

July 12th, 2013

Carlos A. Mejia, Staff Counsel  
California State Resources Control Board  
1001 "I" Street, 22nd Floor  
Sacramento, CA 95814

ORIGINAL  
SECRETARY OF THE  
COMMISSION

2013 JUL 22 A 10:35

FEDERAL ENERGY  
REGULATORY COMMISSION

RE: FERC/PG&E Kilarc project #606/pre-1914 water rights

Thank you for attending the April 10<sup>th</sup> 2013 scoping meeting regarding the decommissioning of the Kilarc cogeneration plant. This project may have far reaching impacts on all pre-1914 water right holders throughout the state. Your legal expertise is sorely needed.

On January 20<sup>th</sup>, 2012 I wrote a letter (see attachment) to the Federal Energy Regulatory Commission (FERC) documenting defects in the decommissioning process of Kilarc. PG&E and FERC appear intent on severely and permanently revoking pre-1914 adjudicated water rights along the German Ditch.

FERC is aware that once the federal government decommissions Kilarc, Fish and Wildlife (the recipients of PG&E's surrendered water rights) will reduce 1/3 of the water flowing down the German Ditch. This water has flowed to the property of my neighbors and I since the late 1800's.

I have been told that during a drought, the Federal Bureau of Reclamation can not ration pre-1914 water rights in California. If this is accurate, permanently 'rationing' or diverting 1/3 of pre-1914 water rights on the German Ditch is not permissible.

California v. United States (1978) 438 U.S. 645. Pursuant to the Federal Reclamation Act of 1902, the State may impose conditions on water appropriations of the United States Bureau of Reclamation, so long as any such condition does not directly conflict with any clear Congressional directive respecting the federal project.

If the federal government is allowed to severely impact the top-tier pre-1914 water rights holders in California, this sets an ominous precedence for all other water rights holders in the state. Many state and local agencies possess pre-1914 water rights and may be directly affected by FERC's decision.

At the April 10, 2013 scoping meeting, Jeffrey Parks of the State Water Board said that FERC has to include any conditions imposed by the Water Board when the board issues a 401 certification.

Please require as a condition of the 401 Certification that PG&E provide the promised (and legally binding) contract which will convey PG&E's water shares to the South Cow Creek Ditch Association upon decommissioning. This must happen before approval of the FERC #606 project is finalized.

I would appreciate hearing your thoughts and any updates on this issue.

Best Regards

  
Heidi Strand

P.O. Box 172

Whitmore, CA 96096

(530) 472-1355

[hswriter@frontiernet.net](mailto:hswriter@frontiernet.net)

CC: South Cow Creek Ditch Assoc., Bureau of Reclamation, FERC, McConnell Foundation

January 20<sup>th</sup>, 2012

Kimberley D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 1<sup>st</sup> Street, N.E. Docket Room #1-A East  
Washington, D.C. 20426-0001

RE: Kilarc Cow Creek Project, FERC Project #606

Dear Kimberley D. Bose,

I am writing to you regarding PG&E and the South Cow Creek Ditch Association's (SCCDA) water rights on the German Ditch. The ditch is part of the water being effected by the Kilarc project and is the entire water supply to my property. As an Environmental Justice community, attention to this matter is of utmost importance.

PG&E owns approx. 34% of the water flowing down the German Ditch. It would be a very significant change to our water rights if that amount of water did not continue to flow down the ditch. In the summer, when the flow is at its lowest, the demand for the water for residents, orchards and hay fields is at its highest. The orchards and hay fields require this water in order to exist.

PG&E's March, 2009 Surrender application (Attachment #1) states: PG&E proposes to abandon its Project-related-water rights rather than transfer them as originally envisioned by the Project Agreement, because abandonment would accomplish the project agreement's goals more easily and with greater certainty. Specifically, abandonment would return the water to the streams without legal proceedings...

PG&E's attorney argues that we won't be effected because PG&E has different water rights on our ditch than the other rights being discussed in their surrender application. That assurance does not give me comfort when I discovered our ditch and two other disputed water diversions have disappeared off PG&E's latest Schematic of Creeks, Canals and Diversions (Attachment # 2). Also, our Association's name has been deleted as the recipient of their water shares in their most recent Surrender applications.

Since the Federal Energy Regulatory Agency is still involved, and Whitmore (located in Shasta County) has been federally recognized as an Environmental Justice community, FERC had the duty and authority to intervene on our behalf (attachment #3).

## Chronology

### Summer 2002

PG&E holds a meeting with the SCCDA regarding our water rights on the German Ditch. PG&E's attorney tells us they will sell their shares on the German Ditch to our association for \$1.00. I stay after the meeting and reconfirm the sale of their shares to our Association. The attorney tells me he will give it to us in writing in a couple of weeks, and he says he already has Camie Weir's (our Associations secretary) address. In 2011, I asked Camie for a copy of the agreement. She explained she never received one.

### Sept. 10<sup>th</sup>, 2007

PG&E Kilarc-Cow Creek Hydroelectric Project Preliminary Proposed decommissioning Plan (Page 5-64) (Attachment #4)

PG&E holds shares in the South Cow Creek Ditch Association for water associated with the German Ditch...

Upon decommissioning, PG&E will divest its ownership of shares in the Association and the shares will remain with the Association.

October 10, 2007 California Department of Fish and Game filed a comment with FERC characterizing PG&E's plan to abandon its water rights as "*a significant modification to the project agreement.*" (Page 2, paragraph 3) This should have triggered enhanced scrutiny from the two Federal Agencies involved in the project.

