.)

10. *Section 4.5.3.1, Air Quality, Analytical Approach, Table 4.5-4 Estimated Maximum Daily Criteria Emissions for Proposed Project page 4-55:*

Comment: PG&E would like to correct Table 4.5-4 to add LTS (Less than Significant) under PM₁₀ and Level "B" Significance. This conclusion is missing from the table.

11. *Section 4.6 Aquatic and Fisheries Resources, Regional Setting, page 4-71, second paragraph, second sentence:*

Comment: PG&E recommends the following edit:

"Riffle sculpin were also observed within the Cow Creek Development within the bypass reach of South Cow Creek downstream of Wagoner Canyon **and in Hooten Gulch during 2003 sampling (PG&E 2007a).**"

12. *Section 4.6.1.2 Aquatic and Fisheries Resources, Regional Setting, page 4-70, last paragraph, second sentence:*

Comment: Old Cow Creek is part of the Kilarc Development, not part to the Cow Creek Development. PG&E recommends the following correction:

"For the Cow Creek Development, pikeminnow were observed in the ~~Old-South~~ Cow Creek bypass reach downstream of Wagoner Canyon and below the Cow Creek tailrace (PG&E 2007a)."

13. *Section 4.6.4.1, Aquatic and Fisheries Resources, Kilarc Development, IMPACT 4.6-1 (Kilarc): Would the action improve spawning habitat for native fish species? Page 4-82, last paragraph, first sentence of the DEIR states: "Anadromous fish species are not expected to occur within the Kilarc Development ... some benefits for native, resident fish Riffle sculpin and Sacramento pikeminnow are the only native, resident fish observed within the Kilarc Development"*

Comment: Anadromous species may be present within the Kilarc Development. *Oncorhynchus mykiss* documented in the Kilarc bypass reach may be progeny of anadromous or resident salmonids. On February 18, 2011, NMFS issued a biological assessment (BO)⁶ to FERC for the license surrender and decommissioning of the Project. NMFS indicated that steelhead could be

⁶ See Southwest Region, National Marine Fisheries Service, File Number 151422SWR2010SA00197 (Issued February 18, 2011).



present at the Kilarc tailrace, and in the bypass reach up to a barrier 2.7 miles upstream. Pages 51 to 52 of the BO state:

CDFG [California Department of Fish and Game] and NMFS re-evaluated the barrier at Whitmore Falls in 2003 and now believe that this barrier may be passable under unspecified high flow conditions, likely during wet years (Manji pers. comm. 2002, confirmed December 17, 2008). The reclassification of the barrier at Whitmore Falls led CDFG (now California Department of Fish and Wildlife; CDFW) and NMFS to revise their management objectives for the Action Area to include anadromous salmonids.

NMFS further notes (page 52) that, “Rainbow trout and/or steelhead were the most abundant species in the Kilarc Development area during the relicensing surveys. This species made up over 90 percent of the total number of fish at all sites sampled (PG&E 2007a).”

14. *Section 4.6.4.1 Aquatic and Fisheries Resources, Kilarc Development, IMPACT 4.6-1 (Kilarc): Would the action improve spawning habitat for native fish species? Page 4-82, last paragraph, fourth sentence of the DEIR states: “Riffle sculpin and Sacramento pikeminnow are the only native, resident fish observed within the Kilarc Development, although only Riffle sculpin were observed upstream of the Kilarc tailrace.”*

Comment: Although stocked in the past, rainbow trout may also be native resident fish.

