

From: [Kelly W. Sackheim](mailto:Kelly.W.Sackheim)
To: [Wr401program](#)
Cc: Wetzel_Jeff@Waterboards; Hildeburn_Chase@Waterboards; Parks_Jeff@Waterboards; [Dick Fly](#)
Subject: Comments on DEIR for Clean Water Act Section 401 Water Quality Certification (FERC P-606)
Date: Friday, May 24, 2019 11:30:58 AM
Attachments: [iddnafahfajjgo.png](#)
[KChydroResponseToNMFS_KilarcDEIRonWQcert.pdf](#)
[KChydroComment_KilarcDEIRonWQcertWattach.pdf](#)

Please find attached two letters for consideration in the preparation of a Final EIR and Conditions of Water Quality Certification for the FERC P-606-027 Kilarc-Cow Creek Hydro Project (License Surrender)

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May 24, 2019

WR401Program@waterboards.ca.gov

submitted via email

Ref: FERC P-606-027 Kilarc-Cow Creek Hydro Project (License Surrender)

Re: Comments on NMFS Comments on DEIR for Clean Water Act Section 401 Water Quality Certification (FERC P-606)

National Marine Fisheries Service (NMFS) filed its Comments on the subject DEIR on the Federal Energy Regulatory Commission (FERC) eLibrary on the P-606 docket and the NMFS Comment Document was assigned FERC Accession No. 20190523-5128.¹

NMFS Comment Document uses the logic of a non-sequitur similar to the logic used by PG&E in its filing to the FERC, “PETITION FOR DECLARATORY ORDER REQUESTING WAIVER OF WATER QUALITY CERTIFICATION OF PACIFIC GAS AND ELECTRIC COMPANY”.² To quote this commenter’s explanation of PG&E’s logical fallacy:

PG&E’s statement “*In spite of*” implies that the SWRCB should not have proceeded to issue its Draft Environmental Impact Report *because* PG&E “did not” do what the SWRCB encouraged PG&E to do. Clearly, PG&E’s decision to decline to do what it was *not obligated* to do *does not* relieve the SWRCB of ITS obligation in the license surrender process.

In its Consultation History section, NMFS wrote: “In 2005, these agencies were among the signatories to an agreement (Settlement Agreement) that PG&E not **seek a new FERC license, instead the license will be either: 1) acquired by another license applicant; or 2) decommissioned by FERC order.** [emphasis added to track the citation]

The Settlement Agreement stipulates that PG&E would support decommissioning.” (NMFS filing assigned FERC Accession No. 20190523-5128, page 1)

Fact: The FERC policies and procedures dictate that in the event that a licensee (in this case, PG&E) opts not to “seek a new FERC license, instead the license will be either: 1) acquired by another license

¹ NMFS comments available at the following link:

http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20190523-5128

² Supplemental Information / Request of KC Hydro in California under P-606. Disclosure of Invalid Argument by PG&E in its Petition for Declaratory Order and Extensive Citation of Legal Cases with Dubious Relevance, attached and available at the following link: http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20190516-5022

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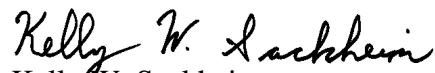
applicant; or 2) decommissioned by FERC order.” The implication that the 2005 Settlement Agreement dictated these two options is misleading.

Fact: Option 2 was selected by PG&E and advocated by the signatories of the 2005 Settlement Agreement, as evidenced by the onerous requirements placed on Synergics, the company that sought to exercise Option 1 (e.g. Synergics was an applicant to acquire a FERC license to succeed PG&E).

Fact: The 2005 Settlement Agreement not ONLY stipulates that PG&E would support decommissioning (as Ordered by the FERC under Option 2) but defines the decommissioning measures to be implemented, e.g. the Settlement Agreement identified that the facilities would be dismantled, while the FERC regulations allow decommissioning while leaving facilities in their original condition.

Further comments by NMFS only justify the analysis of the “Proposed Project” as designed by the signatories to the 2005 Settlement Agreement, NOT the consideration of ALTERNATIVES to achieve the Project Objective, e.g. define what is acceptable, or in fact, the environmentally preferred decommissioning measures to be adopted by the FERC. In the attached “Comments on DEIR for Clean Water Act Section 401 Water Quality Certification (FERC P-606)” page 2, it is similarly noted that the “SWRCB has **[improperly]** limited its analysis to the same alternatives analyzed in the FERC EIS. [Cardno pages xvii – xviii]”