### December 10, 2007

PG&E attorney Mathew A Fogelson's letter to the California Dept of Fish and Game (Attachment #5)

Consequently, we believe court approval would be necessary for PG&E to change its use from power generation to instream use prior to transferring its water rights.<sup>2</sup> Court approval of such a water rights transfer would be extremely time-consuming and resource-intensive, could be contested by the parties to the adjudication, and could potentially disrupt well-settled water rights on an adjudicated watercourse.<sup>3</sup> As a result, PG&E believes abandonment of its water rights provides a much more efficient and certain alternative to achieving the Project Agreement's environmental goal of leaving the water in the streams and enhancing aquatic values. In this way, the Project-Agreement's goals can be achieved without legal proceedings and with minimum impacts to the other parties adjudication.

Upon abandonment, which simply involves PG&E taking affirmative steps to discontinue its diversions with the intent not to resume diversions, PG&E's pre-1914 rights will cease to exist and will not impact any other water rights or the priorities of those rights.

Abandonment of PG&E's water rights will achieve the Project Agreement's environmental objectives because it is highly unlikely that the abandoned water could be diverted by other claimants.

For all these reasons, PG&E believes that the simple act of abandoning its water rights, effectuated by the removal of its diversion structures without an intent to resume the diversions, will achieve the goals of the Project Agreement more efficiently and with greater certainty than would seeking to transfer those rights to a third party, a process that would require court approval and necessarily implicate a panoply of procedural and substantive issues the resolution of which would be time-consuming and resource-intensive.

3 In our meetings with the community, it has become apparent that there is a high level of concern...that a transfer of PG&E's 1908 priority water rights to a government agency or environmental group would allow the recipient of those rights [California Dept. of Fish and Game] to challenge in some manner current diversions and use of cow creek water. PG&E expresses no opinion on the validity of such concerns. (emphasis added)

*this letter was sent to 16 people. Not one of them a member of our Association.*

January 9<sup>th</sup>, 2008

Letter from PG&E to South Cow Creek ditch Assoc. (Attachment #6)

It is PG&E's current intention, upon receiving a final, non-appealable order from the Federal Energy Regulatory Commission approving the decommissioning and removing the Project from its jurisdiction, to sell its 14.9 shares back to the Association for the sum of one dollar (\$1.00).

Why the six *year* delay in getting the document to us? Now it states "upon receiving a final, non-appealable order." We agreed it would be effective immediately with the stipulation that it would be in effect "Upon completion of decommissioning." The wording, 'Current intention' reads like legal swiss cheese to me. But, the critical defect in this letter is that it is not from PG&E's attorney as promised, but co-coordinators of the project.

**Sept. 4, 2008 (PG&E Draft License Surrender Application Vol.1, PG ES-12)**

Any impacts of decommission of existing water rights are appropriately addressed under state law and not through the federal license surrender process.

If this is true, why did PG&E hold a meeting with the SCCDA under federal guidelines?

**Sept. 4th, 2008 PG&E Draft License Surrender Application (Vol 1, page E.2-16) (Attachment #7&7A)**

IN addition to the water rights discussed above, PG&E holds shares in the South Cow Creek Ditch Association for water associated with the German Ditch...Upon decommissioning, PG&E intends to divest its shares in the South Cow Creek Ditch Association.

Notice it no longer states "back to the Association for the sum of one dollar (\$1.00)."

**March, 2009**

**Kilarc-Cow Creek Hydroelectric Project License Surrender Application (page E.2-15 &16)  
(Attachment #1 & #7)**

PG&E remains committed to ensuring that its water rights are used to enhance aquatic resources...

PG&E proposes to dispose of the six water rights described above by abandoning them upon receiving a final Order from FERC approving the decommissioning and removal the Project from FERC's jurisdiction. [closing that avenue of help for people such as myself] PG&E proposes to abandon its Project-related-water rights rather than transfer them as originally envisioned by the Project Agreement, because abandonment would accomplish the project agreement's goals more easily and with greater certainty. Specifically, abandonment would return the water to the streams without legal proceedings and with minimum impacts to the other parties with adjudicated water rights in the watershed.[?] Upon abandonment, which simply involves PG&E taking affirmative steps to discontinue its diversions with the intent not to resume diversions, PG&E's pre-1914 rights will cease to exist and will not impact any other water rights or the priority of those rights. (emphasis added.)

Upon decommissioning, PG&E plans to divest its shares in the South Cow Creek Ditch Association.

This is clearly not what PG&E is telling us. Again, notice how any reference to the SCCDA as the recipient of those shares has been omitted.

March 26, 2011

I wrote to Gary Stacey, California Fish and Game asking if their agency would recognize the SCCDA's right to PG&E's shares on the German Ditch based on PG&E's letter of intention (Attachment #6). I have not received a response.

April 8, 2011

Letter from Matthew A. Fogelson, Attorney for PG&E to me regarding my concern that the SCCDA has never received the promised letter of legal conveyance from PG&E of their shares in our water association upon decommissioning of the Kilarc hydroelectric plant. (Attachment #8)

To be clear, PG&E, at the appropriate time as discussed above, will sell the 14.9 shares back to the Association via a "legal document." To the extent you are requesting that such a legal document (for example, a formal, bi-lateral contract) be drafted and executed now, in advance of FERC issuing any orders regarding Project decommissioning, I must respectfully decline. To do so would require an expenditure of resources that is not prudent at this time given all that must still transpire before PG&E would be in a position to sell its shares back to the Association.

PG&E created the need for and promised this contract in 2002. So to deny us this critical agreement as promised because it is an 'expenditure of resources that is not prudent' is unacceptable.

