

Thomas “Glenn” Dye
Chairman “Save Kilarc” Committee
Whitmore, CA www.savekilarc.org

March 1, 2009

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

Re: Statutory Background for Requiring an EIS for P-606 License Surrender

Dear Ms. Bose:

At the end of this month, PG&E will be submitting for FERC consideration its P-606 License Surrender Application. PG&E has been allowed two years for the development of this document, which time they have spent continuing to ignore input from the local community stakeholders. Concerns with the proposed dismantling of the Kilarc Development facilities have been expressed by a broad base of community members and our elected representatives, with the latest correspondence by each party (various parties have written many times) filed with the FERC (and available at <http://frontiernet.net/~tdye526780/vision/community.htm> or by following the links on the expanded www.savekilarc.org website to Our Vision for the Future of Kilarc and thence to “Our Community Writes”) as follows:

February 12, 2009 - Jim & Linda Gow
February 12, 2009 - Michael Mogler
January 30, 2009 - Marlene Joslin
December 11, 2008 - Glenn Dye
November 7, 2008 - Laura Carnley for Whitmore Community Stakeholders
May 5, 2008 - Tom Kamp
April 25, 2008 - Maggie Trevelyan
December 10, 2007 - Art Tilles for the Whitmore Volunteer Fire Department
September 21, 2007 - Earl & Joan Wetmore
Elected Officials Representing Community Interests
January 11, 2008 - U.S. Senator Dianne Feinstein
October 26, 2007 - U.S. Congressman Wally Herger

Unless PG&E concedes that the Kilarc Development facilities should not be dismantled in the meantime, the members of the Save Kilarc Committee and the community it represents are convinced that an Environmental Assessment (EA) of the proposed project will not be legally sufficient, and an Environmental Impact Statement (EIS) must be prepared.

Statutory Background¹

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, is our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. NEPA’s fundamental purposes are to guarantee that: (1) agencies take a “hard look” at the environmental impacts of their actions by ensuring that they “will have available, and will carefully consider, detailed information concerning significant environmental impacts;” and (2) “the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental impact statement (“EIS”). *See* 40 C.F.R. Part 1502. An EIS must provide a “full and fair discussion of significant environmental impacts” of a proposed action, “supported by evidence that the agency has made the necessary environmental analyses.” *Id.* at § 1502.1. A limited discussion of impacts is permissible only where the EIS demonstrates that no further inquiry is warranted. *Id.* at § 1502.2(b).

To determine whether the effects of an agency action may “significantly” affect the environment, thus requiring preparation of an EIS, an agency may first prepare an environmental assessment (“EA”). 40 C.F.R. § 1501.4(b). The objective of an EA is to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare” an EIS. *Id.* at § 1508.9(a)(1). If the EA indicates that the federal action “may” significantly affect the quality of the human environment, the agency must prepare an EIS. 40 C.F.R. § 1501.4; 42 U.S.C. § 4332(2)(C). *See Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1066-67 (9th Cir. 2002). “An agency’s decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

The threshold for requiring preparation of an EIS is low. *See Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533, 1537-38 (E.D. Cal. 1991) (noting that “the [Ninth] Circuit has established a relatively low threshold for preparation of an EIS”) (citations omitted). The Ninth Circuit has stressed that the evidence regarding the significance of the impacts need not be conclusive in order to compel the preparation of an EIS. Rather,

¹ Copied from COMMENTS on Draft Environmental Assessment, DeSabra – Centerville Project (FERC No. 803), Docket No. P-803-068, Applicant: Pacific Gas & Electric Co., Filed by: Chris Shutes, California Sportfishing Protection Alliance; Allen Harthorn, Friends of Butte Creek; Kelly Catlett, Friends of the River, Dave Steindorf; American Whitewater; and Cindy Charles, Golden West Women Flyfishers

[A]n EIS must be prepared if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor. The plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.

LaFlamme v. FERC, 852 F.2d 389, 397 (9th Cir. 1988) (citations omitted).

Level of analysis under NEPA

The need for an EIS on this project is an issue for which ample justification has been provided in the November 7, 2008 written comments of Community Stakeholders (FERC accession no. 20081110-5005, copy also available at www.savekilarc.org as referenced above), for PG&E to revise its Draft License Surrender Application. As noted on page 4, under item 2 of these comments, “The concerns raised by the community have NOT been addressed, and the burden of proof should not be on the community to determine PG&E’s rationale for dismissing significant issues.” FERC’s regulations provide that an EIS must be completed for major federal actions that significantly affect the quality of the human environment. 18 CFR 380.6(b)² The assertion that the manner in which PG&E proposes to surrender this project will not significantly affect the environment is untenable. As noted in the cover letter to the Whitmore Community Stakeholders’ comments, a determination of whether the impacts of this project are significant, thus requiring the preparation of an EIS, includes a consideration of

- ❖ Loss of local recreation that is especially suitable for youth and handicapped
- ❖ Destruction of a historic resource
- ❖ Water supply impacts from loss of groundwater recharge to springs and wells
- ❖ Loss of fire suppression capability puts our community and natural resources at risk
- ❖ Downstream water quality impacts on endangered fish
- ❖ Impacts to wildlife and natural resources, including wetlands and potentially endangered species
- ❖ Potential hazard of dangerous wildlife seeking water on residential and ranch properties
- ❖ Deterioration of local economy and property values with disruption to ecological balance and community benefits that have evolved over 100 years with the project

And, finally, Steelhead trout would also benefit from the Community’s proposed alternative – it is NOT necessary to dismantle the historic Kilarc Diversion, Canal and Reservoir to save this endangered species.

² Ibid.

Alternatives considered under NEPA³

It is well established that the discussion of alternatives is the “heart” of the NEPA process. 40 C.F.R. § 1502.14; *Ctr. for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). NEPA requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). Such an analysis must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed project in order to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14(a). The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994).

The lack of alternatives presented by PG&E is unfortunately characteristic of an approach PG&E takes repeatedly when its hydropower licenses come up for renewal – whether PG&E decides to pursue a new license, or, as in this case, ultimately decides to surrender its license. The alternatives presented are limited to small variations on the proposed action. Worse in this case, PG&E preemptively proposed its alternative to the powerful resources agencies and environmental groups for rubber-stamping, to make it impossible for other voices to be heard or considered before the FERC is presented with a “consensus” of all parties that PG&E does not dare to ignore. PG&E erroneously concludes that there can be no “no action” alternative because they must surrender their license. While it is true that the license must be surrendered, the “no action” alternative would in fact be to surrender the license without dismantling the facilities – or, “locking the door and walking away” as Mr. TJ Lovullo of your office stated when he came to speak to our community in January of last year.

We are hopeful that the FERC will make it clear to PG&E that continued refusal to pursue a consensus-based process that includes community stakeholders will not result in approval of their alternative as proposed. We are similarly hopeful that the FERC will continue to be pro-active, as you were in sending Mr. Lovullo to speak to our community in the middle of the period when PG&E should have been considering community input to the DLSA, even though the FERC is not required to be active at this stage in the process.

Sincerely,



Thomas “Glenn” Dye
Chairman “Save Kilarc” Committee
Retired Registered California Professional Engineer

³ Ibid.