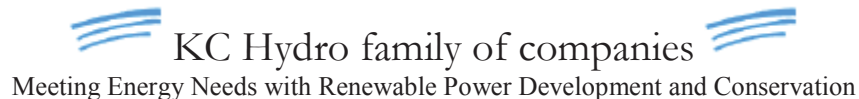
Sincerely,


Kelly W. Sackheim

Principal, KC Hydro

Attachments





May 16, 2019

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: P-606-027 (California) Kilarc-Cow Creek Hydro Project (License Surrender)

Re: Disclosure of Invalid Argument by Pacific Gas and Electric Company in its
PETITION FOR DECLARATORY ORDER
REQUESTING WAIVER OF WATER QUALITY CERTIFICATION
OF PACIFIC GAS AND ELECTRIC COMPANY

Dear Ms. Bose:

The State Water Resources Control Board (SWRCB) is developing terms and conditions in a water quality certification to be issued as an element of the license surrender process being undertaken by the Federal Energy Regulatory Commission (FERC).

PG&E's filing assigned Accession No. 20190515-5213 states:

“On April 5, 2019 the SWRCB Denied without Prejudice PG&E's April 9, 2018 request for a water quality certification for the Kilarc Cow Creek surrender process. The SWRCB's letter stated: “We encourage you to submit a new formal request for certification, for our records, and look forward to continuing working with you.” See Attachment C. PG&E did not submit a new request for certification. In spite of PG&E not submitting another request, the SWRCB issued its Draft Environmental Impact Report on April 8, 2019.” (Page 4)¹

PG&E's statement “*In spite of*” implies that the SWRCB should not have proceeded to issue its Draft Environmental Impact Report *because* PG&E “did not” do what the SWRCB encouraged PG&E to do.

Clearly, PG&E's decision to decline to do what it was *not obligated* to do *does not* relieve the SWRCB of ITS obligation in the license surrender process.


After such a flawed argument in the Background section of its Petition, in its Request for Declaratory Order, PG&E states that its Request is “Consistent with the recent decisions of the U.S. Court of Appeals for the D.C. Circuit” that are cited, as if its arguments will be supported, contrary to the above analysis, following extensive review by FERC staff.

¹ https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20190515-5213



The Honorable Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission
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May 16, 2019
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Principal, KC Hydro



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submitted via email

Ref: FERC P-606-027 Kilarc-Cow Creek Hydro Project (License Surrender)

Re: Comments on DEIR for Clean Water Act Section 401 Water Quality Certification (FERC P-606)

As noted in the Notice of Availability of the DEIR (Draft Environmental Impact Report) issued by the California State Water Resources Control Board (SWRCB) for the above-referenced FERC P-606 License Surrender, the addressee to whom these comments are directed and the party responsible for issuing Water Quality Certification, the “certification must be based on a finding that the activity will meet water quality standards and other applicable requirements.”

1. SWRCB has improperly characterized as the “objectives” of the Proposed Project the “list of subjects to be addressed through the decommissioning process (e.g., the disposition of canals)” [Cardno page xvi¹].
 - a) PG&E as applicant has the objective of surrendering its license. The FERC requires a decommissioning plan, that could be as simple as locking the doors and transferring the facility to a party that meets the environmental standards including water quality and other applicable requirements for a future in which PG&E no longer is responsible under the license being surrendered.
 - b) Under the terms of PG&E’s Settlement Agreement, the balance of PG&E’s objectives are exclusively to protect the environment.
 - c) The parties to the March 2005 Agreement, having the statutory responsibility for environmental preservation and enhancement, have no vested interest in the “disposition of canals” except insofar as such plan can achieve the objective of environmental preservation and enhancement. The “subjects to be addressed” are in fact NOT the objectives but the physical elements of the project that are being decommissioned.

The proposed means to achieve an objective is NOT an objective of the project, and the parties to the March 2005 Agreement are not properly considered PROPONENTS of the Proposed Project.

¹ For ease of reference to the DEIR with Cardno identified in the footer to each page, quotes and references are followed with [Carno page ##] throughout these comments.

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2. SWRCB has limited its analysis to the same alternatives analyzed in the FERC EIS. [Cardno pages xvii – xviii]

- a) After the FERC declared the proposed project, notwithstanding its own analysis, to be the environmentally preferred alternative, while declining to analyze viable alternatives because PG&E through circular reasoning alleged that alternatives were infeasible when in fact PG&E was allowed to create obstacles to the implementation of the alternatives, the SWRCB's new analysis in fact is not "new" at all.
- b) The impacts to recreation at Kilarc Forebay are deemed "significant and unavoidable" because the "objective" embedded in the project is to remove all of the facilities, rather than keep a system intact that does not in fact have adverse impacts.

It is very disappointing that the SWRCB appears to be content to rubber-stamp the FERC's decision to allow PG&E and the March 2005 Agreement to ramrod through the destruction of a valuable resource in lieu of performing a true analysis of the public benefits of the resource.

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