



a collaboration of Davis Hydro LLC
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August 25, 2010

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
Subject: Requirement for New Scoping and Second Draft EIS

Dear Ms. Bose:

Last Tuesday evening, members of the Whitmore Community once again spent over three hours testifying regarding the importance of the P-606 project facilities to their community. Once again, a speaker took a poll of those present and not one individual present indicated that destruction of the facilities was the preferred alternative.

At least two representatives of PG&E were among those present. Once again, none of the federal and state resource agencies who continue to advocate dismantling of the facilities were present. It is understood that Federal Energy Regulatory Commission (FERC) staff responsible for preparation of the Environmental Impact Statement (EIS) could not make substantive statements or express opinions in this forum. Given the overwhelming evidence provided before the August 17 hearing, however, it is inconceivable that FERC staff will next be preparing a final EIS as Ms. Linton-Peters stated, when clearly many of the necessary additions and revisions to the present draft EIS will require subsequent disclosure for review and comment before a final EIS can accurately reflect the environmental effects of the Proposed Project and a reasonable range of Alternatives.

As I expressed in my last comment letter before the hearing (FERC Accession No. 20100810-5108), the FERC must provide leadership in National Environmental Policy Act (NEPA) implementation, because FERC is the lead agency and decision-maker,

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while the other Resource Agencies refuse to do so, even as they may utilize the FERC NEPA document to justify the exercise of their mandatory conditioning authority – that will be disputed in court if there is, as presently, no underlying scientific basis. As suggested by Dr. Richard Ely at the August 17 hearing, the FERC may choose to defer any decision – granting PG&E annual licenses to continue its operations under existing license conditions – until an adequate scientific basis is established to determine the preferred disposition of facilities upon acceptance of PG&E’s license surrender. Davis Hydro has proposed research, fish spawning and rearing, and an adaptive management plan to establish an irrefutable scientific basis for determining the preferred disposition of facilities. FERC can organize discussions of interested parties seeking compromise. FERC can, under the existing license, work with the Licensee and other parties to effect a better outcome. FERC could set surrender terms that allowed other parties to operate the Kilarc site on a trial basis to see what can be done for the fish and the environment. FERC has enormous indirect power over the licensee, and with the licensee, to seek an aggressive and innovative solution that meets agency and community goals. We request that FERC do so in the interest of the environment and the community – both of which will be significantly harmed by the blanket demolition alternative.

As reflected in my testimony at the July 14 hearing, the June 2010 Draft EIS clearly reflects that Action Alternative 1 (AA1) is the environmentally superior alternative for disposition of the Kilarc facilities. Should the FERC opt to proceed immediately with a Final EIS, this conclusion cannot be altered substantively – but the FERC staff recommendation for adopting the demolition alternative without having presented valid reasons for rejecting the environmentally superior alternative cannot be upheld.

This letter provides several reasons, any one of which would be sufficient, to justify resumption of a true Scoping process and preparation of a second DRAFT EIS. The purpose of following through with the NEPA process is to reach a consensus on the appropriate range of alternatives (not eliminating feasible environmentally superior alternatives because of conclusions reached by Resource Agencies who refuse to consider new circumstances or better data that refutes their initial assumptions) and likely environmental effects of each. Attached to this letter are more detailed comments on the

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deficiencies of the current EIS document itself, including a criticism of the arguments in support of continuing without adequate review of alternatives.

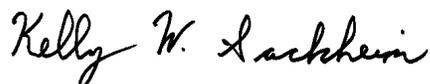
The transcript of the meeting will show that no one can identify any scientific evidence supporting the dismantling of the facilities, rather an excellent analysis by (Bob Carey of Vestra) of the CDFG analysis shows the fallacy of the CDFG conclusions based on their own citation. Nevertheless, it is believed that the National Marine Fisheries Service (NMFS) is prepared to exercise its mandatory conditioning authority to require demolition. FERC staff responsible for the environmental review document (not the overall license surrender process) appear to have been intimidated by this prospect to the point where staff recommendations advocate demolition without any reference to the environmental review, while the reasons cited are clearly not within their purview or understanding.

Attachment 1 to this letter provides a brief review of the comment letters submitted by the National Marine Fisheries Service (NMFS), Department of Interior on behalf of the U.S. Fish and Wildlife Service (USFWS), and California Department of Fish and Game (CDFG) on the draft EIS.