15. *Section 4.6.4.1 Aquatic and Fisheries Resources, Kilarc Development, page 4-82, last paragraph, sixth sentence through page 4-83, first paragraph, first sentence, the DEIR states: “Since flows would be increased in the bypassed reaches, it is expected that there would be a minor increase in potential rearing habitat for these species. The overall effect is expected to be minor to negligible due to the relatively small change in flows (approximately 24 cfs) through the bypassed reaches.”*

Comment: The Kilarc Development is operated as a run-of-the-river facility with minimal ability to store excess flows. Therefore, decommissioning of the Kilarc Development would have a negligible effect on the magnitude of high flows. However, the relative increase in flow would be the greatest during the late summer and early fall when baseflow in Old Cow Creek is low. Instream flow requirements to Old Cow Creek are met by releasing water from the Kilarc Main Canal a few hundred feet downstream of the Kilarc Main Canal Diversion Dam, and gaging records indicated average monthly flows from the canal range between 3 and 4 cfs (PG&E 2009, LSA Vol. 1 Exhibit E). Therefore, an estimated increase of 24 cfs in the low-flow season may have more than a “minimal to negligible” effect.

16. *Section 4.6.4.2 Aquatic and Fisheries Resources, Cow Creek Development, IMPACT 4.6-7 (Cow Creek): Would the action improve migration conditions for native fish species? Page 4-87, third paragraph, the DEIR states: “Under the No Project Alternative, all flows would pass through the natural channels of South Cow Creek, increasing flows through the bypassed reaches, which would facilitate improved passage. Because no discharges would occur from the Cow Creek Powerhouse, Hooten Gulch would return to its natural, ephemeral condition as observed upstream*



of the powerhouse. The No Project Alternative would not result in improved conditions for both native anadromous and resident fish species.”

Comment: PG&E would like to clarify that increased flows in South Cow Creek would improve migration conditions for native anadromous and resident fish species in South Cow Creek. A flashboard diversion dam at the mouth of Hooten Gulch (which belongs to private landowners) prevents fish from entering Hooten Gulch from South Cow Creek⁷.

17. *Section 4.6.4.2 Aquatic and Fisheries Resources, Cow Creek Development, IMPACT 4.6-8 (Cow Creek): Would the action improve rearing conditions for native fish species? Page 4-88, second paragraph, sixth sentence, the DEIR states: “[Proposed Project] Therefore, although the total extent of aquatic habitat will be reduced in the Cow Creek Development, only moderate to poor quality habitat will be eliminated and the aquatic habitat in the bypassed reaches will be enhanced with the restoration of a natural flow volume. Furthermore, with the decommissioning of the Cow Creek Development, there will no longer be the opportunity for fish to be entrained into the constructed areas that contain poor aquatic habitat. ¶ Overall, the Proposed Project is expected to have minor to negligible benefit for juvenile rearing habitat of native, fish species within the Cow Creek Development.”*

Comment: PG&E would like to clarify that an increase in flow in South Cow Creek during the low-flow season is likely to improve rearing conditions in the bypass reach (which contains the best fish habitat) under both the Proposed Project and No Project Alternative. This effect should be considered more than “minor or negligible.” Decommissioning will affect flow magnitude, especially during the summer months, and water temperatures may improve slightly. Spawning sediments trapped behind the dams would be redistributed downstream, and the normal sediment transport process restored. Several miles of designated critical habitat for steelhead would become more easily accessible to salmonids, and essential fish habitat for other salmonids would be improved.

18. *Section 4.7.2 Terrestrial Biological Resources, Regulatory Setting, page 4-147:*

Comment: Discussion of the Migratory Bird Treaty Act in this section should acknowledge the Department of Interior Memorandum of December 22, 2017.⁸

19. *Section 4.7.4.2 Terrestrial Biological Resources, Cow Creek Development, Hooten Gulch, IMPACT 4.7-9 (Cow Creek): Would the action result in impacts on wetlands and riparian habitats? Page 4-169:*

Comment: This section of the DEIR on potential impacts to wetlands should state that Hooten Gulch will return to its natural state that existed prior to the project, with ephemeral flow and some wetland and riparian habitat.

⁷ See PG&E (2009) Kilarc-Cow Hydroelectric Project (FERC-606) License Surrender Application, Volume 1, Exhibit E.

⁸ United States Department of the Interior, Office of the Solicitor (Memorandum, Dec. 22, 2017) The Migratory Bird Treaty Act Does Not Prohibit Incidental Take <<https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>> (as of May 23, 2019).



