

November 12, 2009

The Honorable Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 – 1st Street, NE, Mail Code PJ-12.3  
Washington, DC 20426

*filed electronically*

Ref: Kilarc-Cow Creek Hydroelectric Project, FERC No. 606-027  
Application for Surrender of License by Licensee Pacific Gas and Electric Company

Re: Response to Submittal, Accession No. 20091109-5059  
Additional Scoping Comments of National Marine Fisheries Service under P-606

Dear Ms. Bose:

Davis Hydro remains committed to working to enhance fish resources and specifically to restore anadromy to the Cow Creek watershed. We continue to stand hat-in-hand wanting to work with the National Marine Fisheries Service (NMFS) and the California Department of Fish and Game (CDFG) to that end. The NMFS continues to argue against the consideration of alternatives that is an integral part of the environmental review process undertaken by the Federal Energy Regulatory Commission (FERC) under the National Environmental Policy Act (NEPA) and asserts without evidence that there is a scientific basis for its position. Furthermore, NMFS also implies that its role under the federal Endangered Species Act (ESA) justifies the exercise of its authority to force the dismantling of the FERC-licensed facilities in lieu of other positive measures to promote the recovery of listed species.

The purpose of this letter is to clarify the issues and available scientific information with regard to project alternatives for incorporation into the FERC environmental assessment (EA) due to be released at the end of January 2010, and subsequent FERC decision-making as regards the conditions on the Pacific Gas and Electric Company (PG&E) license surrender.

The following documents are part of the FERC record and comprise ALL of the evidence provided to support the NMFS position against evaluation of alternatives, that has been cited or we have been able to find.

### **FERC Accession Numbers and Quotes from Pertinent Documents**

1. The March 2005 Agreement<sup>1</sup> clearly states:

*“2.1 [...] Entering into this Agreement is not in any manner a pre-decisional act or commitment by any of the governmental agencies as to the disposition of the Project assets or water rights.”*

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<sup>1</sup> Submitted by PG&E as FERC Accession # 20050401-0139

*“3.4 The subjects and desired conditions in Attachment A are based on limited information and subject to change [...] based on additional information that may become available or compliance with applicable laws and regulations.”*

*“4. NEW PARTIES Additional governmental agencies, groups and individuals may become Parties to this Agreement.”*

*“5. COMMUNICATIONS TO THE PUBLIC This Agreement and the work that may be needed to assist the Company and the Parties in developing a detailed decommissioning proposal are open to members of the public.”*

2. The March 2005 Agreement predates the FERC Notice soliciting applications re Pacific Gas & Electric Co's Kilarc-Cow Creek Project, under P-606<sup>2</sup> and the Notice of intent to file application for new license re Synergics Energy Services, LLC's Kilarc-Cow Creek Project under P-606<sup>3</sup> and associated Initial Information Package submitted on behalf of Cow Creek Hydro, LLC<sup>4</sup>.
3. NMFS provided the following comments<sup>5</sup> on the “Scoping Paper on the Kilarc and South Cow License Surrender Study Plans ...” submitted by Davis Hydro<sup>6</sup> and dated July 30, 2007:

*“Davis Hydro states the benefit of these actions<sup>7</sup> is unknown; therefore they recommend studies to determine the potential level of benefit.*

*“Davis Hydro’s proposal does not provide a substantial basis that compels NMFS to think that such benefits are likely, or proposed studies are warranted. Thermal benefits accrued by retaining Kilarc Forebay, if any, are likely to be minimal and outweighed by*

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<sup>2</sup> FERC Accession # 20050407-3064

<sup>3</sup> FERC Accession # 20050714-3036

<sup>4</sup> FERC Accession #20050720-0243 and -0244

<sup>5</sup> FERC Accession # 20070926-5001 and repeated in hardcopy with distribution list as Accession # 20071003-0155

<sup>6</sup> FERC Accession # 20070731-5001

<sup>7</sup> As summarized by NMFS, Davis Hydro suggests “the alternatives include actions or conditions for the benefit of anadromous fish. These actions include providing cold water to downstream habitat, providing a nursery for steelhead in the Kilarc Canal, and establishing a mitigation trust fund to be used for other potential restoration measures.”

