

The Kilarc Foundation

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August 6, 2010

Mr. Wally Herger, Honorable Congressman
Dave Meurer, District Representative
410 Hemsted Drive, Suite 115
Redding, CA 96002

Re: The Kilarc Hydropower Project

Dear Congressman Herger:

The Kilarc Foundation is a non-profit Corporation set up to enhance and restore fish to the upper Sacramento River area. At present, it is funded entirely by Davis Hydro, a proponent in the Kilarc –Cow Creek hydropower discussions.

In recent letters and e-mails you include the following text.

Once PG&E decided not to pursue a new license to continue the operation of the Kilarc project, FERC had no option but to accept the Surrender Application. And, unfortunately, no qualified entity stepped forward during the allowable time frame to actively pursue a new license for the facilities. Even if a qualified entity had filed in a timely manner, strict environmental regulations would likely make it extremely difficult - possibly even cost prohibitive - to continue hydroelectric operations.

Given the very substantial legal and financial barriers that exist, and the windows of opportunity that have already been missed, it is not clear that there are any feasible opportunities remaining by which any entity could reasonably take over operations of the Kilarc Project.

Sir: we need your help. What you have said above is simply not true. Your staff has been misled. FERC can do any of the following at this point:

1. Continue PG&E's license on an annual basis while instructing and requiring the parties to work out an optimal solution with NMFS, under threat of endless annual licenses for PG&E.
2. Continue PG&E license on an annual basis while allowing various parties to try their fish enhancement technologies under annual licenses. This sidesteps NMFS for a while.
3. Instruct PG&E to set up a remediation bond for later removal if necessary, and to put the

- site in moth balls intact while other parties get it relicensed
4. Call the parties into the FERC offices in San Francisco and listen carefully if we can develop with the agencies a compromise solution under threat of legislation described below.
 5. Order studies to make it clear what is the real situation. – Currently there are no NEPA or ESA studies or data ... Just unsubstantiated personal opinions.

These alternatives are among many other solutions that are possible under current law. You have been misled. Allow me to suggest what is really going on:

FERC is in a battle with NMFS over hydropower licensing. Currently, the law requires FERC to put into a hydropower license whatever provisions NMFS (or USFWS) requires. These are called 4(e) conditions. This is true for both licensing and decommissioning.

Sometimes these provisions are contended in Federal court. However, Federal judiciary practice is to defer to the agencies (notably NMFS). So with the Federal courts predisposed to support the agencies (NMFS), we and SMUD and many others have been advised by our attorneys that unless you can show “overwhelming -near embarrassing evidence” that the agency is wrong, NMFS/USFWS will prevail in court and the hydropower or other renewables will lose.

It does not stop there. The issue under contention, in almost all cases, is that the burden of proof for the hydro proponent is “to show that the project will not harm the fish”. Sir, that is requiring the applicant to prove a future hypothetical negative. It cannot be done. Hypothetical negatives are very very difficult to prove even in the present, so the result is that NMFS will always prevail in court and at the moment, green hydro (wind and other projects) are not being built. This is why FERC is being reduced to a custodial/secretarial role. Note that projects-not-being-built cannot be easily shown - you cannot show a negative. Complex projects like Kilarc are being torn out, because of arbitrary decisions by NMFS staff with no scientific support or discussion and similarly no study of the alternatives.

The Kilarc green power hydro project is an example that is infuriating 20 % of your district. For other verification of this story, talk to SMUD, Mr. Dave Hanson 916-762-6703 about a 320 MW project that just experienced the same problem. There are maybe 100-200 other hydro projects that will not happen or are being torn out for this reason. No way to know how many. One cannot count what does not happen.

What to do. We are asking you to work with us to write FERC and NMFS to force a compromise. If NMFS will not compromise or talk, and from our experience NMFS will not since they are now free from judiciary intervention, then let us legislate.

... or let's legislate anyway. I suggest a new Bill that has as its key provisions:
Any Federal administrative condition, license condition, or similar provision made by FERC must have affirmative scientific support. The obligation of proof of likely impact is resident on the Agency not on the applicant. The obligation is not on the applicant to prove that the project will not have an effect – this is usually impossible and unreasonable. All studies must meet the standards of the Federal Information Quality Act, and shall have a National scope at a minimum.

No provision shall be imposed on a licensee that will inhibit the licensee from implementing a project unless it can be affirmatively shown with scientific support but the agency requiring the provision that that provision is necessary to protect an environmental resource. The burden of proof of the likely effect is on the agency to show. All studies must meet the standards of the Federal Information Quality Act, and shall have a national scope at a minimum.

Federal Agencies shall support any renewable projects unless it can be shown by the agency that such a project will be detrimental to the environment on a national scale.

{ Justification: The applicant can never prove that nothing will happen in the future. This standing in the way of most alternative energy projects. }

{ Justification: There is no question that projects have a local impact, but the widespread direct and indirect effects of the construction and operation of projects have impacts on a national, if not global, scale. These effects are usually far larger than the local footprint of a project and are not now ever considered. }

We will be pleased to work with staff on this legislation. It will have a profound effect.

Note: For the record. Our proposal for the Kilarc project is an aggressive pro-fish proposal that will be far - far more effective at fish restoration than tearing out the facilities. This is not about the fish. This is about the arbitrary use of power to thwart FERC by an agency that is now cloaked in the neo-religious mantle of Environmentalism and has been placed above judicial review. Your constituents, the fish, green power projects, and our atmosphere are simply the detritus on this NMFS/FERC battlefield.

Respectfully,
Richard Ely



The Kilarc Foundation,
Davis Hydro

cc: D. Hanson, SMUD