STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF WATER RESOURCES
1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 942360001
(916) 653-5791

January 10, 2008

Division of Water Rights
State Water Resources Control Board
Attention: Ernest Mona
Post Office Box 2000
Sacramento, California 95812-2000

Via U.S. mail and electronic mail
(emona@waterboards.ca.gov)

Yuba River Accord and Hearings on YCWA Change Petition

Dear Mr. Mona:

Please find enclosed 5 copies of the Department of Water Resources' Reply Brief for the Hearing on the Yuba County Water Agency Petitions for the Yuba River Accord. The Reply Brief has also been served via electronic mail on all the parties to the hearings as indicated on the attached Declaration of Service.

If you have any questions or need additional information, please contact me at (916) 653-5613 or crothers@water.ca.gov.

Sincerely,

for

Cathy Crothers
Assistant Chief Staff Counsel

Enclosure

CALIFORNIA DEPARTMENT OF WATER RESOURCES
REPLY BRIEF
FOR STATE WATER RESOURCES CONTROL BOARD
WATER RIGHTS HEARING
REGARDING YUBA COUNTY WATER AGENCY PETITIONS
TO REVISE WATER RIGHT DECISION 1644

1. Introduction

At the December 5, 2007, State Water Resources Control Board (SWRCB) water rights hearing on the Yuba County Water Agency's (YWCA) petitions, the Hearing Officer stated that each party could have the opportunity to submit a response to other parties' closing briefs. This brief is the Department of Water Resources' (DWR) response to the Anglers Committee's closing brief. Specifically, DWR confines its response to the Anglers Committee's characterization of FERC Project No. 2426.

In its closing brief, the Anglers Committee states that the proposed transfer water will be "diverted at the California Aqueduct Project 2426 (aka State Pumps)" and that this will result in a major change to the operations of the California Aqueduct Project No. 2426. (Anglers Committee's Closing Brief at 3 & 4.) Based on this characterization of the California Aqueduct Project No. 2426, the Anglers Committee contends that the SWRCB must delay its approval of the proposed transfer until the Federal Energy Regulatory Commission (FERC) undergoes a Section 7 consultation pursuant to the federal Endangered Species Act (FESA). (*Id.* at 10.)

The Anglers Committee's portrayal of the California Aqueduct Project No. 2426 (Project 2426) is inaccurate in the description and location of the Project. Moreover, the proposed water transfer will not will not change how DWR operates under the provisions of the FERC Project No. 2426 license and there is no need for FERC to undergo a Section 7 consultation. (16 U.S.C. § 1536 (a)(2).) Therefore, the SWRCB has no need to delay approval of the YCWA petitions for the Yuba Accord.

2. FERC Project No. 2426 Does Not Include the Harvey O. Banks Pumping Plant and Is Not Altered By the Proposed Transfer

FERC Project No. 2426, also known as the California Aqueduct Project, was licensed on March 22, 1978. Project 2426 is comprised of five power drops (or hydroelectric facilities) that are, collectively, located in Kern, Los Angeles, San Bernardino, San Luis Obispo, and Ventura Counties in Southern California.

The Harvey O. Banks Pumping Plant (Banks Pumping Plant), i.e, the "State Pumps," is not part of Project 2426 nor is it within the project boundary. In fact,

when applying for the license, DWR conceded FERC jurisdiction for all portions of the California Aqueduct, thus the reason for the name "California Aqueduct Project," but FERC determined that its jurisdiction for Project 2426 was limited to the hydroelectric power facilities. In its Opinion No. 688 issued February 6, 1974, 51 FPC 529, FERC stated that:

> ". . . it is neither required nor necessary under the Federal Power Act that we extend our jurisdiction beyond those facilities actually constructed for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power." (*Id.* at 4.)