*degraded<sup>8</sup> instream conditions in the bypassed reach. Davis Hydro does not provide a substantial basis from which to conclude that establishing a steelhead nursery in Kilarc Canal would be practical or beneficial. Finally, Davis Hydro does not provide any analysis or evidence that any of their proposed alternatives would generate surplus revenues to fund the other restoration measures, as suggested.*

*“NMFS remains committed to the existing agreement previously signed along with PG&E [...] – establishing a framework for a decommissioning and restoration scenario for this project.<sup>9</sup> These signatory parties spent more than a year preparing the agreement and a supplementary description of desired conditions. This agreement remains the most viable alternative for maximizing the benefits for anadromous fish.”*

4. NMFS next provided the following comments<sup>10</sup> regarding Davis Hydro’s “The Kilarc Reconstruction Alternative: A Fish Restoration Proposal for the Kilarc Hydropower Facility” dated June 20, 2008<sup>11</sup>:

*“The document does not change our position with regard to Davis Hydro’s proposal or the existing Early Decommissioning Agreement. NMFS remains committed to the Early Decommissioning Agreement previously signed along with PG&E [...] – establishing a framework for a decommissioning and restoration scenario for this project. This agreement remains the most viable alternative for maximizing the benefits for anadromous fish.*

*“NMFS has previously documented our concerns regarding Davis Hydro’s proposal in a comment letter responsive to an earlier version of the Davis Hydro proposal. These*

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<sup>8</sup> The existing instream conditions in the bypassed reach are clearly challenging, and could remain unchanged if project facilities remain in place, although the proposed Davis Hydro fish return may include enhancements to areas that will be newly populated by fish. The term “degraded” as used by NMFS in this context is understood to reflect NMFS’ belief that conditions in the bypassed reach would be improved by dismantling of the project facilities, or, more importantly, by increasing the minimum flows in the bypassed reach. Davis Hydro continues to ask whether the net benefit to ESA-listed species populations would be greater by increasing minimum flows in the bypassed channel that has no documented anadromous fishery – see Sierra Pacific Industry comments, FERC Accession #20081112-5052 – or with implementation of the full complement of measures that would be evaluated and fine-tuned under the Davis Hydro alternative.

<sup>9</sup> And with equal vigor, Davis Hydro remains committed to an aggressive program of restoring the anadromous fish to this area and to engage with NMFS and others on an active program of habitat, genetic, and fish population improvements both locally and globally.

<sup>10</sup> FERC Accession #20080805-0003

<sup>11</sup> FERC Accession #20080707-5045

*comments were filed on the FERC record on October 1, 2007<sup>12</sup>. Our concerns with the new version are the same.”*

5. Finally, in addition to references to the new Tetrick Ranch alternative that will not be addressed here, the subject filing by NMFS states:

*“NMFS has previously filed comments regarding the Davis Hydro alternative with the Commission (filed July 7, 2008)<sup>13</sup>. During their presentation at the site visit, Davis Hydro did not provide substantial new information regarding their alternative that changes our position as previously stated.*

*“NMFS remains committed to the Early Decommissioning Agreement previously signed along with PG&E [...] – establishing a framework for a decommissioning and restoration scenario for this project. This agreement remains the most viable alternative for maximizing the benefits for anadromous fish.”*

### **Commentary on NMFS Filings**

No consideration of the genetics, genetic dominance by "resident adapted" and hatchery rainbow trout has been entered. The temperature effect is dismissed while the only scientific papers on the Cow Creek Watershed suggest that temperature is the most important resource determinant in this location. Acid rain, global warming and the short and long term effects of destroying this renewable energy source are not addressed. The increased fire prevalence will impact streams in the area far into the future due to the loss of the Kilarc reservoir.

As reflected above, NMFS' has repeated the following nearly verbatim in each comment letter regarding evaluation of alternatives,

*“NMFS remains committed to the existing agreement previously signed along with PG&E [...]” – establishing a framework for a decommissioning and restoration scenario for this project. These signatory parties spent more than a year preparing the agreement and a supplementary description of desired conditions. This agreement remains the most viable alternative for maximizing the benefits for anadromous fish.”*

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<sup>12</sup> *Op. Cit.* footnote 5., FERC Accession # 20070926-5001 and repeated in hardcopy with distribution list as Accession # 20071003-0155, cited in preceding list item 3. of this letter.

<sup>13</sup> *Op. Cit.* all previously filed comments by NMFS regarding the Davis Hydro alternative are provided in this letter.

NMFS position is in direct conflict with the major tenets of the very agreement cited above, that

- the agreement is not a pre-decisional act
- the subjects and desired conditions in Attachment A of the agreement, because they are based on limited information ARE subject to change<sup>14</sup>
- additional information may become available
- compliance with applicable laws and regulations (e.g. NEPA evaluation of alternatives) is required
- new parties may become parties to the agreement, and
- the work that may be needed to assist the Company and the Parties in developing a detailed decommissioning proposal are open to members of the public.

In its first comment letter on the Davis Hydro alternative, NMFS cited three arguments against further study because “Davis Hydro’s proposal does not provide a substantial basis that compels NMFS to think that such benefits are likely, or proposed studies are warranted.”

