

**From:** [Erik Poole](#)  
**To:** [Wr401program](#)  
**Subject:** Kilarc-Cow Creek Hydroelectric Project License Surrender - DEIR Comments  
**Date:** Friday, May 24, 2019 9:51:54 AM  
**Attachments:** [EP ADU Final Draft EIR Comments for SWRCB.pdf](#)

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Ms. Michelle Siebal  
State Water Resources Control Board  
Division of Water Rights - Water Quality Certification Program

Dear Ms. Siebal -

Please find attached comments on the Draft EIR for the following project:

Applicant: Pacific Gas and Electric Company

Project Name: Kilarc-Cow Creek Hydroelectric Project License Surrender

Project Location: Shasta County

I and the ADU would like to thank you for the opportunity to provide input to the SWRCB.

Sincerely,  
- Erik Poole / ADU

Erik Poole – ADU  
26526 South Cow Creek Road  
Millville, CA 96062  
May 22, 2019

Ms. Michelle Siebal  
State Water Resources Control Board Division of Water Rights - Water Quality Certification Program  
P.O. Box 2000  
Sacramento, CA 95812-2000

Re: Personal and ADU (Abbott Ditch Users) Group Comments on SWRCB Draft EIR for Kilarc-Cow Creek Hydroelectric Project License Surrender Federal Energy Regulatory Commission Project no. 606

Dear Ms. Siebal:

Thank you for the opportunity to comment on your agency's draft EIR for the above referenced project. I wish to comment on (1) the current context of the regulatory process at the federal and state level, then on (2) specific points of fact within the EIR which are either incomplete or possibly erroneous and finally on (3) the changes and ideas that have developed over the 6 years since your agency's May 2013 report on the scoping comments for this draft EIR preparation.

(1) The Hoopa Decision and FERC Declaratory Orders

As your agency is already aware, the recent D.C. Circuit court opinion (*Hoopa Valley Tribe v. FERC*, 913 F. 3d 1099 (D.C. Circuit 2019) herein after 'the Hoopa decision') has led to a change at the FERC where the FERC is considering and indeed granting Declaratory Orders that consider the state's delegated authority under section 401 of the Clean Water Act waived if applications are not acted upon within the statutory time limit afforded by the Clean Water Act (see Clean Water Act, 33 U.S.C. § 1341 (a)(1) for that time limit.) While I do not intend to weigh in on these issues per se, I believe it is imperative that the SWRCB offer some guidance and interpretation, and status updates, on the impacts these opinions and orders are having on matters concurrently before the SWRCB. PG&E has already petitioned the FERC for just such a declaratory order in this subject decommissioning matter. However, it seems that the Hoopa decision is currently subject to a petition for rehearing in the D.C. circuit. While I and the ADU intend to participate at each opportunity in the FERC's consideration of their next steps, the SWRCB's next steps are unclear, to say the least. In addition, given the SWRCB's broad authority in matters pertaining to water and the environment in the state of California, I think it is proper and prudent for some sort of discussion of how other agencies and processes, currently provided for in federal and/or state law, may either be impacted by the Hoopa decision, by FERC declaratory orders or other action, or indeed

whether they may be relied upon to ameliorate the obvious (and now documented in your draft EIR) environmental impacts that PG&E's proposed decommissioning project threatens.

## (2) Draft EIR Comments

### 2.1 Domestic Use (Basin Plan MUN Beneficial Use) Ignored

In the Project Background section of the DEIR (Executive Summary xv/page 17), it is stated that:

The State Water Board will determine whether the Proposed Project adequately protects the beneficial uses and meets the water quality objectives for water bodies in the project area, as defined in the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan).

However, there is absolutely no mention anywhere in the DEIR of the MUN beneficial use of the water diverted by the ADU. The Basin Plan specifically calls out and defines the MUN beneficial use as:

Municipal and Domestic Supply (MUN) - Uses of water for community, military, or individual water supply systems including, but not limited to, drinking water supply.

