

**MINASIAN, MEITH,  
SOARES, SEXTON &  
COOPER, LLP**

ATTORNEYS AT LAW  
A Partnership Including Professional Corporations

1681 BIRD STREET  
P.O. BOX 1679  
OROVILLE, CALIFORNIA 95965-1679

Writer's email: [amcclure@minasianlaw.com](mailto:amcclure@minasianlaw.com)

PAUL R. MINASIAN, INC.  
JEFFREY A. MEITH  
M. ANTHONY SOARES  
DUSTIN C. COOPER  
EMILY E. LaMOE  
ANDREW J. McCLURE

WILLIAM H. SPRUANCE,  
Retired

MICHAEL V. SEXTON,  
Retired

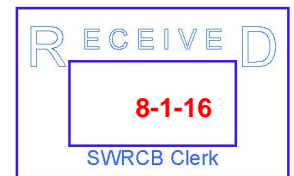
TELEPHONE:  
(530) 533-2885

FACSIMILE:  
(530) 533-0197

July 29, 2016

*Via email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)*

State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100



Re: Consideration of a Proposed Order Addressing Pacific Gas and Electric Company's Petition for Reconsideration of the Water Quality Certification Issued for the DeSabra-Centerville Hydroelectric Project – **Comments of Upper Centerville Canal Water Users**

Dear Board Members:

These comments are submitted on behalf of water users reliant on deliveries from the Upper Centerville Canal (UCC) in response to the State Water Resource Control Board's (SWRCB) July 26, 2016 Draft Order addressing Pacific Gas and Electric Company's (PG&E) Petition for Reconsideration of the April 8, 2015, water quality certification issued for the DeSabra – Centerville Hydroelectric Project (Certification). These comments specifically address the proposed revisions to Mitigation Measure 3, which concern PG&E's obligation to deliver 1.175 cfs of Butte Creek water to diverters located along the UCC, and which are discussed in Section 4.15 of the Draft Order. The SWRCB's proposed changes amount to a new project that was not analyzed in the SWRCB's CEQA document for this project. We urge the SWRCB to correct course by either denying this aspect of the Petition for Reconsideration or conducting new CEQA review for the new project contemplated in the Draft Order.

1. **The Proposed Revisions to Mitigation Measure 3 Contemplate Significant Revisions to the Project Analyzed in the Water Quality Certification's Environmental Review.**

To obtain a new Federal Energy Regulatory Commission (FERC) operating license for its Project 803, PG&E is required to obtain a SWRCB Water Quality Certification pursuant to Section 401 of the federal Clean Water Act. SWRCB was, in turn, required to perform a review under the California Environmental Quality Act (CEQA) of the environmental impacts of the proposed project. That environmental review was based upon the assumption that PG&E would continue to deliver 1.175 cfs of Butte Creek water to diverters located along the UCC as it has continuously for over 100 years until approximately 2014. The proposed revisions to Mitigation Measure 3 would invalidate that assumption and introduce the possibility that PG&E will only continue those deliveries for so

State Water Resources Control Board

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long as it uses the UCC as a conduit for conveying water. As discussed below, this revision would fundamentally change the Project analyzed in the Certification's CEQA analysis, and render that analysis invalid. If the SWRCB wishes to authorize this new, revised project, it must either conduct a new CEQA analysis or amend and supplement its current analysis, with opportunity for public comment.

**A. The Certification's CEQA Document Assumed Continued Deliveries of 1.175 cfs to UCC Diverters.**

For more than one hundred years, PG&E and its predecessors have delivered water to a number of landowners via the UCC. Those rights exist in agreements between predecessors to the parties dated in the early 1900's. (See example attached as Exhibit 1.) Those rights were also formalized and recorded in the 1942 judgment and decree of water rights to Butte Creek (Decree).

The Decree granted PG&E a first priority right to divert 1.175 cfs from Butte Creek, "for . . . public service delivery to customers . . . through appropriate openings or taps in the Upper Centerville Canal . . . and said consumers shall be entitled to use said amounts of water for domestic, stock watering and irrigation purposes."<sup>1</sup> To be sure, the Decree provides that the diverters' rights to receive Butte Creek water pursuant to this provision, "are contingent upon the use of the Upper Centerville Canal (sometimes known as Old Cherokee Ditch) by Pacific Gas and Electric Company, or its successor in interest, as a conduit for conveying water, but said consumers shall be entitled to service as hereinabove provided at all times when water is flowing in said canal."<sup>2</sup> However, the cessation of deliveries to UCC diverters was never disclosed as a potential 'Operational Change' to be analyzed in the Certification's environmental review.<sup>3</sup> Furthermore, the language of the Decree (referring to the "Old Cherokee Ditch") and the early 1900s agreements amongst the parties' predecessors contemplated deliveries anytime Butte Creek water was being diverted into the Old Cherokee Ditch, which was bisected by construction of the Desabra Forebay and is now known as the Butte Creek Canal (the northern segment) and the UCC (the southern segment). PG&E's own 2008 Historic Properties Management Plan for its Project 803 acknowledges the Cherokee Ditch encompasses both the Butte Creek Canal and UCC by stating: "the Cherokee Ditch, which later become [*sic*] known as the Butte Creek Canal." (February 2008 Draft Historic Properties Management Plan (Vol. 2) prepared by PG&E.) This means that for so long as PG&E diverts Butte Creek water into the Butte Creek Canal, it must deliver water to water users from the UCC.