It is my opinion that PG&E was being intentionally deceptive in its dealings with the SCCDA. By not informing us they had made a '*significant modification to the project agreement*' in regards to our water rights, it appears they were hoping to run out the clock on any meaningful recourse we might have.

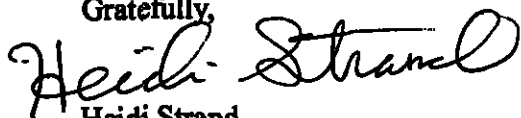
The crux of the Executive Order #12898 (Environmental Justice) is for each Federal Agency to ensure "Early and sustained communication with the affected community," including "identifying potential effects and mitigation measures in consultation with affected communities."

We have been denied meaningful involvement in the permitting process from the beginning. We relied on PG&E's promise to us at the 2002 meeting that they would legally convey their shares on our ditch to our Association 'in the next few weeks.' With that understanding, there appeared to be no reason for our participation.

Since the Federal Energy Regulatory Agency is still involved, and Whitmore has been federally recognized as an Environmental Justice community, FERC has the duty and the authority to intervene on our behalf.

**Thank you in advance for your help in this matter.**

Gratefully,



Heidi Strand  
P.O. Box 172,  
Whitmore, CA 96096  
hswriter@frontiernet.net

**CC: Gary Stacey, California Fish&Game  
Matthew A. Fogelson, In-house Counsel, PG&E  
Record Searchlight  
Sacramento Bee  
San Francisco Chronicle  
Environmental Justice coordinator, EPA  
California Public Utilities Commission  
Len Lindstrand, W.M. Beaty & Associates  
Erin Brockovich  
6 members of the SCCDA (hand delivered)**

**Kilarc-Cow Creek Hydroelectric Project, FERC No. 606  
License Surrender Application**

There are three non-PG&E hydropower diversions in the watershed. The Olson Powerhouse is licensed and diverts water from Old Cow Creek 1.2 miles downstream of the Kilarc Powerhouse. The Wild Oak Powerhouse obtains water from the Cow Creek Powerhouse tailrace at Hooten Gulch. This microhydro project is not FERC-licensed. The Toucher project diverts water from South Canyon Creek at the same location as PG&E, but with a senior water right.

**Project Agreement on Water Rights**

The Project Agreement (Attachment 1 of Appendix A) addressed water rights as follows:

*If FERC authorizes or orders the Company to decommission the Project, upon a final order from FERC ending Project power operations, the Company intends to transfer its appropriative water rights held for operation of the Project ("water rights") to a resource agency or other entity that: 1) agrees to use the water rights to protect, preserve and/or enhance aquatic resources, as authorized by applicable laws and regulations, such as Water Code section 1707; and 2) is acceptable to the Parties. Additionally, prior to transferring of its water rights, the Company will work in good faith with other non-Parties to resolve potential water rights issues with the goal of having the water rights used to preserve, protect and/or enhance aquatic resources.*

In addition, the Project Agreement included the following goals with respect to water rights:

- PG&E appropriative water rights are protected and used to preserve or enhance aquatic resources;
- Other water right holders' rights are preserved;
- All water rights preserved subject to the law;
- Water rights are enforceable and permanent; and
- Maintain aquatic habitat values downstream of Hooten Gulch.

