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FEDERAL ENERGY  
REGULATORY COMMISSION

Law Department

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December 10, 2007

*Via UPS Next Day Air*

Kimberley D. Bose, Secretary  
FEDERAL ENERGY REGULATORY COMMISSION  
888 1<sup>st</sup> Street, N.E., Docket Room, #1-A East  
Washington, D. C. 204226-0001

**Re: Kilarc-Cow Creek Project, FERC Project No. 606  
Response to Comments of California Dept. of Fish & Game on Water Rights**

Dear Secretary Bose:

Attached please find for filing in the above-referenced FERC Project a copy of Matthew Fogelson's letter dated, December 10, 2007, to Gary Stacey, Manager – Northern Region of the California Department of Fish & Game. Mr. Fogelson's letter is in response to the California Department of Fish & Game's October 10, 2007 comments relating to the disposition of water rights in regard to Pacific Gas and Electric Company's Preliminary Proposed Decommissioning Plan for the Kilarc-Cow Creek Hydroelectric Project, FERC Project No. 606. Said letter was mailed to Mr. Stacey, and to the persons named on page five, via First-Class U. S. Mail, today, December 10th.

Very truly yours,

Betsie Diamond,  
Secretary to  
MATTHEW A. FOGELSON  
PG&E Law Department

BD  
Enclosure

cc: Matthew A. Fogelson, Esq.  
Steven Nevares, Project Manager – Power Generation



**Pacific Gas and  
Electric Company**

COPY

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December 10, 2007

Mr. Gary Stacey, Manager – Northern Region  
CALIFORNIA DEPARTMENT OF FISH & GAME  
601 Locust Street  
Redding, CA 96001-2711

**Re: Kilarc-Cow Creek Project, FERC Project No. 606  
Response to Comments of California Dept. of Fish & Game on Water Rights**

Dear Mr. Stacey:

This letter responds to the October 10, 2007 comments of the California Department of Fish and Game (DFG) on Pacific Gas and Electric Company's (PG&E) Preliminary Proposed Decommissioning Plan for the Kilarc-Cow Creek Hydroelectric Project, FERC No. 606 (Project), as those comments relate to the disposition of PG&E's water rights. In its letter, DFG requests a more detailed explanation of how PG&E's proposal to abandon its Project-related water rights, as opposed to transferring those rights to a resource agency or other acceptable entity, will enhance aquatic resources.

In its Preliminary Proposed Decommissioning Plan, PG&E proposed abandoning its Project-related water rights to enhance aquatic resources rather than transferring those rights to a resource agency or other acceptable entity as originally envisioned by the 2005 Project Agreement executed by PG&E, DFG, various other federal and state resource agencies, and environmental groups. PG&E proposed abandoning its water rights in large part because we believe transferring those rights would be complicated by the August 25, 1969 Decree of the Superior Court of Shasta County adjudicating the water rights of the Cow Creek system (Adjudication). The Adjudication, among other things, places restrictions on the exercise of the adjudicated water rights, including PG&E's water rights. In contrast, abandoning the water rights does not implicate the Adjudication and accomplishes the Project Agreement's goals much more easily and with greater certainty.

In its October 10, 2007 comments filed with FERC, DFG characterized PG&E's plan to abandon its water rights as a significant modification to the Project Agreement. The comment letter also questions the difficulty of transferring the water rights to a resource agency or other acceptable entity as a means to enhance aquatic resources.



Mr. Gary Stacey, Manager – Northern Region  
 CALIFORNIA DEPARTMENT OF FISH & GAME  
 December 10, 2007  
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PG&E wishes to reiterate that it remains committed to ensuring that its water rights are utilized to enhance aquatic resources once they are no longer needed for hydroelectric generation. In our view, while the Project Agreement sets forth the overall environmental goals for the disposition of PG&E's water rights, which goals PG&E fully supports, the mechanics for achieving those goals must be tailored so that the goals are achievable with minimum impact to the local community of water users, another goal of the Project Agreement.<sup>1</sup>