20. *Section 4.7.4.2, Terrestrial Biological Resources, Cow Creek Development, pages 4-170 to 4-172: Potential impacts to wetlands and riparian habitats due to potential cessation of artificial flows (IMPACT 4.7-9) identified in the DEIR are speculative and, therefore, not a proper basis for identifying a Significant impact under CEQA. Accordingly, this portion of the DEIR should be revised to eliminate the conclusion of significance.*

Comment: The analysis in this section assumes that, due to the loss of artificial flows in Hooten Gulch as a result of the Proposed Project, water will no longer be present in Abbott Ditch during the summer months, such that existing riparian and wetland habitat would revert to surrounding blue oak-gray pine and dry non-native annual grassland habitat types. However, just as with the DEIR's discussion of potential conversion of Classified Farmland to non-agricultural use (see Specific Comments 6 and 7, above), this analysis and conclusion are predicated on speculation that the ADU will cease to deposit water into Abbott Ditch to exercise their water right. As discussed above, it is speculative that the ADU will cease to use Abbott Ditch as they are not precluded from establishing a new diversion facility that would allow them to lawfully exercise their water right to divert from South Cow Creek, and to continue to use the Abbott Ditch to convey such water. Accordingly, this impact analysis should be revised to remove this speculative discussion and the mitigation measure should be eliminated (Mitigation Measure 4.7-9). Instead, this section should explain that any such analysis is too speculative to be included in the Final EIR.

21. *Section 4.7.4.2 Terrestrial Biological Resources, Cow Creek Development, IMPACT 4.7-9 (Cow Creek): Would the action result in impacts on wetlands and riparian habitat? Page 4-171, third paragraph, the DEIR states: "Prior to commencing activities that will reduce augmented flows in Hooten Gulch, PG&E shall complete a delineation of all potentially jurisdictional aquatic features in areas to be directly impacted by changes to the amount of water flowing in the Abbott Ditch. The delineation shall address all features potentially jurisdictional to waters of the United States or waters of the state, wetlands or riparian areas. PG&E shall, as early as possible, identify and communicate its process to the affected private landowners. To ensure "no-net-loss" of wetlands, PG&E shall prepare, in accordance with applicable agency guidelines and requirements, compensation/mitigation measures for the preservation and/or creation of wetlands and/or purchase of credits at an approved mitigation bank or payment into an in lieu fee program with the final wetland mitigation ratios approved by the applicable resource agencies. An approved monitoring program will be implemented by PG&E to ensure the success of compensation/mitigation areas."*

Comment: As noted elsewhere (e.g., Specific Comments 6, 7 and 20, above), this analysis assumes that, due to the loss of artificial flows in Hooten Gulch as a result of the Proposed Project, there will be changes to the amount of water present in Abbott Ditch during the summer months, which assumption is predicated on speculation. The conclusion that the Proposed Project will lead to impacts to, or require mitigation for, Abbott Ditch wetlands and riparian areas during and after decommissioning is not supported and is speculative. Accordingly, this impact analysis should be revised to remove this speculative discussion and any mitigation should be eliminated. Instead, this section should explain that any such analysis is too speculative to be included in the Final EIR.

22. *Section 4.7.4.2 Terrestrial Biological Resources, Cow Creek Development, IMPACT 4.7-14 (Cow Creek): Would the action result in impacts on rare, threatened, and endangered terrestrial species? Page 4-177.*

Comment: PG&E comments that for the Final EIR, SWB needs to use a current list of special-status species (for both plants and animals). The status of several species relative to the Project has changed since the issuance of the special-status species list used in this DEIR. As noted elsewhere in this letter, first, the Project is outside of USFWS' 2014 revised range for VELB (79 Fed. Reg. 55874 (Sept. 17, 2014), 55879-55917). Second, the California spotted owl subspecies (CDFW species of special concern [SSC]) ranges within the Project, not the Northern spotted owl. PG&E made this distinction clear in the LSA, and this distinction is an important one because Northern spotted owls are listed as Threatened under Federal Endangered Species Act (ESA) and California Endangered Species Act (CESA). Finally, as part of the proposed mitigation measures, the SWB is requiring special-status species surveys and relocation of individuals, and wetland delineations in land areas that are not owned by PG&E. PG&E will make a good faith effort to obtain permission from landowners to access the landowner's property so that the PG&E can perform the work on the landowner's property. However, any required mitigation measures in the Final Environmental Impact Report (FEIR) should be reasonably possible to implement, and therefore enforceable. PG&E will not perform work in areas where access is unsafe, nor on private property for which PG&E has not received specific approval from the landowner to enter the property.