It has been repeatedly called to the attention of the SWRCB, and the FERC in prior proceedings, that not only does the adjudication covering the ADU diversion specify the domestic use of the diverted water, but that indeed it is used for domestic purposes currently. The entire DEIR ignores the MUN beneficial use of waters and the major impacts foreseen on them from PG&E's proposed plan. This needs to be rectified throughout the DEIR.

The DEIR does examine the effects on agriculture, assumedly under the AGR beneficial use definition from the Basin Plan:

Agricultural Supply (AGR) - Uses of water for farming, horticulture, or ranching including, but not limited to, irrigation (including leaching of salts), stock watering, or support of vegetation for range grazing.

These effects are examined with the assumption that should PG&E's proposed project go forward, there would be no water available for the ADU diversion.

This same criteria should be used to document and examine the MUN beneficial uses for that same water available from the ADU diversion throughout the DEIR.

Additionally, the MUN beneficial use of water taken directly from South Cow Creek under riparian water rights also deserve examination and determinations as to the risks those water rights are put under by PG&E's proposed plan.

## 2.2 Further Responsibility to Address MUN Beneficial Use

In the Executive Summary – Implementation and Oversight section (Executive Summary xvi/page 18) and again in section 1.3.1 Scope and Intent of the Document (Introduction 1-9/page 56) your DEIR goes on to state:

Implementation and Oversight - The intent of this EIR is to enable the State Water Board and other responsible agencies and interested parties to understand the potential environmental effects of the Proposed Project. The Draft EIR is expected to be used for the following purposes:

- To disclose to the public, decision-makers, elected officials and other stakeholders the potential environmental effects associated with implementation of the Proposed Project, and to solicit input on the potential environmental effects;
- To identify ways to avoid or minimize potential environmental effects of the Proposed Project, including alternatives;
- To provide the State Water Board with a technically and legally adequate environmental document to be used as one basis for its decision-making process for the proposed water quality certification; and
- To provide responsible and trustee regulatory agencies with information necessary to evaluate Proposed Project permitting requirements or other discretionary actions.

The absence of any mention of the MUN beneficial use in this proceeding is especially egregious given the intent of this EIR as stated above. Disclosure, solicitation of input, identification of alternatives, technical and legal adequacy and provision of information to trustee regulatory agencies regarding this MUN beneficial use is all foregone in your DEIR. This omission must be rectified before a final EIR or any decision making process should begin, much less approach closure.

Other locations where the MUN beneficial use should have been noted include the Key Issues and Significant Impacts (Executive Summary xvii/page 19) and most obviously the Areas of Controversy (Executive Summary xviii/page 20) and the Summary of Impacts and Level of Significance (Executive Summary xviii/page 20.)

## 2.3 Non-Disclosure of Adjudication Impacts

It is important that the proposed plan's impacts to the adjudication be openly examined and assigned a level of impact. The associated examination of possible mitigation measures and a level of impact assessment assuming mitigation would go a long way in informing the decision of whether or not to certify the proposed project and what certification conditions might be appropriate. It is also likely that such an examination would reinforce the SWRCB's environmentally preferable conclusion.

The waters affected by both the Kilarc and South Cow Creek facilities PG&E proposes to decommission are governed by an adjudication: Cow Creek Adjudication Decree of the Superior Court for Shasta County, California in the Matter of the Determination of the Rights of the Various Claimants to the Water of Cow Creek Stream System Excepting Clover Creek, Oak Run Creek and North Cow Creek in Shasta County California, No. 38577, entered August 25, 1969 in Book 89 of Judgments (herein after ‘the adjudication.’) Your DEIR makes only three references to any sort of adjudication. One reference identifies the aforementioned adjudication as giving PG&E rights to the waters that it currently uses for hydropower generation at the Kilarc and South Cow Creek facilities. The other two mentions merely describe that “an adjudication” allows the ADU to divert water from Hooten Gulch – as an explanatory note for your Land Use and Planning section (section 4.14 Environmental Analysis 4-319/page 434.)

This is astonishingly inadequate. At a minimum, the EIR must identify and acknowledge that the adjudication is a significant point of controversy for this project. The Areas of Controversy section (Executive Summary xviii/page 20) must include this item, and a frank explanation of the crux of the disagreement should be included in your EIR. I am not arguing for the SWRCB to pick sides or weigh in, but ignoring a legally binding document that governs the waters of this project, and specifically relates to the beneficial uses of that water, is unacceptable.