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<sup>1</sup> Order of Determination issued by the State of California, Department of Public Works, April 14, 1942, p.27.

<sup>2</sup> *Ibid.*

<sup>3</sup> See California State Water Resources Control Board, DeSabra - Centerville Mitigated Negative Declaration and Initial Study( IS/MND), at pp. iii - iv (no mention of cessation of deliveries in "Operational Changes" outline).

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PG&E has in fact operated and delivered water in this manner for over 100 years and has only recently altered its interpretation and breached its obligation to deliver water to those users, which has come with significant environmental, socioeconomic, and community impacts. If this is in fact the new project PG&E wishes to implement, then the environmental effects should be analyzed and disclosed with opportunity for public comment – this is plainly not the project analyzed in the Certification's environmental review.

The current CEQA analysis of the Certification found a **Less Than Significant Impact** to Hydrology and Water Quality, based in part on the assumption that PG&E is, "required to release a minimum flow of 1.175 cfs to the Upper Centerville Canal from its current release point in the DeSabra Forebay dam to comply with the Butte Creek water rights decree;"<sup>4</sup> and found **No Impact** with respect to Utilities and Service Systems, which included conclusions that the Project would not require or result in the construction of new water or wastewater facilities; and 2) that PG&E will . . . construct a tap off of the DeSabra forebay temperature reduction device to supply any flows to Upper Centerville canal for local water users.<sup>5</sup>

Consistent with the assumptions upon which the CEQA analysis was based, Certification Mitigation Measure 3 provided that, "[i]n compliance with the Butte Creek water rights decree, PG&E is required to provide 1.175 cubic feet per second (cfs) flow to water users along the Upper Centerville Canal from the current release point in the forebay dam."<sup>6</sup>

**B. The Proposed Revision improperly conflates the Decree with the Project Reviewed in the Environmental Review of the Certification.**

PG&E's May 8, 2015, Request for Reconsideration of the Certification sought clarification of Mitigation Measure 3 which would provide that the obligation to deliver water though the UCC applies "only if PG&E chooses" to operate that portion of the Project's Centerville Development.<sup>7</sup> PG&E bases this contention on the portion of the Decree which suggests its obligation to serve users located along the UCC is contingent upon PG&E's use of that facility as a conduit for conveying water. This is in fact not true based on the early 1900s agreements and language of the Decree. PG&E's obligation to deliver water exists anytime it is diverting Butte Creek water into either its Butte Creek Canal, the UCC, or both.

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<sup>4</sup> IS/MND at p.55.

<sup>5</sup> IS/MND at pp.68 - 69.

<sup>6</sup> Water Quality Certification for Federal Permit or License, PG&E DeSabra - Centerville Hydroelectric Project, issued April 8, 2015 (Certification), at p. 2.

<sup>7</sup> PG&E Petition for Reconsideration of the Water Quality Certification for the DeSabra Centerville Hydroelectric Development, at p. 15.

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The critical problem with PG&E's Request for Reconsideration, and the Draft Order's proposed revision to Mitigation Measure 3, is the fact that Project operations analyzed in the Certification's environmental review, and Project operations contemplated by the Decree, are not synonymous. The Certification cannot substitute language from the Decree into Mitigation Measure 3 without altering the Project studied in the Certification's CEQA review. While the Decree may arguably introduce an element of discretion into the question of whether PG&E is obligated to deliver water using the Butte Creek Canal or the UCC, the Project evaluated in the Certification's environmental document never evaluated the possible effects that would occur if PG&E modified its long-standing historical operations and ceased deliveries.

As discussed below, SWRCB cannot now revise Mitigation Measure 3 to contemplate a cessation of PG&E water deliveries through the UCC without also reopening the environmental review to properly evaluate the potential impacts that would result from such a cessation.