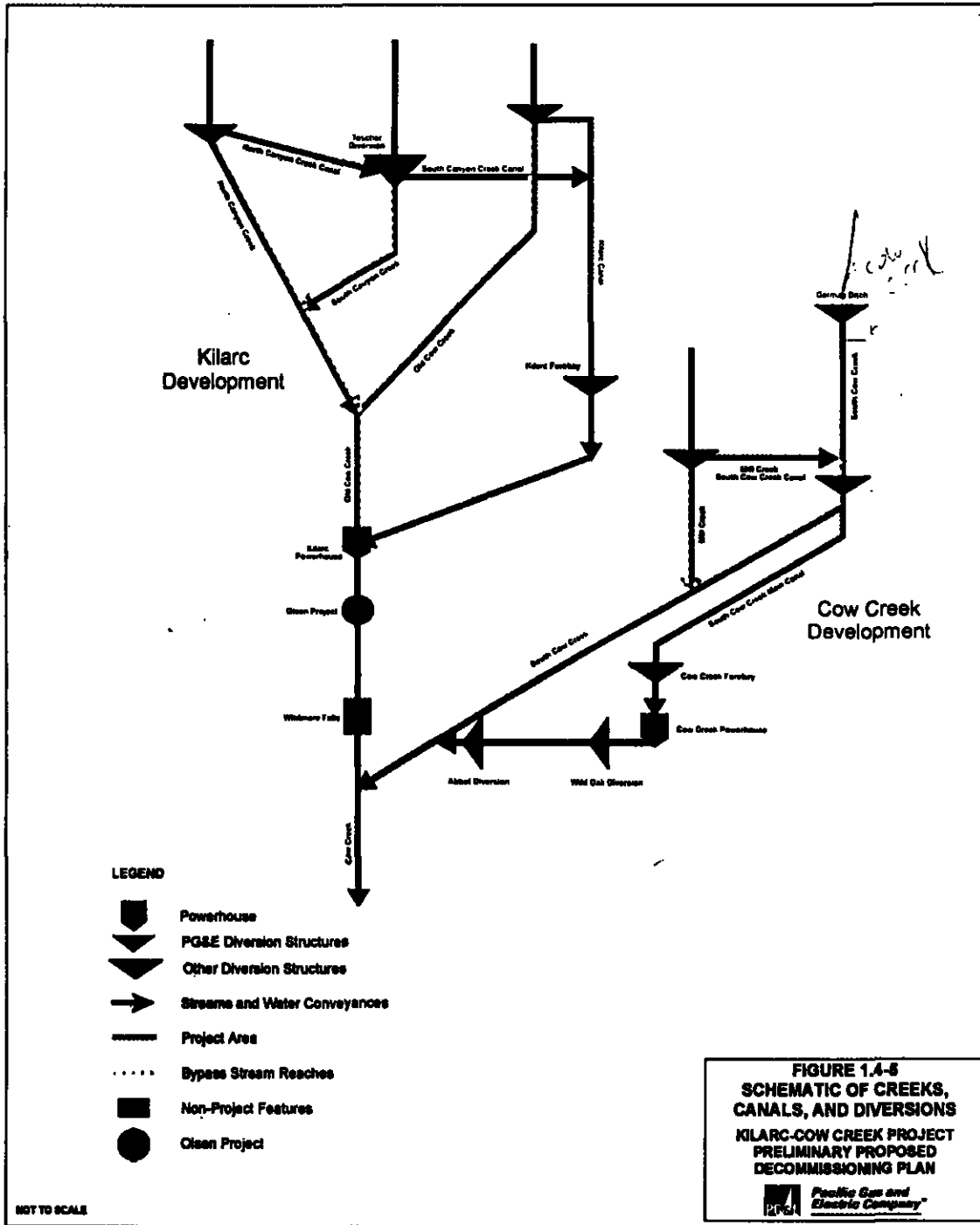
**Disposition of Water Rights**

PG&E remains committed to ensuring that its water rights are used to enhance aquatic resources once they are no longer needed for hydroelectric generation.

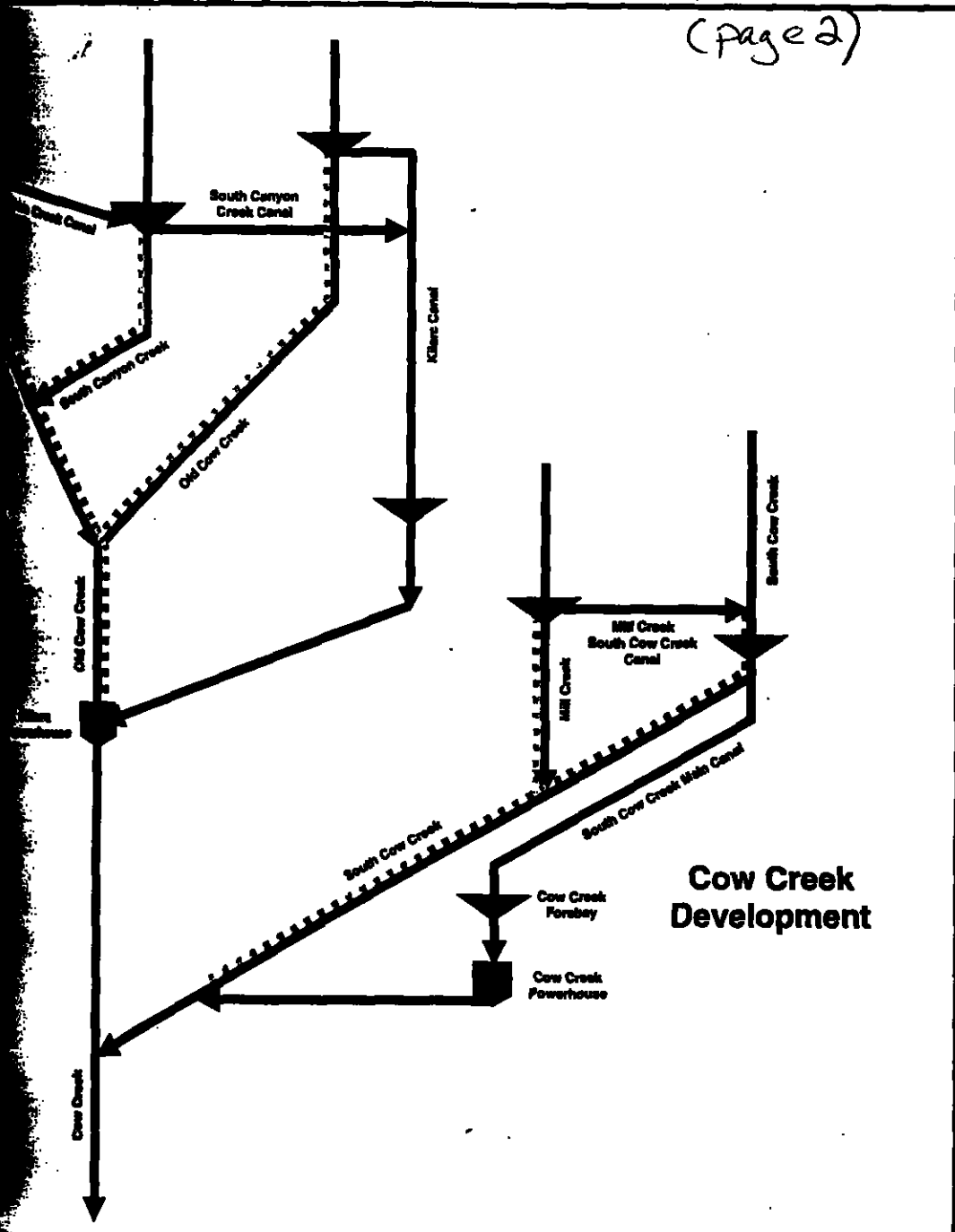
PG&E proposes to dispose of the six water rights described above by abandoning them upon receiving a final Order from FERC approving the decommissioning and removing the Project from FERC's jurisdiction. PG&E proposes to abandon its Project-related-water rights rather than transfer them as originally envisioned by the Project Agreement, because abandonment would accomplish the Project Agreement's goals more easily and with greater certainty. Specifically, abandonment would return the water to the streams without legal proceedings and with minimum impacts to the other parties with adjudicated water rights in the watershed. Upon abandonment, which simply involves PG&E taking affirmative steps to discontinue its diversions with the intent not to resume the diversions, PG&E's pre-1914 rights will cease to exist and will not impact any other water rights or the priorities of those rights.