23. *Section 4.7.4.2, Terrestrial Biological Resources, Cow Creek Development, pages 4-172, 4-174: The DEIR's analysis of potential impacts to special-status plants, mammals, and birds in Abbott Ditch (IMPACTS 4.7-10 and 4.7-12) relies on the speculative assumption (discussed at length above) that the ADU will cease to deposit water into Abbott Ditch to exercise their water right as a result of PG&E ceasing to discharge artificial flows into Hooten Gulch.*

Comment: Under CEQA, an environmental consequence that is speculative should not be considered an impact. Because the lack of water in Abbott Ditch is speculative, it is not proper to either analyze this impact or conclude that impacts will be Significant. Accordingly, this analysis should be revised to remove this speculative discussion and the mitigation measures should be eliminated (Mitigation Measures 4.7-10 and 4.7-12). Instead, this section should explain that any such analysis is too speculative to be included in the Final EIR.

24. *Section 4.7.4.2 Terrestrial Biological Resources, Cow Creek Development, IMPACT 4.7-12 (Cow Creek): Would the action result in impacts on birds and mammals? Page 4-175, fourth paragraph, the DEIR states: "Abbott Ditch. Habitat restoration in the Project Area would help offset potential impacts on bird and mammal species. However, the lands irrigated and thus under hydrological influence of Abbott Ditch have not been surveyed for birds and mammals. Therefore, impacts on bird and mammal species potentially present along the Abbott Ditch would be significant."*

Comment: It is not clear how wildlife along Abbott Ditch would be significantly impacted by decommissioning, as no explanation is given. There is additional surrounding riparian habitat at nearby South Cow Creek available for wildlife communities and special-status wildlife, if they occur. Further, there is no clear reasoning given for including non-special-status wildlife (birds



and mammals). The PM&E's already proposed by PG&E would avoid impacts to nesting birds and special-status-species wildlife.

Moreover, as pointed out in a number of preceding Specific Comments, changes to conditions along Abbott Ditch as indirect impacts of the Proposed Project are speculative. Accordingly, this analysis should be revised to remove this speculative discussion. Instead, this section should explain that any such analysis is too speculative to be included in the Final EIR.

25. *Section 4.7.4.2 Terrestrial Biological Resources, Cow Creek Development, IMPACT 4.7-13 (Cow Creek): Would the action, specifically dewatering of canals, forebays, and related watercourses result in impacts on amphibians and pond turtles? Pages 4-176 and 4-177: This section refers to Mitigation Measures 4.7-9 and 4.7-10.*

Comment: The intent of these mitigation measures relative to this impact appears to be to require surveys, and capture and relocation, of amphibians and pond turtles if any are found. However, this measure should clarify the location of these surveys.

26. *Section 4.10.1.2, Greenhouse Gas Emissions, Regional Setting, Global Warming Potential. Page 4-229, sixth sentence: PG&E would like the Global Warming Potential for CH₄ and N₂O to be updated to 25 and 298, respectively.*

Comment: These values are based on the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), and have been incorporated into California Emissions Estimator Model[®] (CalEEMod) Version 2016.3.1, which was used to estimate greenhouse emissions.