2. **The Proposed Revisions to Mitigation Measure 3 Would Significantly Change the "Project" Analyzed in the IS/MND, and Would Require the CEQA Process for the Water Quality Certification to be Reopened.**

Numerous cases have repeated the general principle that an accurate, stable, and finite project description is the indispensable prerequisite to an informative and legally sufficient CEQA document.<sup>8</sup> The Proposed Revision to Mitigation Measure 3 contemplates a significant change to the Project evaluated in the Certification's CEQA document and, if adopted, the revision would render that environmental review contained in that document inadequate.

As relevant here, a project description must include all relevant parts of a project, including reasonably foreseeable activities that would result from the project.<sup>9</sup> The Certification's CEQA document contemplated a 'Project' in which PG&E would continue to make deliveries of 1.175 cfs to diverters located along the UCC. In this regard, what the Decree or the early 1900s agreements may or may not say about PG&E's obligation to continue deliveries through the Butte Creek Canal or UCC is largely irrelevant. The Project description upon which the Project's environmental review was based assumed continued deliveries - and that assumption cannot now be changed without upending and invalidating the environmental review which relied upon that assumption.

The proposed revision to Mitigation Measure 3, in which PG&E would only provide water to users along the UCC when PG&E uses that facility as a conduit for conveying water, introduces the potential that water users may *not* be served from the UCC. If PG&E did in fact cease deliveries through the UCC, the water users who rely on that source would be required to find alternate sources of supply. The CEQA document did not consider the environmental impacts associated with those

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<sup>8</sup> Continuing Education of the Bar, *Practice Under the Environmental Quality Act*, at § 12.2.

<sup>9</sup> *Laurel Heights Improvement Ass'n v. Regents of Univ. Of Cal.* (1988) 47 Cal.3d 376.

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diverters obtaining a substitute source of supply, and as a result, specifically concluded there would be a less than significant impact to Hydrology and Water Quality and No Impact to Utilities and Service Systems.<sup>10</sup>

Obviously, the 'less than significant' and 'no impact' findings would no longer be defensible if the water users currently supplied by PG&E through the UCC are required to develop alternative sources of supply; an outcome that is not so remote, given PG&E's December 24, 2014, correspondence to FERC in which it advised of a plan to begin proceedings to remove the Centerville Development from Project 803, possibly clearing the way to start proceedings to decommission the UCC. (See copy attached as Exhibit 2.) If Mitigation Measure 3 is to contemplate the cessation of deliveries through the UCC, then the Certification's environmental review must analyze that possibility as a 'reasonably foreseeable' consequence of the Project.

**Conclusion**

For the reasons stated above, the Board should either deny this aspect of the Petition for Reconsideration or conduct new CEQA review for the new project contemplated in the Draft Order.

Very truly yours,

**MINASIAN, MEITH, SOARES,  
SEXTON & COOPER, LLP**

By \_\_\_\_\_

**ANDREW J. McCLURE**

AJM/vlh  
Enclosures

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<sup>10</sup> IS/MND at 55, 68 - 69.

# Exhibit "1"

Grant of Right of Way

C. W. Skinner

&

Pacific Gas and Electric Company

*E. B. Nulty*

ASST. MGR. LAND DEPT.

*Form O. K.  
L. A. Susman, atty.*

THIS INDENTURE made by and between C. W. SLIMMER of the County of Butte, State of California, the party of the first part, and the PACIFIC GAS & ELECTRIC COMPANY, a corporation duly organized and existing under and by virtue of the LAWS of the State of California, the party of the second part.

WHEREAS the party of the second part, under license and permission heretofore given to it by the party of the first part, has constructed, maintained and used as a conduit for conveying water, a ditch upon, over and across the lands of the party of the first part situated in said County of Butte and described as the East Half (E $\frac{1}{2}$ ) of the Southwest Quarter (SW $\frac{1}{4}$ ) and the Southwest Quarter (SW $\frac{1}{4}$ ) of the Southeast Quarter (SE $\frac{1}{4}$ ) of Section 22 in Township 23 North - Range 3 East, Mount Diablo Base & Meridian.

NOW THEREFORE, THIS INDENTURE WITNESSETH that the party of the first part, for and in consideration of the sum of One Dollar (\$1.00) in lawful money of the United States of America to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant unto the said party of the second part, its successors and assigns, the right to enlarge, repair, maintain and use, for conveying water, the said ditch as the same is now constructed over and across the said lands and a right of way along each side of the same, together with the right of ingress thereto and egress therefrom, upon, over and across the said lands of the party of the first part.