FERC then concluded that facilities such as the pumping stations were "facilities which are unrelated and only incidental to the several power facilities to be constructed." (*Id.* at 5.)[1] Given this reasoning, any changes to the operation at the Banks Pumping Plant that may occur due to the proposed transfer will be, as FERC stated, unrelated and incidental to Project 2426. Thus, it is unnecessary for DWR to apply for a license amendment because the proposed transfer does not affect how DWR operates under or, more importantly, complies with the requirements of the FERC license.

3. Because There Are No Proposed Changes to Project 2426, FERC Is Not Required to Undergo a Section 7 Consultation Pursuant to FESA

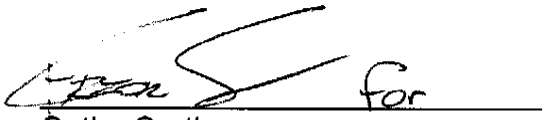
The Anglers Committee does not allege that DWR is in violation of its license, nor of any statute or regulation in the operation of the actual Project 2426. The Anglers Committee has provided no legal or factual basis for FERC to take any action. In order for a consultation to take place under section 7 of FESA, there needs to be a proposed federal agency action. (16 U.S.C. § 1536 (a)(2).) FERC has no need to take an action here. Instead, the Anglers Committee argues that FERC must undergo a Section 7 consultation for a proposed transfer that concerns facilities that are unrelated and incidental to the facilities under its jurisdiction. DWR is unaware of any legal authority that supports this argument. Thus, the Anglers Committee contention that the SWRCB must delay its approval of the proposed transfer until FERC undergoes a section 7 consultation in the context of Project 2426 is without basis and should be disregarded.

[1] A copy of the FERC order is attached to this brief as Exhibit A. DWR asks the SWRCB to take official notice of this order.

4. Conclusion

In sum, the Banks Pumping Plant is not part of Project 2426 and the proposed transfer water will not affect how DWR complies with the requirements of the Project 2426 license. Thus, the SWRCB should not delay approval of the YCWA petitions for the Yuba Accord based on assertions made by the Anglers Committee.

Respectfully submitted by



Cathy Crothers
Assistant Chief Counsel
and
Erick Soderlund
Staff Counsel

01/10/08
Date

DECLARATION OF SERVICE BY MAIL

Pursuant to Title 8 CCR Section 355, I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 1416 Ninth Street, Room 1104-4, Sacramento, California 95814.

On January 10, 2008 I served the attached "Department of Water Resources' Reply Brief for the Hearing on the Yuba County Water Agency Petitions for the Yuba River Accord" to the attached list of Hearing Participants by electronic mail at the E-mail addresses shown therein. In Addition, 5 copies were mailed to the SWRCB Division of Water Rights, P.O. Box 2000, Sacramento, California 95812-2000. There is delivery by the United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10, 2008 at Sacramento, California.

Frank Nickel

PROPOSED LOWER YUBA RIVER ACCORD
(2007 PETITION FOR MODIFICATION AND LONG-TERM TRANSFER PETITION)
DECEMBER 5-6, 2007 HEARING
SERVICE LIST OF PARTICIPANTS
(October 12, 2007)

(PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS.)

(Note: The participants whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 688

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO.688

Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power)	)	Project No. 2426

OPINION AND ORDER REMANDING PROCEEDING

Issued: February 6, 1974

DC-45

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power)	)	Project No. 2426

OPINION NO. 688

APPEARANCES

Thomas C. Lynch, Iver E. Skjeie, and Richard D. Martland for Department of Water Resources of the State of California

Roger Arnebergh, Gilmore Tillman, Ralph Guy Wesson, C. Emerson Duncan, II, and Don Allen for the City of Los Angeles Department of Water and Power

John D. Maharg, David D. Mix, and Thomas Malcolm for the County of Los Angeles

Marlon F. Schade, George B. Mickum, III, James V. Dolan, and Glen J. Sedam, Jr., for Atlantic Richfield Company and Cuyama Pipeline Company

R. H. Zahm, John A. Lilygren, Donald G. Canuteson, Robert D. Haworth, Charles B. Swanner, Carroll L. Gilliam, and Philip R. Ehrenkranz for Mobil Oil Corporation