In short, we believe that in order for PG&E to transfer its water rights to another entity for instream use, it would first be necessary to file a motion in Shasta County Superior Court seeking to modify the Adjudication. This is because the Adjudication expressly limits PG&E's use of Cow Creek water to "power use." See Adjudication ¶ 7, and attached Schedules. The Adjudication further provides that "Power use is limited to the hydro-dynamic applications required for the development of electrical energy." Adjudication ¶ 20. PG&E's conversion of its water rights to instream use would constitute an unauthorized use of Cow Creek water and would run afoul of the court's order that the parties are "perpetually enjoined and restrained from doing anything in violation of the terms or provisions of this judgment and decree." Adjudication ¶ 30.

Consequently, we believe court approval would be necessary for PG&E to change its use from power generation to instream use prior to transferring its water rights.<sup>2</sup> Court approval of such a water rights transfer would be extremely time-consuming and resource-intensive, could be contested by the parties to the Adjudication, and could potentially disrupt well-settled water rights on an adjudicated watercourse.<sup>3</sup> As a result, PG&E believes abandonment of its water

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<sup>1</sup> The discussion of water rights in Attachment A to the Project Agreement makes clear that the parties wished to preserve the rights of other water rights holders.

<sup>2</sup> Because the Superior Court, and not the State Water Resources Control Board (Board), has jurisdiction over the adjudicated water rights on the Cow Creek system, PG&E could not petition the Board to change its use from power generation to instream use under Water Code Section 1707, as DFG's comments propose.

<sup>3</sup> In our meetings with the community, it has become apparent that there is a high level of concern, even among those that would not be directly impacted by the cessation of hydroelectric diversions, that a transfer of PG&E's 1908 priority water rights to a governmental agency or environmental group would allow the recipient of those rights to challenge in some manner current diversions and use of Cow Creek water. PG&E expresses no opinion on the validity of such concerns.



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Mr. Gary Stacey, Manager – Northern Region  
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rights provides a much more efficient and certain alternative to achieving the Project Agreement's environmental goal of leaving the water in the streams and enhancing aquatic values. In this way, the Project Agreement's goals can be achieved without legal proceedings and with minimum impacts to the other parties to the Adjudication. Upon abandonment, which simply involves PG&E taking affirmative steps to discontinue its diversions with the intent not to resume the diversions, PG&E's pre-1914 rights will cease to exist and will not impact any other water rights or the priorities of those rights.

Abandonment of PG&E's water rights will achieve the Project Agreement's environmental objectives because it is highly unlikely that the abandoned water could be diverted by other claimants. First, because PG&E's water rights are non-consumptive, no new water will be made available for appropriation by virtue of PG&E abandoning its water rights. This is significant because the State Water Resources Control Board has listed Cow Creek, "from the confluence of Cow Creek and the Sacramento River upstream" as a "Fully Appropriated Stream System" for the yearly season of April 1 to November 30 (WR-Order 98-08). Consequently, the Water Board is precluded by Water Code section 1206 from accepting any application to appropriate water from Cow Creek.<sup>4</sup>

Second, junior rights holders in the stream reaches between PG&E's points of diversion and points of use will not be able to divert any additional water. As noted, PG&E's rights are non-consumptive and the water PG&E returns to the streams is already used downstream. Thus, senior rights are already able to divert their decreed amounts. Decreed junior rights in the reaches between PG&E's points of diversion and where the water returns to the creeks are very limited. On South Cow Creek, there is one junior water rights holder in the affected reach that may divert up to 0.83 cubic feet per second (cfs), while on Old Cow Creek, there is one junior water rights holder in the affected reach that may divert up to 0.63 cfs.<sup>2</sup> Since these junior rights

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<sup>4</sup> Water Code section 1206 provides that upon declaring a stream system fully appropriated, "the board shall not accept for filing any application for a permit to appropriate water from the stream system described in that declaration, and the board may cancel any application pending on that date."