27. *Appendix E-1 Biological Species Lists. Special-status Wildlife Species Potentially Present in the Project Area.*

Comment: PG&E requests that the following corrections and clarifications be made to this table:

- Under status, bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*) are also protected by the Bald and Golden Eagle Protection Act
- Northern spotted owl (*Strix occidentalis caurina*) are unlikely to occur, they do not have moderate to high potential to occur (Appendix E-1 and page 4-111).
 - The California spotted owl (*Strix occidentalis*) subspecies (CDFW species of special concern (SSC)) ranges within the Project, not the Northern spotted owl. PG&E made this distinction clear in the LSA, and this distinction is an important one because Northern spotted owl are listed as Threatened under Federal ESA and CESA (page 4-142).
- Spotted bats (*Euderma maculatum*) are not likely to occur in facilities. This species sometimes roosts in buildings and other structures, but typically roosts in rock crevices or rock cliffs. The potential for this species to occur on Project facilities is thus low, not moderate to high (Appendix E-1 and page 4-1345).



- Western red bats (*Lasiurus blossevillii*) are not likely in facilities, although they may occur in trees. This species is a foliage rooster (Appendix E-1). This species is correctly described in the DEIR on page 4-135, first and second paragraphs.
- The status of the Fisher West Coast DPS (*Pekania pennanti*) (Distinct Population Segment) in the Kilarc-Cow Project Area is not State Threatened. It is a CDFW SSC. This species should be moved from the RTE section to special-status wildlife. On April 20, 2016, the California Fish and Game Commission (FGC) made the finding that listing the fisher Southern Sierra Nevada Evolutionarily Significant Unit (ESU) (defined as California south of the Merced River) as Threatened is warranted, and that listing the fisher Northern California ESU is not warranted.

If you have questions about this letter, please contact Lisa Whitman, Project Manager, at (415) 973-7465 or at lisa.whitman@pge.com. You can also contact me at (415) 973-7145 or at annette.faraglia@pge.com.

Sincerely,

Annette Faraglia
Chief Counsel, Hydro Generation

Attachments

cc: Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 – 1st Street, N.E.
Washington, D.C. 20426-0001

FERC Project No. 606-027 Service List (attached)

ATTACHMENT A



State Water Resources Control Board

APR 05 2019

Ms. Lisa Whitman
Hydro Licensing Project Manager
Pacific Gas and Electric Company
Mail Code N11C
P.O. Box 770000
San Francisco, CA 94177

DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION FOR THE LICENSE SURRENDER OF THE KILARC-COW CREEK HYDROELECTRIC PROJECT; FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 606; SHASTA COUNTY

Dear Ms. Whitman:

On April 9, 2018, the State Water Resources Control Board (State Water Board) received a request from Pacific Gas and Electric Company (PG&E) for water quality certification (certification) pursuant to section 401(a)(1) of the Federal Clean Water Act (33 USC § 1341 et seq.) for license surrender of the Kilarc-Cow Creek Hydroelectric Project (Project). Waterbodies associated with the Project include Old Cow Creek, South Cow Creek, and their tributaries.

In taking a certification action, the State Water Board must either: (1) issue an appropriately conditioned certification; or (2) deny certification. (Cal. Code Regs., tit. 23, § 3859.) A certification may be issued if it is determined that there is reasonable assurance that an activity is protective of state and federal water quality standards and that the appropriate environmental documents have been adopted to support certification and meet the requirements of the California Environmental Quality Act (CEQA). However, when a proposed project's "compliance with water quality standards and other appropriate requirements is not yet necessarily determined, but the application suffers from some procedural inadequacy (e.g., failure to . . . meet CEQA requirements)," the State Water Board may deny certification without prejudice. (Cal. Code Regs., tit. 23, § 3837, subd. (b)(2).) At this time, the CEQA process has not been completed for the Project. Without completion of the CEQA process, the State Water Board cannot issue a certification.

PG&E is hereby notified that the April 9, 2018 request for certification for the Project is denied without prejudice, effective the date of this letter. The denial without prejudice carries with it no judgment on the technical merits of the Project. We encourage you to submit a new formal request for certification, for our records, and look forward to continuing to work with you.