John Ormasa, Robert Salter, W. H. Owens, and Harvey Goth for Southern California Gas Company and Pacific Lighting Service Company

John R. Bury, Rollin E. Woodbury, and Harry W. Sturges, Jr., for Southern California Edison Company

John D. Lane and Wallace Edward Brand for the Staff of the Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

LICENSING; JURISDICTION; ENVIRONMENTAL IMPACT

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power) Project No. 2426

OPINION NO. 688

OPINION AND ORDER REMANDING PROCEEDING

(Issued February 6, 1974)

NASSIKAS, Chairman

1. This proceeding involves an application filed in December of 1965, by the Department of Water Resources of the State of California (DWR) for a license under Part I of the Federal Power Act for Project No. 2426, more commonly known as the California Aqueduct. In September 1967, the City of Los Angeles Department of Water and Power (LADWP) became a joint applicant with DWR in order to participate in the development of pumped storage generating facilities at the lower end of the project. Prior to hearings on the project, interventions were granted to Atlantic Richfield Company (Atlantic), Cuyama Pipeline Company (Cuyama), Mobil Oil Corporation (Mobil), Southern California Gas Company (Southern Gas), and Pacific Lighting Service and Supply Company (Pacific Lighting), Southern California Edison Company (Edison), the County of Los Angeles (County), the Los Angeles Chamber of Commerce, and four state water agencies who supported the project. Following the issuance of the Administrative Law Judge's decision, Congressman Jerome R. Waldie was permitted to intervene late for purposes of participating in oral argument, if any, and applying for rehearing to any final order.

2. The California Aqueduct constitutes a major portion of the California "State Water Project" which will stretch most of the length of the State of California and cost almost $3 billion. In addition to the facilities proposed in this application, the overall project will utilize the Oroville Dam, licensed as Project No. 2100, the Central Valley Project operated by the U.S. Bureau of Reclamation and the proposed Peripheral Canal which will also be a part of the Central Valley Project and be operated by the Federal government. The portions of the project proposed to be licensed in this proceeding start about 30 miles northeast of San Francisco, and will carry water to the outskirts of Los Angeles, about 475-miles overall.

3. At the initial hearings on this application no party to the proceedings indicated opposition to the project itself, although the Commission's jurisdiction was questioned by the Pipelines. The issues at the initial hearing were generally limited to the appropriateness of the construction plans and routes for the project and what if any reimbursement displaced pipelines would be entitled to receive. After the close of the initial hearings the passage of the National Environmental Policy Act of 1969, required that additional hearings be held and consideration given to the environmental impact of this project pursuant to the National Environmental Policy Act. On January 14, 1972, Administrative Law Judge Ernest Eisenberg issued his initial decision approving the project with certain conditions recommended by the Commission staff and generally holding against the pipelines who sought reimbursement for removal of their lines from previously withdrawn lands.

4. Exceptions to the initial decision were filed by the Pipeline Intervenors who questioned the extent of our jurisdiction as well as the findings with respect to the effect of withdrawals under Section 24 of the Federal Power Act. With regard to the environmental aspects of the proceeding, an environmental statement filed by the Applicants was adopted by our staff in a motion filed on June 10, 1971. The only comments on this environmental statement were filed by the U.S. Forest Service, which questions certain aspects of the impact in Northern California of running the fresh water out of the area

constitutes the submission of a Staff statement. In light of the Greene County decision supra, we believe that a staff environmental statement must be prepared with respect to all jurisdictional portions of this project and that an opportunity must be afforded all interested parties to comment upon and, if so desired, cross-examine this statement at a further hearing. For this reason we are remanding this case to the Presiding Administrative Law Judge so that the full requirements of the Greene County decision can be met. Following preparation of an environmental statement by our staff it will be necessary that notice be given of the availability of such statement; that it be made available to the parties, to the Council on Environmental Quality, to other appropriate governmental bodies and to the public, for comment; that a final environmental statement be prepared by our Staff taking such comments into account, prior to hearing; and that such final environmental statement of the staff be offered in evidence at a reopened hearing; and that opportunity for cross-examination of the final staff statement be afforded at that hearing.