**Kilarc-Cow Creek Hydroelectric Project, FERC Project No. 606**  
**Preliminary Proposed Decommissioning Plan**



**Figure 1.4-5. Schematic of Creeks, Canals, and Diversions**




### Cow Creek Development

Pacific Gas & Electric Company  
KILARC-COW CREEK HYDROELECTRIC PROJECT

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Figure A.1-3  
Schematic of Creeks, Canals, and Diversions

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 Pacific Gas and Electric Company

[ March 2009 ]

EXHIBIT D  
Project Cost/Financing

EXHIBIT E  
Environmental Report

EXHIBIT B  
Project Operations

EXHIBIT C  
Project History/Schedule

justice issues on a case-by-case basis in issuing PSD permits consistent with its legal authority.

3. The EPA Environmental Appeals Board (EAB) has addressed environmental justice issues in connection with PSD permit appeals on several occasions. The EAB first addressed environmental justice issues under the CAA in the original decision in Genesec Power (September 8, 1993). In that decision the EAB stated that the CAA did not allow for consideration of environmental justice and siting issues in air permitting decisions. In response, the Office of General Counsel filed a motion for clarification on behalf of the Office of Air and Radiation (OAR) and Region V. OGC pointed out, among other things, that the CAA requirement to consider alternatives to the proposed source, and the broad statutory definition of "best available control technology" (BACT), provided ample opportunity for consideration of environmental justice in PSD permitting. In an amended opinion and order issued on October 22, 1993, the EAB deleted the controversial language but did not decide whether it is permissible to address environmental justice concerns under the PSD program. 4 E.A.D. 832, 1993 WL 484880, <<http://www.epa.gov/eab/disk4/genesec.pdf>>. However, in subsequent decisions, Ecoeléctrica, 7 E.A.D. 56, 1997 WL 160751 (1997) <<http://www.epa.gov/eab/disk11/ecoelect.pdf>>, and Puerto Rico Electric Power Authority, 6 E.A.D. 253, 1995 WL 794466 (1995) <<http://www.epa.gov/eab/disk9/prepa.pdf>>, the EAB stated that notwithstanding the lack of formal rules or guidance on environmental justice, EPA could address environmental justice issues. In 1999 in Knauf Fiber Glass, 8 E.A.D. PSD Appeal Nos. 98-3 through 98-20, 1999 WL 64235 (Feb. 4, 1999) <<http://www.epa.gov/eab/disk11/knauf.pdf>>, the EAB remanded a PSD permit to the delegated permitting authority (the Shasta County Air Quality Management District) for failure to provide an environmental justice analysis in the administrative record in response to comments raising the issue.
4. In the 1990 CAA Amendments, Congress provided that the PSD provisions of the Act do not apply to hazardous air pollutants (HAPs), see CAA section 112(b)(6), so the role of hazardous air pollutant impacts as environmental justice issues in PSD permitting is not straightforward. Thus, BACT limits are not required to be set for HAPs in PSD permits. However, the Administrator ruled prior to the 1990 Amendments that in establishing BACT for criteria pollutants, alternative technologies for criteria pollutants could be analyzed based on their relative ability to control emissions of pollutants not directly regulated under PSD. EPA believes that the 1990 Amendments did not change this limited authority, and EPA believes it could be a basis for addressing environmental justice concerns. In addition, EPA may have authority to take into account – and to require States to do so in their PSD permitting – effects of HAPs that are also criteria pollutants, such as VOCs.

## B. Title V

**Kilarc-Cow Creek Project, FERC No. 606**  
**PGE Preliminary Proposed Decommissioning Plan**

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- *Maintain aquatic habitat values downstream of Hooten Gulch.*

PG&E's current proposal for disposition of the six water rights described above is to abandon them upon receiving a final Order from FERC ordering the decommissioning of the Project. The Cow Creek Adjudication (Decree entered August 25, 1969), address water rights in the Project Area. It is PG&E's intention not to re-open the Adjudication or diminish its authority in any way as part of decommissioning the Project.

PG&E holds shares in the South Cow Creek Ditch Association for water associated with the German Ditch. The German Ditch diversion is located upstream from PG&E's diversion for the South Cow Creek Canal. PG&E's shares of first and second priority water allow it to keep up to 1.44 cfs in the German Ditch to be delivered to Mill Creek. The water is then allowed to flow down to PG&E's Mill Creek diversion for the Mill Creek Canal where it can be diverted by PG&E for generation use at Cow Creek Powerhouse. Under third priority right, 2.0 cfs are left in the creek and are diverted at PG&E's South Cow Creek Ditch for generation use at Cow Creek Powerhouse. Upon decommissioning, PG&E will divest its ownership of shares in the Association and the shares will remain with the Association. (Figures 1.4-1 through 1.4-5 present a schematic of creeks, canals, and diversions in the Project area).

Cow Creek Powerhouse current discharges water into Hooten Gulch, which continue to flow for a distance before the water joins with Cow Creek. The Wild Oak Development, a mini-hydro takes water from Hooten Gulch for generation purposes. In addition, Abbott Diversion also withdraws water from Hooten Gulch (a total water right of 14 cfs) for irrigation purposes. With decommissioning of the Cow Creek Development, water will not be available to Hooten Gulch to serve these two water users. As stated in the Agreement, PG&E intends to work with the parties involved to address these issues.

A summary of the water rights associated with the Project is presented below.



Mr. Gary Stacey, Manager - Northern Region  
CALIFORNIA DEPARTMENT OF FISH & GAME

December 10, 2007

Page Two

PG&E wishes to reiterate that it remains committed to ensuring that its water rights are utilized to enhance aquatic resources once they are no longer needed for hydroelectric generation. In our view, while the Project Agreement sets forth the overall environmental goals for the disposition of PG&E's water rights, which goals PG&E fully supports, the mechanics for achieving those goals must be tailored so that the goals are achievable with minimum impact to the local community of water users, another goal of the Project Agreement.<sup>1</sup>

In short, we believe that in order for PG&E to transfer its water rights to another entity for instream use, it would first be necessary to file a motion in Shasta County Superior Court seeking to modify the Adjudication. This is because the Adjudication expressly limits PG&E's use of Cow Creek water to "power use." See Adjudication ¶ 7, and attached Schedules. The Adjudication further provides that "Power use is limited to the hydro-dynamic applications required for the development of electrical energy." Adjudication ¶ 20. PG&E's conversion of its water rights to instream use would constitute an unauthorized use of Cow Creek water and would run afoul of the court's order that the parties are "perpetually enjoined and restrained from doing anything in violation of the terms or provisions of this judgment and decree." Adjudication ¶ 30.

Consequently, we believe court approval would be necessary for PG&E to change its use from power generation to instream use prior to transferring its water rights.<sup>2</sup> Court approval of such a water rights transfer would be extremely time-consuming and resource-intensive, could be contested by the parties to the Adjudication, and could potentially disrupt well-settled water rights on an adjudicated watercourse.<sup>3</sup> As a result, PG&E believes abandonment of its water

<sup>1</sup> The discussion of water rights in Attachment A to the Project Agreement makes clear that the parties wished to preserve the rights of other water rights holders.

<sup>2</sup> Because the Superior Court, and not the State Water Resources Control Board (Board), has jurisdiction over the adjudicated water rights on the Cow Creek system, PG&E could not petition the Board to change its use from power generation to instream use under Water Code Section 1707, as DFG's comments propose.

<sup>3</sup> In our meetings with the community, it has become apparent that there is a high level of concern, even among those that would not be directly impacted by the cessation of hydroelectric diversions, that a transfer of PG&E's 1908 priority water rights to a governmental agency or environmental group would allow the recipient of those rights to challenge in some manner current diversions and use of Cow Creek water. PG&E expresses no opinion on the validity of such concerns.



Mr. Gary Stacey, Manager – Northern Region  
 CALIFORNIA DEPARTMENT OF FISH & GAME  
 December 10, 2007  
 Page Three

rights provides a much more efficient and certain alternative to achieving the Project Agreement's environmental goal of leaving the water in the streams and enhancing aquatic values. In this way, the Project Agreement's goals can be achieved without legal proceedings and with minimum impacts to the other parties to the Adjudication. Upon abandonment, which simply involves PG&E taking affirmative steps to discontinue its diversions with the intent not to resume the diversions, PG&E's pre-1914 rights will cease to exist and will not impact any other water rights or the priorities of those rights.

Abandonment of PG&E's water rights will achieve the Project Agreement's environmental objectives because it is highly unlikely that the abandoned water could be diverted by other claimants. First, because PG&E's water rights are non-consumptive, no new water will be made available for appropriation by virtue of PG&E abandoning its water rights. This is significant because the State Water Resources Control Board has listed Cow Creek, "from the confluence of Cow Creek and the Sacramento River upstream" as a "Fully Appropriated Stream System" for the yearly season of April 1 to November 30 (WR-Order 98-08). Consequently, the Water Board is precluded by Water Code section 1206 from accepting any application to appropriate water from Cow Creek.<sup>4</sup>

Second, junior rights holders in the stream reaches between PG&E's points of diversion and points of use will not be able to divert any additional water. As noted, PG&E's rights are non-consumptive and the water PG&E returns to the streams is already used downstream. Thus, senior rights are already able to divert their decreed amounts. Decreed junior rights in the reaches between PG&E's points of diversion and where the water returns to the creeks are very limited. On South Cow Creek, there is one junior water rights holder in the affected reach that may divert up to 0.83 cubic feet per second (cfs), while on Old Cow Creek, there is one junior water rights holder in the affected reach that may divert up to 0.63 cfs.<sup>2</sup> Since these junior rights

<sup>4</sup> Water Code section 1206 provides that upon declaring a stream system fully appropriated, "the board shall not accept for filing any application for a permit to appropriate water from the stream system described in that declaration, and the board may cancel any application pending on that date."

<sup>2</sup> Note that the Adjudication lists an additional junior right within the bypass reach on Old Cow Creek that may divert up to 0.25 cfs (Dewey H. Marshall, Diversion Number 6b). This right is listed as "proposed" and PG&E has no information as to whether that 0.25 cfs right has been perfected. Assuming it has, the two junior rights holders on the bypass reach of Old Cow Creek could divert up to a combined 0.88 cfs.

ATTACHMENT #5  
(Page 3)

Mr. Gary Stacey, Manager – Northern Region  
 CALIFORNIA DEPARTMENT OF FISH & GAME  
 December 10, 2007  
 Page Five

For all of these reasons, PG&E believes that the simple act of abandoning its water rights, effectuated by the removal of its diversion structures without an intent to resume the diversions, will achieve the goals of the Project Agreement more efficiently and with greater certainty than would seeking to transfer those rights to a third party, a process that would require court approval and necessarily implicate a panoply of procedural and substantive issues the resolution of which would be time-consuming and resource-intensive.