Attachment 2 to this letter provides a review of the deficient analysis of Cultural Resources in the 2010 draft EIS.

In summary, KC LLC continues to support the efforts of the FERC to render a decision regarding the preferred license surrender plan based on the analysis of the starting set of five alternatives presented in FERC Accession No. 20100222-5135 and within the regulatory procedures established for such purpose.

Sincerely,



Kelly W. Sackheim, Principal

KC Hydro, a partnership of Davis Hydro LLC and Sackheim Consulting

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Attachments

cc: augmented P-606 e-mail list and full service list

L. Jackson, EPA

J. Lubchenco, NOAA

R. Gould, USFWS

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 25th day of August 2010.

Kelly W. Sackheim

Kelly W. Sackheim, Principal
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Attachment 1

Brief review of the comment letters submitted by the National Marine Fisheries Service (NMFS), Department of Interior on behalf of the U.S. Fish and Wildlife Service (USFWS), and California Department of Fish and Game (CDFG) on the P-606 License Surrender draft EIS.

The NMFS letter (FERC Accession No. 20100824-5104) disingenuously states that “the community recommendations fall within the range of alternatives analyzed in the Draft EIS” when in fact the Davis Hydro alternative was allegedly “considered but eliminated from further analysis” (June 2010 Draft EIS pages 33-34).

The draft EIS states “All of the resource agencies, with the exception of California SWRCB, which neither opposes nor advocates the community recommendations, have objected to the community recommendations because they would not provide the increased instream flows considered necessary for the enhancement of aquatic resources. These specific alternatives were not analyzed throughout this DEIS separately; however, the community recommendations fall within the range of alternatives analyzed within this DEIS (No-Action Alternative, AA1, and AA2).” (June 2010 Draft EIS, page 34)

The FERC may not establish as a criteria for evaluating or not evaluating an alternative because the alternative “would not provide the increased instream flows considered necessary for the enhancement of aquatic resources.” This choice reflects a pre-decisional determination that the only means to achieve the goal of enhancing aquatic resources is by providing increased instream flows. This choice reflects that the FERC is in fact allowing the analysis to be driven by the alleged “greatest conservation benefits for anadromous fish” rather than performing an analysis and then making a decision based on the environmentally preferred alternative with regard to ALL resources, including those more directly affecting the human environment.

The Davis Hydro alternative was first introduced in mid-2007 and upgraded approximately every 6 months since then, as documented in FERC Accession No. 20100726-5012, nearly a month before NMFS letter was submitted. The community recommendations include allowing continued hydropower generation to achieve greater enhancement of aquatic resources as described in the Davis Hydro alternatives and omitted from the draft EIS analysis.

The CDFG letter similarly makes it clear that the FERC must take the initiative in requiring analysis of an appropriate range of alternatives. CDFG does not propose any additional alternatives because the Department’s preferred alternative is the Proposed Action, and they have chosen to review only the range of alternatives highlighted by the FERC, ignoring what Davis Hydro is committed to implement and has documented would result in greater benefits to the anadromous fishery.

CDFG concurs with FERC staff’s DEIS preferred alternative, that takes none of the adverse effects of the proposed action into consideration, because no superior option for the anadromous fishery has been identified by the FERC as requiring analysis. CDFG has determined that the only “suitable” flows for aquatic habitat would be the maximum flows available, with no underlying analysis.

The Draft EIS only “includes adequate information for NMFS to conclude that the Proposed Action is the best alternative for anadromous fish and the habitat that supports them” because the Draft EIS simply parrots back the unsubstantiated conclusion that NMFS has already made in this regard. FERC has ignored every challenge to this predecisional conclusion. NMFS’ relies on no data specific to this watershed, but bases its conclusion on the fact that “Numerous fisheries benefits are **typically** associated with [significantly higher instream flows, restoration of the natural hydrograph, and elimination of fish passage impediments].”

The purpose of a Draft EIS is to disclose the underlying evidence supporting conclusions regarding environmental effects of a Project and alternatives. The present FERC June 2010 Draft EIS does not do so. It is unacceptable for the FERC to rely on the fact that any commenter states “NMFS has previously reviewed the community recommendations and concluded they would not provide as much benefit to NMFS’ trust resources as decommissioning.” The basis for NMFS’ conclusion is not in the record. Although NMFS is the federal Resource Agency responsible for fisheries resources, this resource area is not exempt from a thorough disclosure by the FERC. It is the FERC’s obligation to review both the documents cited by NMFS and the evidence submitted by other stakeholders that refutes the conclusions drawn by NMFS. It is the obligation of FERC staff preparing the Draft EIS to base its recommendations on the environmental analysis.