8. As noted above, we are directing our staff to prepare an environmental impact statement on the "jurisdictional" portions of this project. While the applicant for this project has conceded our jurisdiction for all portions contained in this application a number of the intervenors have questioned whether we have any jurisdiction at all, and if so whether it is only over those portions of the project involving power facilities or the entire project because power facilities are incidentally involved. Essentially those questioning our jurisdiction over this project argue that Part I of the Federal Power Act applies only to power projects and not to a project which is essentially a water transportation facility with some incidental production of power.

9. We agree with the Intervenors that it is neither required nor necessary under the Federal Power Act that we extend our jurisdiction beyond those facilities actually constructed for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power.

10. The mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all of such facilities are properly the subject of a license. In Lake Ontario Land Development, etc., Association v. F.P.C., 212 F.2d 227 (CADC 1954), cert. denied 347 U.S. 1015 the court stated at page 232:

> "Of course, the Commission may decline, and has repeatedly refused, to license a structure which is only part of a project...".

Many of the facilities proposed for licensing in this project, while a part of the overall project, are facilities which are unrelated and only incidental to the several power facilities to be constructed.

11. In a number of cases primarily involving primary lines to projects we have indicated that when a particular facility is no longer part of the power project itself it is not subject to our licensing jurisdiction. In Pacific Power and Light Company v. F.P.C. 184 F.2d 272, (CADC 1950), in ruling on this Commission's refusal to issue a license for a line from a project the court stated;

> "The stipulated question is whether the Commission has authority over the line regardless of its nature, purpose or function. Our answer is that, unless the nature, purpose or function of the line is such as that it is part of a power project, it does not fall within the statutory definitions which established the authority of the Commission, and is not to be forceably enveloped in the statutory language by the compulsion of a congressional purpose inadequately expressed."

The test of determining the purpose of certain facilities in deciding which facilities to license has been consistently followed by this Commission. See, E.G., Western Massachusetts Electric Company, 39 FPC 723, at 731 (1968).

12. Although some of the parties have argued that if you do not have jurisdiction over the entire project then you have jurisdiction over no part of the project, we cannot agree.

and into Southern California. The questions raised by the Forest Service were noted by Congressman Waldie in his letter of intervention. In his initial decision, the Administrative Law Judge made extensive findings on the basis of the environmental evidence before him and held that these findings met the requirements for an environmental impact statement under the National Environmental Policy Act.

5. Based upon the entire record in this proceeding, the filings by the various parties, the initial decision by the Administrative Law Judge, the exceptions to that decision and our own recent holding in Appalachian Power Company, Project No. 2317, order issued October 26, 1972, we find that it will be necessary to remand this case for compliance with our Order No. 415-C by our staff and for affording opportunity for comments and cross-examination as required by our procedures. In addition, we find that in remanding it is appropriate that we clarify the extent of our jurisdiction which is considerably more limited than the presiding Administrative Law Judge found it to be.

6. While we are aware of the importance of this case to the State of California and join in the State's desire that final action be taken as soon as possible, we have concluded that we cannot decide the case now in advance of a further hearing. As noted in Appalachian Power Company, Project No. 2317, supra, on October 10 1972, the Supreme Court denied this Commission's petition for a writ of certiorari to review the decision of the Court of Appeals for the 2nd Circuit in Greene County Planning Board v. F.P.C., 455 F.2d 412 (1972), F.P.C. v. Greene County Planning Board, 409 U.S. 849, 1972. That case concerned this Commission's procedures with respect to the implementation of the National Environmental Policy Act and in particular the Court held that an environmental impact statement must be prepared by our Staff in advance of hearing, and that such statement must be "subject to the full scrutiny of the hearing process".