We would be happy to meet with you at your convenience to discuss further our proposal on these issues.

Very truly yours

Matthew A. Fogelson

MAF:bd

cc: Stephen Bowes, National Park Service  
 Steve Edmondson, NOAA Fisheries  
 David White, NOAA Fisheries  
 Bill Foster, U. S. Fish and Wildlife Service  
 Matt Meyers, CA Dept. of Fish & Game  
 Annie Manji, CA Dept. of Fish & Game  
 Russ Katz, California State Water Resources Control Board  
 Jennifer Watts, California State Water Resources Control Board  
 Kelly Cattet, Friends of the River  
 Brian Johnson, Trout Unlimited  
 Thomas J. Lovullo, Federal Energy Regulatory Commission  
 Margaret Kim, California Resources Agency  
 Traci Bone, California Public Utilities Commission  
 Kelly Sackheim, Sackheim Consulting  
 Dick Ely, Davis Hydro



**Pacific Gas and  
Electric Company**

Power Generation

245 Market Street  
San Francisco, CA 94105

Mailing Address  
Mail Code N11C  
P.O. Box 770000  
San Francisco, CA 94117

January 9, 2008

South Cow Creek Ditch Association  
c/o Len Lindstrand  
W.M. Beaty & Associates, Inc.  
P.O. Box 990898  
Redding, Ca. 96099-0898

Re: Pacific Gas and Electric Company's Decommissioning of the Kilaro-Cow Creek Hydroelectric Project and Disposition of its Shares in the South Cow Creek Ditch Association

Dear Mr. Lindstrand:

As you are aware, Pacific Gas and Electric Company (PG&E) intends to decommission its Kilaro-Cow Creek Hydroelectric Project, FERC Project No. 606 (Project). Upon decommissioning the Project, which PG&E does not expect to occur for several years, it will no longer have reason to maintain its membership in the South Cow Creek Ditch Association (Association). PG&E currently holds 14.9 shares in the Association.

It is PG&E's current intention, upon receiving a final, non-appealable order from the Federal Energy Regulatory Commission approving the decommissioning and removing the Project from its jurisdiction, to sell its 14.9 shares back to the Association for the sum of one dollar (\$1.00). Until such time, PG&E will retain its shares and full membership in the Association. In the event the Project is not decommissioned, PG&E will continue to retain its shares and full membership in the Association indefinitely.

Sincerely,

Stacy Evans and Steve Nevares  
Co-Project Managers - Kilaro-Cow Creek Project



In addition to the water rights discussed above, PG&E holds shares in the South Cow Creek Ditch Association for water associated with the German Ditch. The German Ditch diversion is located upstream from PG&E's diversion for the South Cow Creek Main Canal. PG&E's shares allow the utility to retain up to 1.44 cfs in the German Ditch to be delivered to Mill Creek. The water then flows to PG&E's Mill Creek Diversion Dam and into the Mill Creek-South Cow Creek Canal where it is diverted by PG&E for generation at Cow Creek Powerhouse. An additional 2 cfs are left in the South Cow Creek and are diverted at PG&E's South Cow Creek Main Canal for generation at Cow Creek Powerhouse. Upon decommissioning, PG&E intends to divest its shares in the South Cow Creek Ditch Association.

### Hooten Gulch Water Users

Cow Creek Powerhouse currently discharges water into Hooten Gulch, which flows into South Cow Creek. Releases into Hooten Gulch are artificial flows; but for PG&E's powerhouse releases into Hooten Gulch, there would be minimal natural flow in Hooten Gulch.

An irrigation diversion known as the Abbott Ditch diverts water from Hooten Gulch. Pursuant to an adjudication of the watershed, Abbott Ditch water users are entitled to divert 13.13 cfs from the natural flow of the east channel of South Cow Creek below the confluence with Hooten Gulch (and not from Hooten Gulch itself). In addition, a mini-hydro facility known as the Willow Oak Development, with a generating capacity of 110 kilowatts, has operated since 1984 taking water from Hooten Gulch for power generation. Upon decommissioning of the Cow Creek Development, there will no longer be artificial flows in Hooten Gulch.

### E.2.3 Geomorphology

The geomorphology of streams within the Project is addressed in this section, which includes discussion on channel types, channel and bank stability, sediment storage, and sediment transport characteristics associated with Project streams. In addition, sediment characterization studies were performed on the deposits stored behind the South Cow Creek Diversion Dam on South Cow Creek and the Kilare Main Canal Diversion Dam on Old Cow Creek.

#### E.2.3.1 Relicensing Resource Reports and Analyses

PG&E conducted studies in 2003 for relicensing to characterize stream type, sediment transport, and channel stability on Old Cow Creek, South Cow Creek, and Hooten Gulch. No studies were conducted on North Canyon and South Canyon creeks or on Mill Creek. Approximately 0.5 mile of non-Project, unregulated stream above the South Cow Creek Diversion Dam and 0.5 mile of channel above the Kilare Main Canal Diversion Dam on Old Cow Creek were surveyed to compare to the Project-affected bypass stream reaches (Figures E.2.3-1 and E.2.3-2). In addition, Hooten Gulch above the Cow Creek Powerhouse was inspected for comparison to a downstream segment between the powerhouse and confluence with South Cow Creek. The studies provide useful information needed to address the likely effects of Project decommissioning on stream morphology and channel stability. Field studies were performed in 2008 to obtain data related to sediment volume and particle sizes in storage behind

- PG&E appropriate water rights are protected and used to preserve or enhance aquatic resources;
- Other water right holders' rights are preserved;
- All water rights preserved subject to the law;
- Water rights are enforceable and permanent; and
- Maintain aquatic habitat values downstream of Hooten Gulch.