If you have questions regarding this letter, please contact Chase Hildeburn, Project Manager in the Water Quality Certification Program of the Division of Water Rights, at (916) 341-0358 or by email at Chase.Hildeburn@waterboards.ca.gov.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

APR 05 2019

Ms. Lisa Whitman

- 2 -

Written correspondence should be directed to: State Water Resources Control Board, Division of Water Rights – Water Quality Certification Program, Attn: Chase Hildeburn, P.O. Box 2000, Sacramento, CA 95812-2000.

Sincerely,



Eileen Sobeck
Executive Director

cc: Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Mr. Tomas Torres
U.S. Environmental Protection Agency
Region 9, Water Division
75 Hawthorne Street
San Francisco, CA 94105

Mr. Patrick Pulupa
Regional Water Quality Control Board
Central Valley Region 5
Sacramento Office
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

Mr. Clint Snyder
Regional Water Quality Control Board
Central Valley Region 5
Redding-Branch Office
364 Knollcrest Drive, Suite 205
Redding, CA 96002

Interested Parties mailing list

ATTACHMENT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

Hon. Jack Halpin

Dept. 12/ct

#38577

IN RE COW CREEK WATER RIGHTS

NATURE OF PROCEEDINGS:

RULING ON MOTION TO AMEND
OR MODIFY COW CREEK ADJUDICATION
DECREE, SCHEDULE 2:

Erik Poole moves the Court for an order modifying the legal description of a point of diversion ("POD") set forth in the August 25, 1969 Decree determining rights of various claimants to the water of Cow Creek in Shasta County. Poole, a successor in interest to a portion of the POD, contends that the legal description of the Abbott Ditch POD as set forth in "Schedule 2" attached to the Decree, is erroneous. Specifically, Poole claims that the bearing and distance from the reference corner identified in "Schedule 2" incorrectly places the Abbott Ditch POD on a hillside away from any water source, and does not comport with the Decree's language used to describe the POD. The correct location, according to Poole, is actually located at the head of Abbott Ditch, where it intersects with Hooten Gulch. Poole claims this is the actual and current location of the POD and it has existed there since before the 1969 Decree, and this is the same location contemplated by the Decree.

In opposition to the motion, Pacific Gas and Electric Company ("PG&E") argues that Poole's motion seeks to move, rather than correct, the location of the Abbott Ditch POD. PG&E contends that while the legal description set forth in "Schedule 2" may be erroneous, the "correct" location proposed by Poole is not the location set forth in the Decree. Instead, PG&E contends the true purpose of Poole's motion is to move the POD location in order to gain an advantage in ongoing disputes involving PG&E's plan to decommission a hydroelectric power project. PG&E currently diverts water from South Cow Creek through a powerhouse and subsequently along Hooten Gulch until it reflows into South Cow Creek. According to PG&E, by moving the Abbott Ditch POD to Hooten Gulch, instead of at South Cow Creek as specifically identified in the Decree, Poole can better argue that his water rights are being impacted by the opposed decommission of the powerhouse. PG&E alternatively argues that the Court lack jurisdiction to modify the Decree because it makes substantive changes to parties' rights by moving the POD, and it impacts the parties' riparian and appropriative rights.

The primary issue on this motion is whether the bearing and distance set forth in "Schedule 2" to the 1969 Decree accurately reflects the Court's intended location of the Abbott Ditch POD. The declaration of engineer Ed Whitson, which identifies the POD's legal description as on a hillside a distance from any water course. PG&E's concession that the legal description "may indeed be incorrect", is sufficient to lead to the conclusion that "Schedule 2" incorrectly states the bearing and distance of the POD. The secondary, and more complex, issue is whether Poole's proposed "corrected" legal description comports with the Decree.

Paragraph 27 of the 1969 Decree entitles various claimants to divert water "from the natural flow of the east channel of South Cow Creek as set forth in Schedule 6 though Abbott Ditch, at a point designated on SWRCB map as Diversion 73, as described in Schedule 2...." The SWRCB map, judicially noticed by the Court, referred to in the Decree, places Diversion 73 (the Abbott Ditch POD) along a line that the map's legend indicates is a creek, and at the head of Abbott Ditch. Diversion 73's placement on the SWRCB map also appears to match Poole's proposed corrected location of the POD, as demonstrated on the aerial map prepared and produced by PG&E in opposition to the motion, attached as Exhibit "A" to Wilson Declaration. Nonetheless, PG&E views the line in which Diversion 73 is located on the SWRCB map, as the lower portion of Hooten Gulch just before its confluence with South Cow Creek, and *not* as a second, smaller channel of South Cow Creek. Since the Decree only entitles the claimants the right to divert water from South Cow Creek, PG&E argues that there is no right to water from Hooten Gulch, and therefore the POD could not be located along Hooten Gulch as proposed by Poole. Upon lengthy review of the SWRCB map, the 1969 Decree, and the various historical documents produced by the parties, it appears that PG&E's characterization of the SWRCB map with respect to South Cow Creek at the time of the Decree, is mistaken.

The SW ¼ of Section 6, T31N R1W on the SWRCB map depicts South Cow Creek as splitting into two channels just above Diversion 72. The easternmost channel continues on until it intersects with Hooten Gulch, and then shortly thereafter rejoins the westernmost channel as one watercourse. The head of Abbot Ditch, as well as the designated location of Diversion 73, is along a portion of the eastern channel of the creek *after* its intersection with Hooten Gulch, but *before* its confluence with the western channel. This reading of South Cow Creek's course at the time of the Decree is supported by various documents.

The October 1911 Notice of change of point of Diversion of Water Right, attached as Exhibit "A" to Holder Declaration, describes the diversion of water from South Cow Creek "in to a slough or a natural water course about 20 feet wide, thence dow[n] said slough or water course to the Junction of Hooten Gulch [...] in a southwesterly direction to a point [...]" at which the water is re-diverted into a canal.

The December 1911 map of the Abbott and Jones Irrigation Canal, attached as Exhibit "B" to the Holder Declaration, also depicts South Cow Creek as dividing into two channels, in which water is described as "diverted by means of a dam across South Cow

Creek". The eastern channel is identified on the map as a "slough" that converges with Hooten Gulch at approximately the same place that South Cow Creek Road intersects Hooten Gulch. The eastern channel/slough and Hooten Gulch continue on the same course until rejoining the western channel of South Cow Creek. Again, the head of Abbott Ditch, the purported location of the POD, is located along a portion of the eastern channel of the creek *after* its intersection with Hooten Gulch, but *before* its confluence with the western channel. This demonstrates that at the time of the SWRCB map, in the SW ¼ of Section 6, T31N R1W, South Cow Creek divided into two channels consisting of a 20-foot wide eastern channel and a larger western channel, which converge just below the head of Abbott Ditch.

Whether the east channel of South Cow Creek, above the intersection of Hooten Gulch exists today, is unknown, but irrelevant for purposes of determining the intended POD location according to the 1969 Decree. At the time of the Decree, the water course at which Abbott Ditch, and the purported POD were located, was not solely Hooten Gulch, as PG&E claims. It was also considered a natural water course extending from South Cow Creek above Hooten Gulch. The SWRB's 1965 Report on Water Supply and Use of Water, for which the Court takes judicial notice, clearly confirms this in its description of the source of water for Diversion 73: "Water available for diversion consists principally of water discharged into Hooten Gulch through the South Cow Creek Powerhouse tailrace, although a small amount is also contributed by the eastern channel of South Cow Creek..."

Having determined that South Cow Creek consisted of a west and east channel in the area in which Poole claims is the correct POD location, the Decree's description of the Abbott Ditch POD matches the location of Diversion 73 on the SWRCB's map. This also explains the Decree's specification of the right to divert water from the natural flow of the *east* channel. PG&E points out that the POD has historically been in locations other than the head of Abbott Ditch. The Court does not disagree, but concludes that those historic locations pre-dated the location of the POD that was contemplated by the SWRCB and the 1969 Court. Proof of Claim No. 64, submitted by the Abbotts and contained in the SWRCB's Abstract of Proof of Claims, attached as Exhibit "C" to Holder Declaration, does nothing to refute the location of Diversion 73 as being at the head of Abbott Ditch. In fact, it confirms that the Abbotts claimed water from South Cow Creek through Diversion 73 as identified on the SWRCB's map.

The reference to a claim for water from "South Cow Creek", as opposed to specifying which channel, does not provide proof that the POD was in a location other than at the head of Abbott Ditch. The June 1911 and August 1911 notices of appropriation, attached as Exhibit "A" to Holder Declaration, fail to refute Poole's proposed corrected location of the POD. The notices' language that the claimants take water from "South Cow Creek" at a point on the "south side of the said stream" may be describing the taking of water from the south side of the east channel of South Cow Creek. While the October 1911 Notice of change of point of diversion of Water Right, Exhibit "A" to Holder Declaration, does seek to change the POD to a location upstream where South Cow Creek splits into the west and east channels, this notice is not

referenced anywhere within the SWRCB's Abstract of Claims or the 1969 Decree, and therefore appears to not be a document considered by the SWRCB or the Court in determining the location of Diversion 73.

The 2004 letter to PG&E, attached as Exhibit "F", identifies a POD north of Diversion 73, but specifies such existed "prior to 1907." The 2009 Affidavit of Steve Tetrick attached as Exhibit "J" also recognizes an "original diversion" north of the confluence of South Cow Creek and Hooten Gulch, but before the construction of the Kilar-Cow Creek Project. The 2008 letter by Erik Poole, attached as Exhibit "H", also recognizes a "historical diversion point on South Cow Creek" but describes it having been not used in more than 100 years.

It is clear from the language of the 1969 Decree describing the location of the Abbott Ditch POD, and the location of Diversion 73 as identified on the SWRCB map incorporated by reference into the 1969 Decree, that the POD was intended to be located where Abbott Ditch diverts from the east channel of South Cow Creek, but that due to clerical error, the bearing and distance provided in "Schedule 2" was erroneous. Code of Civil Procedure section 473(d) provides that the court has the power to "correct clerical mistakes in its judgment...so as to conform to the judgment...directed."

Poole has submitted, based upon the calculation of Ed Whitson, the corrected bearing and distance for the POD.

In addition Paragraph 29 of the Decree reserves allows the court "to review this decree and to change or modify the same as the interests of justice may require." PG&E contends the proposed modification is a substantive change for which the Court lacks jurisdiction, the proposed change does not seek to move the POD. The Court concludes that the POD identified in the Decree was always intended to identify the POD location proposed by Poole. Modifying the bearing and distance in "Schedule 2" does not move the POD from South Cow Creek to Hooten Gulch (which PG&E fails to identify also as the east channel of South Cow Creek), but rather corrects the "Schedule 2" error so as to conform to the judgment directed. The correction of this error does not modify or materially alter the rights of any of the parties.

If the POD no longer provides water from South Cow Creek, so that the right to diversion no longer exists, this evidence has not been placed before the Court, and the determination of rights under the Decree is not at issue in this request to change the location of the POD.

The Court finds that the corrected bearing and distance of the POD proposed by Poole accurately reflects the location intended by the 1969 Decree.

The motion is granted. The Court will execute the Order to Amend or Modify the Cow Creek Adjudication Decree of the Abbott Ditch Point of Diversion in "Schedule 2" to reflect a N65° 09'38"E bearing from reference corner, and a 1275 foot distance from reference corner.

Dated: January 30, 2012



JACK HALPIN
Superior Court Judge

CERTIFICATE OF MAILING and/or FAX

State of California, County of Shasta

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a Deputy Court Clerk of the above-entitled court and not a party to the within action; that I mailed a true and correct copy of the above to each person listed below, by depositing same in the United States Post Office in Redding, California, enclosed in sealed envelopes with postage prepaid and/or FAX at the number(s) listed.

Dated: January 30, 2012

A. Thatcher, Deputy Clerk

cc:

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