7. A draft environmental statement has not been prepared by our staff in this proceeding and we cannot find that the adoption by our staff of the applicants environmental statement

We have consistently licensed power facilities at projects where we have not licensed the remaining facilities because they were not part of the project or were not subject to our jurisdiction for other reasons. The most obvious example is those facilities licensed at government dams for the production of power even though we have no authority over the dam itself. The Commission's authority to license only jurisdictional portions of an overall project was specifically approved by the Court of Appeals in Lake Ontario Land Development, and so forth Association v. F.P.C., supra. 1/

13. Having concluded that only those portions of the project involving power facilities are appropriate for licensing we have reviewed the application to determine just which facilities are subject to our licensing authority and for which a draft environmental statement should be prepared in accordance with our Order 415-C. We have concluded that those facilities which will require licensing may be briefly summarized as follows:

1. The Devil Canyon Power Drop consisting chiefly of the Cedar Springs Dam, Silverwood Lake, the Devil Canyon Power Development and associated facilities as described in Exhibits L 35-a through 45-a of the application and Exhibit M-a pages 173 and 174 of the application.

2. The Castaic Power Drop consisting chiefly of Pyramid Dam and Lake, Castaic Power Plant and the Castaic Pumping Forebay and associated facilities as described in Exhibits L 73-a thru 88-a of the application and Exhibit M-a pages 175 and 176 of the application.

3. The Pyramid Power Drop consisting of the Quail Regulation Pool, Quail Canal, Peace Valley Pipeline, Pyramid Tunneled Penstock and the Pyramid Power Plant as described in Exhibits L 53-a thru 71-a and Exhibit M-a pages 174 thru 175 of the application.

1/ The following cases are also instances where the Commission has licensed power drops but not the basic canal or water course, City and County of Denver, 10 FPC 766, 1411. City and County of Denver, 29 FPC 192, 35 FPC 1135, Niagara Mohawk Power Corporation, 32 FPC 1404, 34 FPC 1298, Niagara Mohawk Power Corporation, 39 FPC 872.

14. In addition, the overall plan of development contemplates two more power developments as follows:

a. The proposed Cottonwood Development (to be constructed when economically feasible) as described in Exhibits L31-a thru L32-a and Exhibit M-a, pages 172 thru 173.

b. The proposed San Luis Obispo Development (to be constructed in the early 1980's) as described in Exhibits L101-a thru L102-a and Exhibit M-a, page 180.

The environmental impact statement should include consideration of the plans for these two developments.

The Commission further finds:

(1) In order to assure that the parties to this proceeding have available to them all of the procedures and safeguards contained in the National Environmental Policy Act, as construed in Greene County Planning Board v. F.P.C., supra, it is necessary that the proceeding be remanded to the Presiding Administrative Law Judge and that the hearing be reopened.

(2) A further hearing in this proceeding would be in the public interest.

(3) Such further hearing shall not be held until a final environmental statement has been prepared by the Staff, following the receipt of comments on the Staff's draft environmental statement, and until such final statement by the Staff has been made available to the parties for a period of time sufficient for their preparation of cross examination. Such final environmental statement of the Staff shall be introduced in evidence at the reopened hearing.

(4) The environmental statement to be prepared by Staff shall cover only those facilities which we have found to be subject to our licensing authority as set forth above.

The Commission orders:

(A) The proceeding is hereby reopened and a further public hearing before the Presiding Administrative Law Judge shall he held in Washington, D.C., commencing on such date as he may, in his discretion, prescribe. The Presiding Administrative Law Judge shall prescribe procedures for such further hearing, consistent with the decision in Greene County Planning Board v. F.P.C., supra, and with this Opinion and Order. At such reopened hearing, the Staff's final environmental statement shall be offered in evidence, and cross examination thereon shall be permitted.

(B) All interested persons desiring to be heard in this phase of the proceeding who are not already parties may file appropriate petitions to intervene on or before February 28, 1974.

(C) The limited intervention granted to Congressman Jerome R. Waldie is amended to include all rights as an intervening party in this proceeding.

By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary.