



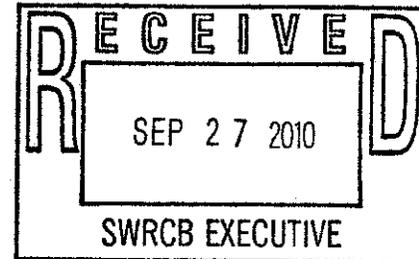
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September 27, 2010

filed electronically
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Ms. Victoria A. Whitney, Deputy Director
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California State Water Resources Control Board
1001 I Street, 14th Floor
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**Subject: American Whitewater and American Rivers Comment on,
Draft 401 Certification, FERC 2100, dated 7/2/2010**

American Whitewater (AW) and American Rivers (AR) appreciate the opportunity to comment on the subject document.¹ We submitted comments to two previous drafts of the Section 401 Certification (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.

Whitewater Recreation

We were encouraged when SWRCB's 6/23/09 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."

¹ AW timely submitted our comments before 12 noon today. We submit these revised comments, which include a specific recommendation for resolving disputes related to the consistency of the certification and the Settlement Agreement. American Rivers joins these comments.

Understandably, AW was disappointed to find that condition S22 was deleted from the 1/21/10 Draft Certification. We strenuously objected to this deletion in our response to that second draft. In its 7/2/10 rebuttal to our comments, the SWRCB staff defended their decision to delete S22.

"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."

This response was inadequate and inconsistent with the SWRCB's obligations under the Clean Water Act section 401 and the California Environmental Quality Act (CEQA).

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, SWRCB may not properly lump all recreation activities together (contact and noncontact), ignoring the distinct differences between flat water (reservoir noncontact) and riverine (instream contact) uses.

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.

Public Resources Code section 21083 (emphasis added).

It is not possible to avoid, minimize, rectify or reduce the impacts caused by past construction and operation of Oroville on the recreational uses that relate to free-flowing river now flooded beneath the reservoir. The only option left is to provide substitute resources to mitigate the lost whitewater recreation opportunity. Replacement of a resource must infer equivalency.

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.

Replacing whitewater recreation with flat water 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.

Related Dispute

We provide notice to the SWRCB that AW and DWR have a dispute about the performance of a contractual obligation under SA section B101, which 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 conduct 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 services 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 (p. 6-26) regarding the shuttle is included below.

"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. 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.

Under SA section 5, AW and Chico Paddleheads will provide a Notice of Dispute challenging DWR's performance of its obligations under SA section B101.

Conference to Assure Consistency of Certification and Settlement Agreement

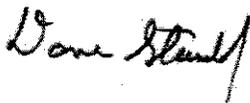
As applicant, DWR has commented that the original and revised Draft Certifications contain conditions inconsistent with the Settlement Agreement. Pursuant to Section 4.5.2.1 and 6, it stated, correctly, that it has the right to withdraw from the agreement, which would then terminate, if this dispute is not resolved.

As a signatory of the Settlement Agreement, AW and its local affiliate, Chico Paddleheads, accepted and supports the compromises and obligations stated therein. It is plain that, despite considerable efforts by SWRCB staff in bilateral discussions with DWR, a substantial risk remains that DWR may dispute the consistency of the 7/2/10 Draft Certification and the Settlement Agreement. If so, we recommend that the SWRCB convene a conference to attempt to address and resolve this and other disputes related to the Draft Certification. Such a conference would be open to all signatories to the Settlement Agreement and other parties in this Certification proceeding. Any resolution reached in such a conference would be at a staff level and would be proposed for consideration by the applicable decisional authorities. The Office of Energy Projects at the Federal Energy Regulatory Commission has used such a technical conference to resolve alleged inconsistencies between its staff's draft licenses and settlements.

Conclusion

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



Steve Rothert
California Director
American Rivers

Attachments (2)
Letter dated July 28, 2009
Letter dated February 23, 2010



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July 28, 2009

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RE: American Whitewater Comments Draft 401 FERC 2100

American Whitewater appreciates the opportunity to comment on the Draft Water Quality Certification from the State Water Resources Control Board (SWRCB) for the Oroville Project (FERC License 2100). American Whitewater, along with our local affiliate club the Chico Paddleheads, were involved from the beginning of the Oroville relicensing process in 2000. We were also signatories to the Settlement Agreement (SA) signed in 2006. American Whitewater has participated in the relicensing of over twenty FERC projects in California and we are currently involved in the implementation of new licenses for the Feather, Pit, Mokelumne, and Kern Rivers. Our experience on these projects has given us a clear perspective on how negotiated agreements are transformed into on the ground license measures. It is with this background that we offer the following comments on the Draft Water Quality Certification for the Oroville Project.

In general, we appreciate the fact that this Draft Certification provides clarity on many of the provisions in the settlement agreement. Providing timelines, for specific measures in areas where none were provided in the SA, will help to insure that mitigation measures move forward on a timeline that is clear to all parties. The Draft Certification provides clarity as to the parties that must be consulted in regards to plans for specific resources areas. Including recommendations from the consulting parties will help to keep development of these plans open and transparent. Approval of these plans by the Deputy Director is consistent with the State Boards independent regulatory authority and the State Board's mandate to protect beneficial uses of the Feather River In our view this Draft Certification is consistent with the SA and will improve the implementation of this license.

Comments on Specific Measures

American Whitewater would like to be listed among the consultees on any areas that have the potential to impact river recreation. Our rationale is that most agencies lack the specific expertise to determine how resource measures could have an effect on water river recreation, particularly safety. Measures that have the potential to impact river recreation include:

- S1. *Lower Feather River Habitat Improvement Plan*
- S2. *Gravel Supplementation and Improvement Program*
- S3. *Channel Improvement Program*
- S4. *Structural Habitat Supplementation and Improvement Program Plan*
- S5. *Fish Weir Program*
- S6. *Riparian and Floodplain Improvement Program*
- S22. *Feather River Whitewater Boating Opportunity Feasibility Study*

Developing a comprehensive strategy that integrates all of these plans and includes recreation will ensure the best possible outcome on this project. The *Feather River Whitewater Boating Opportunity Feasibility Study*, as required in the Draft Certification, would be an opportunity to look for ways to improve river recreation while improving the ecological function of the river channel.

The Draft Certification is incorrect in stating that there aren't any whitewater boating opportunities within the project boundary. The R-16 Whitewater and River Boating Report (DWR 2004) describes both the North Fork Arm and the Middle Fork Arm as having whitewater boating opportunities. The run on the North Fork Arm of the Feather is only available in dry water years when the Lake Oroville is low and provides excellent boating opportunities in dry and critically dry years. This run begins at PG&E's Poe powerhouse and is almost entirely within the Oroville Project Boundary. The other run is on the Middle Fork Feather and is available every winter and spring when the flow on the Middle Fork Feather is between 1200 and 400 cfs. This world famous run through Bald Rock Canyon run begins five miles above the lake and continues down into the reservoir. These runs are impacted by the project by limiting takeout access. Currently both of these runs require a paddle out on the reservoir that is between two and four hours depending on the reservoir elevation.

During settlement discussions a number of options to improve access were discussed, including building or improving roads to the take out points of each of these runs. After evaluating the cost of these options it was determined that it would be far more cost effective to provide a shuttle service from the Lime Saddle Marina, for the run on the North Fork, and from the Bidwell Marina for the run on the Middle Fork. American Whitewater and the Chico Paddleheads did agree 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.

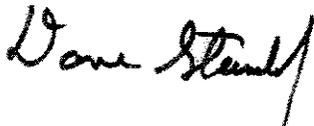
Continuation of the service will be contingent upon the feasibility of the shuttle service and demonstrated use of the service.

In 2007 we were notified by Department of Water Resources (DWR) that this service would be included in the new Lime Saddle Marina concessionaires contract that was up for renewal in 2008. We met with the Lime Saddle Marina concessionaire in September of 2007 and conducted a test run to determine the logistic feasibility of providing the shuttle. In that meeting we discussed with the concessionaire that the boating community would support a user fee of \$10 to \$15 per person for the shuttle. We also supported having a minimum group size of four paddlers. In 2008 State Parks approved a contract with the concessionaire that set the shuttle fee at a flat rate of \$175 with a maximum of eight people. This contract clearly disregarded our input and did not meet the intent of the SA language above.

It is clear at this point that the language contained in the SA is not sufficiently clear on what is an appropriate fee for this shuttle service. From American Whitewater's perspective this is the only 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 welcome having the SWRCB 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 Oroville Project.

Having clear objectives, and requirements for consultation and timelines for execution are critical for reducing conflicts during implementation of any license. We believe that SWRCB has helped to clarify many measures, or provided a mechanism to clarify measures, that will ultimately improve the Settlement Agreement.

Thank you for your consideration,



Dave Steindorf
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February 23, 2010

Ms. Victoria A. Whitney, Deputy Director
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RE: American Whitewater Comments Draft 401 FERC 2100

American Whitewater submitted comments to the previous draft 401-certification document that was issued June 23, 2009 (those comments are attached). American Whitewater was dismayed to find that not only were the recommendations that we made in our previous comments not adopted but also the only provision pertaining to whitewater recreation in the entire certification document was removed. In fact, the only reference to rafting or canoeing in the document is in the SWRCB acknowledgment that these are beneficial uses specified within the basin plan for the Feather River. We would appreciate having the State Water Resources Control Board explain why the *Feather River Whitewater Boating Opportunity Feasibility Study*, condition S. 22 from the previous draft certification document, was removed as a condition of certification. As we stated in our previous comments, it is our view that having the licensee prepare a report documenting how the needs of whitewater recreation are being met on the project will help to ensure that the public interest in this beneficial use is being addressed. This report will provide the licensee an opportunity to highlight how they are meeting the terms of the settlement agreement that pertain to whitewater recreation. As the only agency that has a specific mandate to protect noncontact water recreation, such as rafting, canoeing and kayaking, the State Water Resources Control Board must have some mechanism to know if these beneficial uses are being protected on this project.

The impacts to Whitewater recreation from the development of this project have been substantial. Over 60 miles of the Feather River now lay underneath Lake Oroville. The year-round high flows of the North Fork Feather River made this a unique river resource in California. While this new license provides for many potential improvements that could benefit spawning and rearing habitat for salmon, these same improvements could come at the detriment to contact and noncontact water recreation in the low flow channel. Measures that have the potential to impact river recreation include:

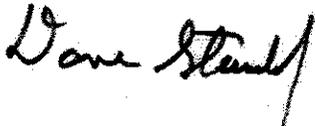
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S6. *Riparian and Floodplain Improvement Program*

It is our belief that the Settlement Agreement was developed with the intent of meeting the needs of a wide array of interests including, the city of Orville, the Feather River Parks and Recreation, and the array of users from Butte County and elsewhere that enjoy the lower Feather River. Members of the supplemental benefits fund committee have invested considerable time, effort, and expense in developing a strategic plan for recreational development along the low flow channel through the City of Orville. Unfortunately the settlement agreement is silent on the need to have coordination and cooperation between the licensee's implementation of the measures listed above and this strategic plan. American Whitewater, and the other members of the supplemental benefits fund committee should be listed among the consultees on any areas that have the potential to impact river recreation. Developing a comprehensive strategy that integrates all of these plans and includes recreation will ensure the best possible outcome on this project.

The *Feather River Whitewater Boating Opportunity Feasibility Study*, as required in the original Draft Certification, would be an opportunity to look for ways to improve river recreation while improving the ecological function of the river channel.

Thank you for your consideration,

A handwritten signature in black ink that reads "Dave Steindorf". The signature is written in a cursive style with a large, stylized 'D' and 'S'.

Dave Steindorf
California Stewardship Director
American Whitewater