NMFS disingenuously suggests that while no further analysis is necessary to determine whether anadromous fish in fact exist above Whitmore Falls (asserting rather that it must be assumed, because it may be difficult to ever locate any fish, while it is impossible to prove their absence), the benefit of eliminating any false attraction, delay or mortality of anadromous fish at the Kilarc powerhouse and tailrace should be considered in the Final EIS.

The fact that “NMFS would likely require a comprehensive fish passage evaluation as part of the licensing process of any alternative that included significant flows through either powerhouse” is irrelevant to the present analysis in the Draft EIS on the P-606 License Surrender. The identification of costs for water diversion and fish screen facilities is similarly relevant only if considered as general background or information that may be used to validate the benefit of financial contributions to on-going enhancements proposed by Davis Hydro. It does not justify eliminating any such alternative from analysis at the present time.

NMFS alleges that “Aquatic species would be able to expand into new habitats for rearing, feeding on terrestrial organisms, or avoiding predation” with no evidence whatsoever of the existence of necessary conditions for such “new habitats” to automatically become established upon the restoration of diverted flows whereby “the cross section of the wetted stream would expand and contract naturally.” If these factors are to be considered in the EIS, such new evidence would need to be disclosed in a new Draft EIS.

NMFS correctly notes that CDFG and USFWS currently manage the reach above Whitmore Falls for resident fish. Unfortunately, the hatchery program EIS/EIR discussed extensively by Davis Hydro reflects

that management practices have in fact been a disaster and likely contributed to the decline of both anadromous and resident fish stocks. A new FERC Draft EIS is necessary to provide appropriate disclosure of these issues and the solutions proposed in the Davis Hydro alternative.

The proposed Project is not the only alternative to have the following features, it is simply the only alternative studied by FERC staff in the DEIS because they specifically defined the alternatives to exclude the benefits offered by the Davis Hydro alternatives:

Page 6, Section 1.3.3 – “Most of the components of the Proposed Action are designed and anticipated to result in long-term beneficial effects to steelhead and Chinook salmon and designated critical habitat in the action area.” – in fact, the long-term beneficial effects of the Proposed Action are much more speculative than with the Davis Hydro alternative, because the alternative would provide on-going funding and adaptive management to achieve its goals while the Proposed Action would involve no follow-on monitoring, much less funding for further mitigation.

The comment letter from the Department of Interior (DOI) (FERC Accession No. 20100825-5047) makes further egregious conclusory statements,

“Page 33, Actions Considered But Eliminated from Further Analysis – The FWS has determined that the KC LLC alternative *“An Alternative to Demolition of the Kilarc Hydropower Project”* is not protective of anadromous salmonids or the aquatic ecosystem that they inhabit.

The Service [USFWS] does not support restoration of salmonid habitat in Hooten Gulch. Such an attempt at habitat creation is not protective of the ecosystem and is likely to adversely impact local anadromous fish.” – In order to be considered in the FERC analysis, a new Draft EIS is required to disclose the basis for these statements.

The DOI letter further fails to disclose the means by which diseases could be introduced into local fish and amphibian populations in Old Cow Creek. If the introduction of diseases would be a result of fish stocking, that is a separate action approved by CDFG, in accordance with protocols established in the joint USFWS/CDFG Hatchery EIS/EIR, and should at best be considered a remote and mitigable adverse effect of not demolishing Kilarc reservoir.

Page 45, third paragraph – Todd Wroe raised serious concerns at the second hearing on the DEIS based on observations of poor slope stability that have not been addressed in the PM&E measures for erosion and sedimentation.

Page 202 – CDFG concurs with a statement about recreation that is outside of its jurisdiction and has been thoroughly disputed by the concerned stakeholders. The total disregard of both the FERC and CDFG for the statements of the local residents with regard to changes in recreation is inexcusable.