There has already been an incident in which PG&E contested my motion to amend and correct the adjudication’s description of the location of the Abbott Ditch diversion (diversion point 73) in the Shasta County Superior Court. PG&E maintained that my motion was an attempt “ ... to gain an advantage in ongoing disputes involving PG&E’s plan to decommission a hydroelectric power project.” This motion was of course ultimately granted (Shasta County Superior Court Judge Halpin’s decision of January 31, 2012) and the adjudication remains whole and accurate. The SWRCB was notified of this hearing and the resulting ruling. The ruling was given into the record in writing (NOP comments April 10, 2013 at the Millville Grange in Palo Cedro, CA), and remains part of the SWRCB’s record, *including its inclusion in the appendices of this very DEIR document* (Appendix A.) The SWRCB also produced the Report on Water Use and Supply used to inform the court during its creation of the adjudication degree (Cow Creek Adjudication Report on Water Supply and Use of Water on Cow Creek Stream System Shasta County California May 1965.) This report was also given into the record in writing, and remains part of the SWRCB’s record, including its inclusion in the appendices of this very DEIR document.

And yet, for some reason, the SWRCB refuses to acknowledge the “ongoing disputes” involving the adjudication and PG&E’s woefully inadequate redress of its planned water rights impacts. In addition, the arguments of section 2.2 of this comment document regarding beneficial uses can easily be applied to the absence of any mention of the adjudication and the ongoing disputes – this is exactly the sort of situation that needs to be disclosed, have input solicited, have alternatives identified, affects the technical and legal sufficiency of the EIR and provides information to trustee regulatory agencies. Please, recognize the issue and bring it forth for discussion in a formal manner.

#### 2.4 Section 1.2.2 – Water Rights

The intricate and interconnected nature of the water rights present among the ADU, PG&E and Tetrick Ranch deserve explanation in the Water Rights section of the EIR. Section 1.2.2 – Water Rights of the document is the appropriate place to include a description of the water rights available for diversion at points 72 and 73 from the adjudication. Information from the adjudication and the SWRCB's report on Water Use and Supply for the Cow Creek Watershed is all that would be required to for an accurate depiction.

While I recognize the difficulty in adequately explaining the complex nature and relation of these water rights, an understanding is imperative to making an appropriate determination of impacts and possible mitigation. Adding to this difficulty is the fact that the adjudication was written at a time when the historic east channel of South Cow Creek joined Hooten Gulch above the ADU diversion point (73.) Current conditions are different. The historic east channel of South Cow Creek no longer joins Hooten Gulch (anecdotally, this is due to Army Corps of Engineers rechanneling South Cow Creek in the area in the early 1970's.) This means that water available for diversion by the ADU consists solely of the natural flow ('natural flow' as defined in the adjudication) created by the tailrace of the PG&E facility. If the adjudication is read with this change in the state of natural flow in mind, it becomes slightly easier to recognize the intent of the adjudication, and the severe impact of the proposed PG&E plan for decommissioning. However, this also makes the appropriate mitigation measures much easier to recognize – restoration of the historic interlacing of South Cow Creek and Hooten Gulch via the east channel would be an elegant solution that returns the environment to its prior state.

#### 2.5 Chap. 4 Environmental Analysis – Agriculture and Forestry Resources

While this section analyses the ADU irrigated area's agricultural impacts, it overlooks the dewatering of Hooten Gulch on the Tetrick Ranch. The approximately 0.6 miles of Hooten Gulch between the powerhouse and its confluence with South Cow Creek passes through the Tetrick Ranch and its pasture areas. Were these areas considered?

#### 2.6 Chap. 4 Environmental Analysis – Hydrology and Geomorphology

##### Section 4.12.4.2 - Cow Creek

Impact 4.12-8 - (Cow Creek): Would the action re-establish a natural streamflow regime in the augmented segment of Hooten Gulch?

