



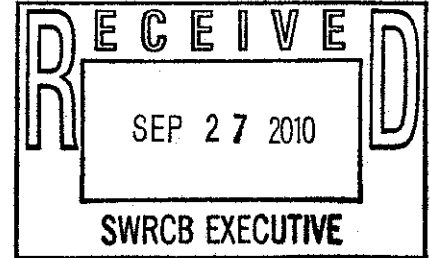
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filed electronically

Ms. Victoria A. Whitney, Deputy Director
Division of Water Rights
California State Water Resources Control Board
1001 I Street, 14th Floor
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Subject: **American Whitewater Comments on Draft 401 Certification
FERC Project No 2100, dated 7/2/2010**

American Whitewater (AW) appreciates the opportunity to comment on the subject document. We submitted comments to two previous Draft Section 401 Certifications (dated June 23, 2009 and January 21, 2010) issued by the State Water Resources Control Board (SWRCB), those comments are attached. AW has always viewed the SWRCB as an important and supportive partner in the protection of whitewater boating opportunities on California's rivers. This is why AW continues to be dismayed to find that not only have recommendations that we made in our previous comments not been adopted, but also that the only provision pertaining to whitewater recreation (Condition S22, contained in the original draft certification) has not been reinstated.

The SWRCB has a responsibility, especially as delegated under Section 401 of the Clean Water Act, to protect water quality on the rivers of this state and beneficial uses of those rivers. We have reviewed "The Water Quality Control Basin Plan (revised September 2009 with approved amendments), for the California Regional Water Quality Control Board, Central Valley Region (Sacramento and San Joaquin River Basins)," which states:

"State law defines beneficial uses of California's waters that may be protected against quality degradation to include (and not be limited to) "...domestic; municipal; agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or reserves" (Water Code Section 13050(f)). *Protection and enhancement of existing and potential beneficial uses are primary goals of water quality planning. (emphasis added)*"

The SWRCB's own description of beneficial uses for "Water Contact Recreation (REC-1)" indicates "uses of water for recreational activities involving body contact with water. These specifically include "white water activities". Whitewater activities, including kayaking, canoeing, and rafting are clearly separate uses, requiring unique hydrological regimens and conditions. Table II-1 of the Basin Plan indicates that "existing beneficial uses on the North Fork Feather River" includes "contact, canoeing, and rafting", while acknowledging the implication that certain flows are required for this beneficial use. On the other hand, flat water boating is clearly designated as noncontact water recreation (REC-2). Given this direction, it is most disturbing that the SWRCB appears to be

establishing a precedent of arbitrarily lumping all recreation activities together (contact and noncontact), ignoring the distinct differences between flat water (reservoir noncontact) and riverine (instream contact) uses.

In its response to our comments on the January 21, 2010 Draft Certification, the SWRCB argued that:

"under the Basin Plan, canoeing and rafting is a subset of the contact recreation beneficial use. While the Project eliminated whitewater opportunities when built, the creation of Lake Oroville created a range of other contact recreation uses, including, but not limited to, swimming, water-skiing, and diving, as well as expanded flatwater boating opportunities. Lake Oroville offers several boat launches and a marina, rentals of kayaks, canoes and other boats, and provides swimming and bass fishing opportunities. These uses provide adequate protection of the contact recreation use. While the State Water Board understands that additional consideration of whitewater opportunities specifically are contemplated in the Settlement Agreement, these measures are not required to protect state water quality standards."

We take exception. Your responsibility is to recognize the provisions of the P-2100 Settlement Agreement (SA) while upholding the protection of beneficial uses, not to pick winners and losers among various recreational activities. The Clean Water Act requires that the specific impacts of a project be mitigated. CEQA also defines what can constitute mitigation.

"Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Sections 21002, 21002.1, 21081, and 21100(c), Public Resources Code.

We argue that avoiding, minimizing, rectifying or reducing the impacts on the Feather River and its beneficial uses associated with the construction of Oroville dam is not possible. The only option left is to provide substitute resources to mitigate the lost whitewater recreation opportunity. Replacement of a resource must infer equivalency. Replacing whitewater recreation with flatwater recreation has no more justification and is no more equivalent than replacing a native riverine fishery with a non-native reservoir fishery. Indeed, such a view would end the restoration and enhancement of native riverine fisheries based on the generic fisheries values of reservoirs. Eliminating whitewater paddling makes no more sense than eliminating other riverine values like native fisheries. Additionally, because the flatwater boating resources are part of the baseline condition, nothing has been added to mitigate for the lost whitewater boating

opportunity. We believe that the SWRCB has put in jeopardy the protection of all beneficial uses of rivers by suggesting that they can be traded with no equivalency required, while referring to the baseline condition as mitigation for the project impacts.

The impacts to whitewater recreation from this project, and to the entire Feather River Basin, have been substantial. With few exceptions (portions of the Middle Fork Feather, seasonally), instream whitewater boating opportunities have been removed from the Feather River system. The P-2100 project itself removed some 60 miles of boatable streams. Whitewater boating has been relegated to a maximum of ten days a year on one short segment (Rock Creek) of the North Fork. No off-site mitigation for this loss was realized as a result of the P-2100 SA and negotiated conditions for the Upper North Fork (P-2105) remain in suspense. With this certification, the SWRCB appears to be removing the last chance for supporting the whitewater beneficial use on the Feather River.

AW and its local affiliate, Chico Paddleheads, involved themselves in the P-2100 proceeding from the start and supported, and became signatory to, the SA. As we approached post licensing, we have registered several objections to the subsequent lack of collaboration and consultation which the Department of Water Resources (DWR) implied in the spirit of the agreement.

AW has continually objected to being excluded from consultation in the Feather River Whitewater Boating Opportunity Feasibility Study, which was required pursuant to Section B101 of the SA. Section B101 states:

"(a) After filing the signed Settlement Agreement with FERC, Licensee will initiate and fund a whitewater boating opportunity and recreation feasibility study to assist the Fund Steering Committee of the Project Supplemental Benefits Fund in determining whether to fund the construction and operation of such a project, or cost share on such a project somewhere in the region, pursuant to their funding criteria. This feasibility study will be conducted in consultation with signatory Parties of this Settlement Agreement for the Oroville Facilities. Specifically, American Rivers, American Whitewater, and the City of Oroville may actively contribute to the completion of the study and participate in its funding."

AW was never consulted by DWR (or their consultants) during the conducting of the feasibility study, except for agreeing to the original scope of work and to extend the due date for the study report at DWR's request. When the study results were issued they were considered final and AW didn't have an adequate opportunity to review and comment on its conclusions. There was consensus among AW, American Rivers, Chico Paddleheads and other interested parties that the study was inadequate. In our letter to the SWRCB dated April 5, 2010, AW stated that "throughout this process DWR has failed to appropriately consult with the settlement parties. As a result, the study does not meet its primary objective of determining the feasibility of building a whitewater park in the Oroville area." We went on to chronicle the specific instances where DWR has failed to consult or collaborate with AW and the other members of the SA.

AW was not consulted during the Department of Parks and Recreation (DPR) negotiations with Lime Saddle and Bidwell Marina concessionaires relative to shuttle services on Lake Oroville. During settlement discussions it was determined that compared to constructing or improving vehicular access on the North and Middle Forks

of the Feather River, it would be far more cost effective to provide a shuttle service for whitewater boaters. These services would emanate from the Lime Saddle Marina, for the run on the North Fork, and from the Bidwell Marina for the run on the Middle Fork. AW and the Chico Paddleheads agreed to have paddlers charged a reasonable fee for this service even though we thought that it would be totally reasonable for the licensee to pay for the entire cost of this service given the substantial impact this project has had on whitewater recreation. The language from the recreation management plan regarding the shuttle is included below.

Page 6-26 Recreation Management Plan

DWR will coordinate with DPR to include in the next revision of the DPR-Marina concessionaire contract, a whitewater boater fee-based shuttle service, to the extent feasible, for paddlers from a take-out/end-of-trip point on the North Fork arm of Lake Oroville to the marina at Lime Saddle. Frequency, scheduling, and fees of the service will be determined based upon user demand and reasonable use of concessionaire resources. Continuation of the service will be contingent upon the feasibility of the shuttle service and demonstrated use of the service.

Following the conclusion of the SA, AW was notified by DWR that shuttle services would be included in the new marina concessionaires' contracts. In 2007 we met with the Lime Saddle Marina concessionaire, conducted a test run to determine the logistic feasibility of providing the shuttle, and informed them that the boating community would support a user fee of \$10 to \$15 per person for the shuttle assuming a minimum group size of four paddlers. In 2008, without further consultation with AW or the boating community, DPR approved a contract with the concessionaires that set the shuttle fee at a flat rate of \$175 with a maximum of eight people. We consider this cost structure to be prohibitive and inflexible. This contract clearly disregarded our input and did not meet the intent of the SA language above.

In retrospect, it is clear that the language contained in the SA is not sufficiently clear on what is an appropriate fee for this shuttle service. From AW's perspective this represents the last potential provision in the entire SA to insure the protection of whitewater recreation as a beneficial use. As it currently stands, this measure does not meet the interest of the whitewater boating community. We continue to encourage the SWRCB to provide independent review via *Feather River Whitewater Boating Opportunity Feasibility Study* to explain how the needs of whitewater recreation are being met by DWR on the Feather River Project.

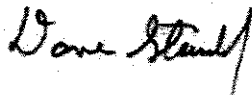
Given these circumstances, we were encouraged when SWRCB's original Draft Certification included condition **S22** which stated:

"Within one year of license issuance the Licensee shall submit a plan to the Deputy Director for modification or approval that will result in protection of the water contact (whitewater boating) beneficial use of the Feather River. The plan shall include an evaluation of whitewater opportunities within the area, the feasibility of constructing and operating a whitewater boating facility, a recommended alternative, and a schedule for completion of the recommended alternative."

Understandably, AW was appalled to find that condition S22 was unexpectedly and inexplicably deleted in SWRCB's January 21, 2010 Draft Certification. We strenuously objected to this deletion in our response to that second draft. In its rebuttal to our comments, the SWRCB defended its decision to delete S22. We feel that the SWRCB response to AW's comments was inadequate and inconsistent with CEQA guidelines and we are in serious disagreement with your conclusion. **We, again, request that condition S22 be replaced, in its original form, in the final certification.**

Historically we have found the SWRCB to be a good partner in the protection of whitewater recreation as a beneficial use of California's rivers. We expect that the SWRCB will ensure that the future license for the operation of the Oroville Facilities meets not only the spirit and intent of the Settlement Agreement but also the broader protection of this resource for the people of the State of California as required under the Clean Water Act. We hereby request that the SWRCB reinstate condition S22 from the original Draft 401 Certification to help protect whitewater recreation as a beneficial use.

Thank you for your consideration,



Dave Steindorf
California Stewardship Director
American Whitewater