The events this spring and summer involving the CDFG and community response to curtailment of the CDFG stocking program clearly demonstrate that recreation at Kilarc IS serving a community that is not otherwise adequately served. To review: CDFG had been stocking for years. When CDFG had to choose the priority of facilities in resumption of stocking, Davis Hydro supported the community by hiring a
Attachment 1: Brief review of the comment letters submitted by the National Marine Fisheries Service (NMFS), Department of Interior on behalf of the U.S. Fish and Wildlife Service (USFWS), and California Department of Fish and Game (CDFG) on the P-606 License Surrender draft EIS

biologist to complete the necessary pre-stocking protocol because Davis Hydro recognized that CDFG did not have the resources to adequately meet its responsibility to its constituents and it was preferable to collaborate in getting the work done, rather than waste more resources arguing which work should be done first. CDFG did acknowledge the hundreds of people clamoring to fish, particularly the disabled and youth (although there are also the elderly and economically disadvantaged) and completed the limited work remaining to be able to plant at Kilarc some of the limited fish still available.

A speaker at the second hearing on the draft EIS pointed out that the entire County of Shasta has been identified as a disadvantaged community that warrants an Environmental Justice analysis when a project has the potential to generate disproportionate effects on this community. The Environmental Justice analysis has not been included yet in the draft EIS. Viable alternatives exist and have not been studied to alleviate the very deprivation of this community of their limited recreational and socioeconomic assets.

NMFS similarly comments outside its jurisdiction with regard to the 2004 determination of the California Energy Commission with regard to decommissioning. This determination is outdated and does not address the Environmental Justice issues raised in this proceeding.

Page 263 – the alleged “significant long-term environmental benefits gained from the project removal” would NOT outweigh the underestimated short-term and long-term environmental impacts and loss of generation that are completely unnecessary if viable alternatives that have been put forward were not ignored by the FERC, CDFG and other parties who are satisfied with the present draft EIS and manner in which this proceeding is moving forward.

Bob Carey, a fisheries biologist from Vestra, revealed at the July 17 public hearing a key flaw in NMFS assumption that steelhead could pass upstream at Whitmore Falls. The flaw is repeated in NMFS comment letter on the DEIS that subsequently appeared: in the fourth paragraph of Attachment 1 – Preliminary Hydraulic Analysis of Fish Passage Whitmore Falls, NMFS concedes that “a realistic range for the maximum jump height of steelhead as from 9 feet to over 14.5 feet, depending on the condition of the fish (from 0.75 to 1.0)” while Carey pointed out that having travelled more than 250 river miles from the ocean, steelhead arriving at Whitmore Falls would be nowhere close to 0.75 to 1.0.

The DOI’s conclusion accurately reflects how the FERC’s NEPA process has gotten off-track: “The Department's FWS has worked closely with PG&E, National Marine Fisheries Service, California Department of Fish and Game, and FERC on the decommissioning proposal for the Project.”

- The NEPA process is supposed to be transparent, but important stakeholders have been excluded from the discussion.
- The focus has been on the decommissioning proposal, more accurately characterized as a demolition plan, to the exclusion of consideration of ANY alternative proposals for an alternative disposition of facilities upon PG&E’s license surrender.

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Attachment 2

Review of the deficient analysis of Cultural Resources in the 2010 draft EIS on P-606 License Surrender. Draft of remarks prepared but not presented before the FERC in Whitmore on August 17, 2010 due to time constraints.

When I (Kelly Sackheim) came before you just over a month ago in Redding, I was the only speaker that evening to express the opinion that the present FERC EIS analysis is adequate for its purpose.

Although the analysis of alternatives has thus far been limited, Alternative Action 1 does include retention of the Kilarc Forebay for recreational purposes.

I based my opinion on Table 26 found on pages 260 and 261 of the EIS, that is, The “**Summary and Comparison of Impacts under the Proposed Action, Action Alternative 1, Action Alternative 2, and No-Action Alternative**”

A Summary and Comparison **developed by FERC staff**
Of the Analysis **performed by FERC staff**.

I noted that, when looking at the FERC’s **Summary and Comparison of Impacts**, the unequivocal conclusion is that Action Alternative 1 is environmentally superior to the Proposed Demolition of nearly all project facilities.

When I spoke before you over a month ago, I noted that the Staff Recommendations that appear immediately following Table 26 make **NO comparison of the environmental effects** of the Proposed Action with Staff Modifications **to** Action Alternative 1.