Alternative 2A, 2B, 2C and 2D (Environmental Analysis 4-293/page 408)

This section states that: "... Under Alternative 2B, 2C, and 2D, new features would be installed to continue flows to the Abbott Diversion. Flows to Hooten Gulch would be retained and the natural streamflow regime would not be reestablished at this location, similar to existing conditions prior to decommissioning." This is not strictly accurate. Option A, leaving the existing PG&E diversion in place, would not dewater any section of Hooten Gulch compared to current conditions: Option B, a restored

east channel of South Cow Creek, would dewater Hooten Gulch above the confluence of the restored channel; Option C, a new pump in South Cow Creek to the ADU diversion, would dewater all of Hooten Gulch from the powerhouse to its confluence with South Cow Creek; Option D, a piped conveyance from South Cow Creek to Hooten Gulch would dewater Hooten Gulch above the insertion point of the piped conveyance. Options B and D would vary depending on where the actual point of arrival for the channeled or piped water was on Hooten Gulch, but at least some portion of Hooten Gulch would return to its natural ephemeral state – that is, the portion between the current powerhouse tailrace and where the channeled or piped water arrives in Hooten Gulch. The pumped solution, it is assumed, would pump the water directly into the Abbott Ditch, and therefore the entirety of Hooten Gulch would return to its natural flow regime.

### (3) – New Community Input

In the intervening 6 years since the scoping meeting for this draft EIR report was held in Palo Cedro, the community has continued to think about ways to facilitate the decommissioning of the project while retaining the important and valuable aspects of the community. For the community, it is not acceptable to lose water delivery to the ADU, nor is it acceptable to see our aquatic and instream resources degraded – we all live in the South Cow Creek valley, we drink the water available here and we use the water for domestic and agricultural uses. We enjoy the natural setting of this place, its fish, wildlife and varied plants and trees. The community have developed an outline for what the South Cow Creek valley could be if this decommissioning is done in a responsible manner by all parties involved.

We feel that retaining water delivery to the existing diversion point for the ADU would be best accomplished by restoring the east channel of South Cow Creek to a point of confluence with Hooten Gulch above the adjudicated diversion point 73, that is, the current ADU diversion (similar to the DEIR Alternative 2, option B.) This would return the flow regime to a similar state as existed at the time the adjudication was created, though it would lack the increased flows from the hydropower facility's tailrace. It would restore at least a portion of Hooten Gulch to that same "adjudication era" flow regime, except for the section from the powerhouse to the new east channel confluence with Hooten Gulch.

In order to further improve the aquatic resources of the South Cow Creek valley, the ADU have discussed the possibility of piping our unlined ditch. This would allow for greater ease in complying with SWRCB measurement requirements, less resources in ditch maintenance, greater efficiency in the application of water to pasture land, more reliable water availability to all ADU members, reduced water losses due to evaporation and seepage and other corollary benefits. The increased efficiency in application of water and greater reliability of water availability to the ADU members could lead the ADU to consider forgoing a small portion of their water right and allowing that water to stay instream for beneficial purposes. While the details of this plan are not completely worked out, it feels like a scenario that could provide a "win" for all parties concerned. The Tetrick Ranch is involved because their property would have to allow for the re-creation of the east channel of South Cow Creek, and the

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Tetrick's desire to create a mitigation bank from the land near to, and upstream from, the confluence of Hooten Gulch and South Cow Creek plays a major role in providing a mechanism to turn mitigation requirements into the funding needed to achieve the ADU system improvements.

Removal of the PG&E facilities, restoration of the currently bypassed reach (Wagoner Canyon), restoration of the east channel of South Cow Creek, retention and respect for the ADU water rights and diversion, piping an unlined ditch and increased water for instream beneficial uses sounds like an exceptional outcome for this project and process – and something that all parties could be proud of as a result. The fact that this aligns with an alternative and option already foreseen in the draft EIR shows that we are all attempting to work towards the same goals, and that is encouraging.

We hope that the SWRCB and all interested parties will continue to work together and offer ways to achieve this exceptional outcome for the resources of the South Cow Creek valley and its community.

Sincerely,

A handwritten signature in black ink that reads "Erik Poole". The signature is written in a cursive, slightly slanted style.

Erik Poole / ADU