### **Disposition of Water Rights**

PG&E remains committed to ensuring that its water rights are used to enhance aquatic resources once they are no longer needed for hydroelectric generation.

PG&E proposes to dispose of the six water rights described above by abandoning them upon receiving a final Order from FERC approving the decommissioning and removing the Project from FERC's jurisdiction. PG&E proposes to abandon its Project-related-water rights rather than transfer them as originally envisioned by the Project Agreement because abandonment would accomplish the Project Agreement's goals more easily and with greater certainty. Specifically, abandonment would return the water to the streams without legal proceedings and with minimum impacts to the other parties with adjudicated water rights in the watershed. Upon abandonment, which simply involves PG&E taking affirmative steps to discontinue its diversions with the intent not to resume the diversions, PG&E's pre-1914 rights will cease to exist and will not impact any other water rights or the priorities of those rights.

In addition to the water rights discussed above, PG&E holds shares in the South Cow Creek Ditch Association for water associated with the German Ditch. The German Ditch diversion is located upstream from PG&E's diversion for the South Cow Creek Main Canal. PG&E's shares allow it to keep up to 1.44 cfs in the German Ditch to be delivered to Mill Creek. The water then flows to PG&E's Mill Creek Diversion Dam and into the Mill Creek-South Cow Creek Canal where it is diverted by PG&E for generation at Cow Creek Powerhouse. An additional 2 cfs are left in the creek and are diverted at PG&E's South Cow Creek Main Canal for generation at Cow Creek Powerhouse. Upon decommissioning, PG&E intends to divest its shares in the South Cow Creek Ditch Association.

### **Hooten Gulch Water Users**

Cow Creek Powerhouse currently discharges water into Hooten Gulch, which flows into South Cow Creek. Releases into Hooten Gulch are artificial flows; but for PG&E's powerhouse releases into Hooten Gulch, there would be minimal natural flow in Hooten Gulch.

An irrigation diversion known as the Abbott Ditch also diverts water from Hooten Gulch. Pursuant to an adjudication of the watershed, Abbott Ditch water users are entitled to divert 13.13 cfs from the natural flow of the east channel of South Cow Creek below the confluence with Hooten Gulch (and not from Hooten Gulch itself). In addition, a mini-hydro facility known



ATTACHMENT #8  
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April 8, 2011

Ms. Heidi Silva  
South Cow Creek Ditch Association  
P. O. Box 172  
Whitmore, CA 96096-0172

**Re: Kilarc-Cow Creek Hydroelectric Project, FERC Project No. 606**

Dear Ms. Silva:

I write in response to your letter of March 26, 2011. As you know, Pacific Gas and Electric Company ("PG&E") has committed, several times and in writing, to sell the 14.9 shares it holds in the South Cow Creek Ditch Association ("Association") back to the Association upon receiving a final, non-appealable order from the Federal Energy Regulatory Commission ("FERC") approving the decommissioning of the Kilarc-Cow Creek Hydroelectric Project ("Project") and removing the Project from its jurisdiction. The 14.9 shares currently held by PG&E would then be distributed among the remaining shareholders as the Association deems appropriate.

To be clear, PG&E, at the appropriate time as discussed above, will sell the 14.9 shares back to the Association via a "legal document." To the extent you are requesting that such a legal document (for example, a formal, bi-lateral contract) be drafted and executed now, in advance of FERC issuing any orders regarding Project decommissioning, I must respectfully decline. To do so would require an expenditure of resources that is not prudent at this time given all that must still transpire before PG&E would be in a position to sell its shares back to the Association.

Moreover, and as described in my letter to you of November 29, 2010, drafting and executing a formal document now is not necessary to protect the Association's interests. To repeat, the Association, *not* PG&E, is the holder of the adjudicated water right referenced at pages 14-16 of the Cow Creek Adjudication.<sup>1</sup> As a legal matter, PG&E cannot transfer to any entity a "water right" with respect to the German Ditch because it does not own a "water right" with respect to the German Ditch – the Association owns that water right. Instead, and as discussed above, PG&E owns shares in the Association and intends to sell those shares back to the Association. Doing so will have no effect on the Association's water right.

<sup>1</sup> In the Matter of the Determination of the 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 (Cal. Sup. Ct. Aug. 25, 1969)(Decree No. 38577).

Attachment #8  
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Ms. Heidi Silva  
South Cow Creek Ditch Association  
April 8, 2011  
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To the extent the assertion in your letter is correct that the California Department of Fish and Game ("DFG") has a "goal" of having "as much water as possible flow down South Cow Creek," I fail to see the relevance of the assertion since PG&E will not be transferring any water rights to DFG. As also explained in my letter to you of November 29, 2010, even if PG&E were still planning to transfer the *water rights it holds outright* to DFG – which it is not; it is planning to abandon those rights<sup>2</sup> – PG&E's shares in the Association would not be among the bundle of water rights PG&E would be transferring to DFG. Consequently, any concerns you have about DFG somehow modifying or otherwise impacting the Association's water right are ill-founded.

I am hopeful this letter clears up any remaining confusion that exists concerning this issue. If not, please feel free to call me.

Very truly yours,

Matthew A. Fogelson

MAF:bd  
Dictated but not read.

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<sup>2</sup> Consequently, the statement in your letter that "Once the project is decommissioned, all water rights on Project 606 are transferred to the Dept of Fish and Game," is not correct.

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