Since the last hearing in Redding, I have already filed a letter commending FERC staff for their responsiveness to concerns expressed by community stakeholders at the last hearing, and your willingness to return this evening, and requesting that **until the conclusion of the environmental review, all staff recommendations be based on the environmental analysis only**.

I also stated that “We are hopeful that the resource agencies may take the initiative to provide a comprehensive review of the analysis performed by the FERC in the draft EIS, perhaps even expanding to alternatives proposed but not addressed, rather than simply concurring with FERC staff recommendations and ignoring the environmental analysis as FERC staff has done.”

For my part, I would like to facilitate your revision to the Cultural Resources Environmental Analysis (Section 3.3.11 of the draft EIS, commencing on page 211).

On page 217 of the draft EIS, under the heading “Identified Cultural Resources within the APE” there is reference to five resources located within the Kilarc Development that are identified in Table 21 (found on page 220). The two historic water systems, Kilarc Canal on the one hand and the North and South Canyon Creek Ditch on the other hand are deemed “Not eligible” for listing in the National Register of Historic Places.

I will read the final paragraph on page 218 of the draft EIS, so you know what I am talking about:

Quote: Site 482-12-07H consists of the Kilarc canal system, which includes the Kilarc main diversion dam, about 3.65 miles of canals and flumes, and the 4-acre Kilarc forebay and penstock. A total of 44 features, located between Old Cow Creek and the Kilarc powerhouse, are encompassed by the Kilarc canal system. This resource has been determined not eligible for listing on the National Register (Siskin et. al., 2009).

End Quote

The next paragraph in the draft EIS provides similar information for the North and South Canyon Creek water system.

I'll read the following paragraph from the draft EIS now, and that's as much as I want to quote rather than paraphrasing to make myself clear.

Quote: Although only the Kilarc powerhouse was determined to be eligible for listing on the National Register, several public comments filed with the Commission have indicated that the community feels that the entire Kilarc water system is an important historic and cultural resource for the area. In addition, public comments specified concern over effects on these historic resources under the Proposed Action. Comments have generally indicated a preference for the preservation of these resources through continued use and maintenance; these alternatives, however, have been eliminated from further analysis due to feasibility issues. **End Quote**

Siskin *et al* 2009 refers to the cultural resources study commissioned by PG&E.

You can find on the FERC eLibrary, a letter dated March 26, 2010 on KC Hydro letterhead, addressed to John Fowler at the federal Advisory Council on Historic Preservation in Washington, DC and Milford Wayne Donaldson, our California State Historic Preservation Officer, that is signed by Sandy Winters, a volunteer with the Shasta Historical Society who spoke at last month's meeting, and myself.

Our March 26, 2010 letter assembles sufficient relevant documentation for the FERC to reconsider its findings, absent any response from the two agencies addressed. I'll wrap up my comments with just four observations –

1. The community stakeholders began to raise concerns in their comments on PG&E's draft License Surrender Application, by letter dated November 7, 2008 (attached to our March 26, 2010 letter, so you only have to pull one filing), about the first public iteration of the cultural resources study commissioned by PG&E.
2. PG&E had already obtained concurrence of the recommendation by the consultants preparing this report, with only the initial version of the study. We know that staff at the State Office of Historic Preservation would not have time to review the study report in detail – in other words, the recommendation of the

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consultants preparing a deficient report has served as the basis for the determination that the water systems are not eligible for listing in the National Register of Historic Places. Notably, the report is **biased** against consideration of the Kilarc Canal water system as eligible, as documented in our March 23, 2010 letter, when 23 numbers are assigned to groups of historic features with common characteristics that remain in sufficiently good condition to depict the important history of this area, while 21 numbers (still less than half of the 44 numbers) are assigned to features such as each of a half-dozen short metal flume segments that have been modified in recent times.

3. It becomes much easier to advocate demolishing facilities that are not eligible for listing in the National Register of Historic Places.
4. IF the Kilarc Canal is deemed eligible for listing in the National Register of Historic Places, THEN there is a clear contrast between the adverse effects of the Proposed Action and the cultural resource benefits of maintaining the Kilarc Forebay and the water system that supplies it.

I'll leave a copy of my notes with the court reporter, if I may, to facilitate accurate transcription. The court reporter did a great job with the last hearing.

Thank you.