The party of the first part may build fences across the said right of way, provided, however, that none of such fences shall be so built or maintained as to impair the enjoyment by the party of the second part of any of the rights hereby granted to it, and provided further that the party of the first part will install proper gates in such fences wherever the same shall cross such right of way for free use by the party of the second part in the enjoyment of the rights hereby granted to it.

The party of the second part hereby grants unto the party of the first part, the right to take from the old Cherokee Ditch in said County of Butte, at a point to be mutually agreed upon by the parties hereto, and to use ten (10) Miner's Inches of water measured under a four inch pressure as long as it shall use said old Cherokee Ditch as a conduit for conveying water, except when for any reason there shall be no water flowing in said ditch. All openings in said ditch which may be required for taking such water by the party of the first part, hereunder shall be made by the party of the second part and shall at all times be under its control.

The party of the first part also grants to the party of the second part the right to extend the slopes of its cuttings and embankments beyond the boundaries of the said right of way whenever necessary for the proper construction and maintenance of the said ditch,

The party of the second part, at its option, may at any time change and convert the ditch constructed by it, or any part thereof into any other type or kind of aqueduct.

The party of the first part also hereby grants unto the party of the second part the right to maintain, repair, replace and use for telephone purposes, the line of poles and wires heretofore erected along said right of way, as the same is now constructed, such right having been heretofore exercised by the party of the second part under license and permission given to by the party of the first part.

The said party of the second part and its assigns shall have full right and liberty of using such right of way for all purposes connected with the construction, maintenance and use of such ditch, and shall also have full right and liberty of cutting and clearing away all trees and brush within the boundaries of said right of way whenever necessary and proper for the convenient use and enjoyment of the said ditch and right of way, provided, however, that all the trees which the party of the second part is hereby authorized to cut and remove shall, if valuable for either timber or wood, continue to be the property of the party of the first part, but all tops, lops, brush and refuse wood or timber shall be burned by the party of the second part.

IN WITNESS WHEREOF the party of the first part has executed these present this Tenth DAY OF April, 1908.

Executed in the presence

of

C. E. Wilson  
Witness

C. W. Summer

# Exhibit "2"



Pacific Gas and  
Electric Company®

Power Generation

245 Market Street  
San Francisco, CA 94105

*Mailing Address*  
Mail Code N13E  
P. O. Box 770000  
San Francisco, CA 94177

December 24, 2014

**Via Electronic Submittal (E-Filing)**

Mr. Frank Blackett, P.E., Regional Engineer  
San Francisco Regional Office  
Federal Energy Regulatory Commission  
100 First Street, Suite 2300  
San Francisco, CA 94105-3084

**RE: DeSabra-Centerville Project, FERC No. 803-CA  
Centerville Powerhouse and Penstock Update**

Dear Mr. Blackett:

This submittal is to follow up on Pacific Gas and Electric Company's (PG&E) letter dated June 25, 2014, committing to provide the Federal Energy Regulatory Commission (FERC) with an update on the Centerville Development, part of the DeSabra - Centerville Project, FERC No. 803, by December 31, 2014. PG&E has evaluated the viability of the Centerville Powerhouse and associated infrastructure. PG&E plans to file an Application for Amendment of License to remove the Centerville Development from the DeSabra-Centerville Project license. Given the studies and analysis needed to prepare the amendment, PG&E plans to make the amendment filing by December 31, 2016 or six months after new license issuance whichever comes first. If PG&E's plans change, PG&E will inform FERC.

If you have any questions concerning this matter please give Tom Jereb of my staff a call. Tom can be reached at (415) 973-9320.

Sincerely,

Alvin Thoma, Director  
Hydro Licensing

cc: Attached list

Mr. Frank Blackett, P.E., Regional Engineer  
December 24, 2014  
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cc List: Ms. Barbara Evoy, Deputy Director  
State Water Resources Control Board  
Division of Water Rights  
Water Resource Control Engineer  
1001 I Street, 14th Floor  
Sacramento, CA 95812-2000

Ms. MaryLisa Lynch, Supervisor  
California Department of Fish and Wildlife  
North Central Region  
1701 Nimbus Road  
Rancho Cordova, CA 95670

Ms. Deborah Giglio-Willoughby  
Special Assistant for Renewable Energy and Migratory Birds  
U.S. Fish and Wildlife Service  
2800 Cottage Way, Suite W-2605  
Sacramento, CA 95825

Mr. Steve Edmondson  
Northern California Habitat Manager  
Federal Energy Regulatory Commission Branch  
777 Sonoma Ave.  
Santa Rosa, Ca. 95404

Mr. Ken Hogan, Fish Biologist  
Federal Energy Regulatory Commission  
Mail Code PJ-14.6  
888 First Street, N.E.  
Washington, DC 20426