Two of the arguments against further study were based on unsupported assumptions regarding the outcome of any further study<sup>15</sup>, and the third argument asserted that doubt regarding the availability of funding<sup>16</sup> was a reason to refuse to continue any discussion.

In the next two comment letters on the Davis Hydro alternative, NMFS referred back to its prior arguments, stating, “*Our concerns with the new version are the same,*” and “*During*

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<sup>14</sup> Davis Hydro did not come on the scene, or start proposing viable alternative approaches to demolition until 2 years after this agreement.

<sup>15</sup> NMFS stated, “*Thermal benefits accrued by retaining Kilarc Forebay, if any, are likely to be minimal and outweighed by degraded instream conditions in the bypassed reach. Davis Hydro does not provide a substantial basis from which to conclude that establishing a steelhead nursery in Kilarc Canal would be practical or beneficial.*”

<sup>16</sup> NMFS stated, “*Finally, Davis Hydro does not provide any analysis or evidence that any of their proposed alternatives would generate surplus revenues to fund the other restoration measures, as suggested.*” The proper sequence of evaluation is first to determine whether proposed actions are desirable, and subsequently whether they are feasible. PG&E’s alternative appears to cost considerably more to implement. Irregardless, as micro-hydro developers and operators, we consider this to be a perfectly viable project from an economic standpoint, with ample opportunity to generate net revenues to offset mitigation costs. Without being specific, the following economic factors may clarify the question of economic viability. The project was profitable for PG&E under the same flows as the Davis Hydro Alternative at a price of power near \$ 0.03 / kWh. Today this same power is worth well over \$ 0.10. Labor costs as seen by PG&E are high, their work rules are difficult for small projects, and PG&E corporate overheads are expected to be in excess of our insurance costs. This project will throw off considerable revenue stream for habitat restoration up and down Cow Creek, and it is in these works we need the guiding hand and partnership of NMFS biologists and staff. Let’s get on it.

The Honorable Kimberly D. Bose, Secretary  
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*their presentation at the site visit, Davis Hydro did not provide substantial new information regarding their alternative that changes our position as previously stated.”*

NMFS has yet to consider the data and professional judgment of more than a half-dozen scientists who have evaluated the Davis Hydro proposal<sup>17</sup>, including: Cramer Fish Sciences (Joseph Merz & Bradley Cavallo), StreamWise Stream Assessment and Restoration (Rick Poore), Todd Sloat Biological Consulting, Inc. and most recently Sophia Philip Unger (Ph.D. in Aquatic Ecology, University of Colorado, Boulder; B.A. in Biology, Harvard University). Not yet addressed by NMFS is the displaced fishing pressure on hopefully-restored fishing resources north of Chico. It is unclear where NMFS thinks the fishing activity driven by them from the Kilarc reservoir will go - what other fish resources the large human population of fishers will burden. We look forward to working with FWS and NMFS to address the hatchery/genetic issues that pollute the “natural conditions” Alternative and possibly denude this demolition approach of any benefit to anadromy for many years into the future.

In summary, the NMFS has – to date, remained committed to avoiding further study and rejecting any change to a decommissioning proposal that was originally based on limited information, and did not have the Davis Hydro Alternative extant. NMFS remains committed to its original position based on two assumptions about the outcome of proposals from Davis Hydro. NMFS has – to date, not yet considered scientific and other preliminary data contradicting NMFS’ assumptions. NMFS remains committed to the decommissioning proposal that involves dismantling of project facilities. We respectfully disagree with NMFS’ current assertion that, “This agreement remains the most viable alternative for maximizing the benefits for anadromous fish.”

Let us move quickly to the EIS studies, or let us move on to trying some of Davis Hydro’s ideas. Let us now work together to save the fish and sustain the planet rather than focusing on what local works we can tear down. Please NMFS – please reconsider. Let us consider global benefits and use local resources for the benefit of all.

Sincerely,



Richard D. Ely, Principal, Davis Hydro LLC

<sup>17</sup> Studies commissioned by Davis Hydro, from which both the Tetrack and Davis Hydro alternatives have evolved, were submitted under FERC Accession No. # 20080707-5045 (4 documents found at pages 25-41 of FERC-generated .pdf). These studies were cited in the Bibliography and Sources to KC LLC, *et. al.*, Comments of Davis Hydro on the Scoping Document on PG&E’s Application for License Surrender and Evidence Supporting Selection of the Davis Hydro Alternative under P-606, FERC Accession # 20091016-5091 and resubmitted as FERC Accession #20091026-5005 when other text in the document was revised.

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day served the foregoing document by first class mail postage prepaid or email upon each person designated on the official service list compiled by the Secretary of the Commission in this proceeding.

Dated at Fair Oaks, CA this 12<sup>th</sup> day of November 2009.

*Kelly W. Sackheim*

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