<sup>2</sup> Note that the Adjudication lists an additional junior right within the bypass reach on Old Cow Creek that may divert up to 0.25 cfs (Dewey H. Marshall, Diversion Number 6b). This right is listed as "proposed" and PG&E has no information as to whether that 0.25 cfs right has been perfected. Assuming it has, the two junior rights holders on the bypass reach of Old Cow Creek could divert up to a combined 0.88 cfs.



Mr. Gary Stacey, Manager – Northern Region  
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are less than PG&E's instream flow releases, the junior diverters may already divert these amounts under their junior rights, to the extent downstream senior rights are satisfied first. To the extent the junior diverters are not already diverting these amounts, it is likely because there is either not enough water to first satisfy the more senior rights downstream, or they simply have chosen not to exercise their rights. This dynamic would not change upon PG&E's abandoning its water rights.<sup>6</sup>

Third, claimants of irrigation rights for dormant riparian lands are entitled under the Adjudication to divert specified allotments in Fourth Priority Class, assuming the claimants submitted sufficient proof of their claims to the court and the court accepted the claims.<sup>7</sup> Adjudication ¶ 14 and attached Schedules. While the Adjudication identifies certain dormant riparian rights, none of those rights are within the bypass reaches.<sup>8</sup> Even if there were dormant riparian landowners within the bypass reaches, PG&E believes it is extremely unlikely that those landowners would seek to divert any water from the streams upon PG&E's abandonment of its rights. Any attempt to exercise fourth priority rights through upstream diversions on a fully-appropriated watercourse would likely be protested by more senior rights holders downstream.

In summary, PG&E does not believe additional water would be diverted out of the creeks as a result of the abandonment of its water rights.

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<sup>6</sup> In any event, the diversion of less than 1 cfs from each watercourse would not adversely impact the establishment of beneficial fish habitat in the watercourses.

<sup>7</sup> Note that Paragraph 32 of the Adjudication states: "Any person who has failed to appear and submit proof of his claim as provided in Chapter 3, Division 2 of the Water Code, shall be barred and estopped from subsequently asserting any rights heretofore acquired on the Cow Creek Stream System as defined herein and has forfeited all rights to water heretofore claimed by him on said system, other than as provided in this decree, unless entitled to relief under the laws of this State."

<sup>8</sup> PG&E here defines a dormant riparian right to mean any rights identified in the Adjudication that are not associated with a corresponding diversion number on the State Water Resources Control Board maps. While there is no diversion point associated with these rights, each of the rights is associated with a specific location and acreage. None of the locations are within the bypass reaches. For example, Schedule 4, Sheet 4, identifies a 0.48 cfs fourth priority right on Old Cow Creek associated with James W. Schmitt. Page xxv of the Adjudication locates the Schmitt property by Section, Township and Range. The Schmitt property is well downstream of the bypass reach on Old Cow Creek.



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For all of these reasons, PG&E believes that the simple act of abandoning its water rights, effectuated by the removal of its diversion structures without an intent to resume the diversions, will achieve the goals of the Project Agreement more efficiently and with greater certainty than would seeking to transfer those rights to a third party, a process that would require court approval and necessarily implicate a panoply of procedural and substantive issues the resolution of which would be time-consuming and resource-intensive.

We would be happy to meet with you at your convenience to discuss further our proposal on these issues.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Matt Fogelson', with a long horizontal flourish extending to the right.

Matthew A. Fogelson

MAF:bd

cc: Stephen Bowes, National Park Service  
Steve Edmondson, NOAA Fisheries  
David White, NOAA Fisheries  
Bill Foster, U. S. Fish and Wildlife Service  
Matt Meyers, CA Dept. of Fish & Game  
Annie Manji, CA Dept. of Fish & Game  
Russ Kanz, California State Water Resources Control Board  
Jennifer Watts, California State Water Resources Control Board  
Kelly Catlett, Friends of the River  
Brian Johnson, Trout Unlimited  
Thomas J. Lovullo, Federal Energy Regulatory Commission  
Margaret Kim, California Resources Agency  
Traci Bone, California Public Utilities Commission  
Kelly Sackheim, Sackheim Consulting  
Dick Ely, Davis Hydro