

**DEPARTMENT OF WATER RESOURCES**

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February 23, 2010

Russ Kanz  
State Water Resources Control Board  
Division of Water Rights  
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Dear Mr. Kanz:

On January 21, 2010, the State Water Resources Control Board (SWRCB) posted on its website a Draft Water Quality Certification (Draft WQC) for relicensing of the Oroville Facilities, Federal Energy Regulatory Commission (FERC) Project No. 2100. The notice accompanying the Draft WQC identified February 16, 2010, as the deadline for filing comments. However, prior to that date, The Department of Water Resources (DWR) received SWRCB authorization to submit its comments by February 23, 2010. Pursuant to that correspondence, DWR respectfully submits its comments below and attached.

DWR would first like to thank the SWRCB for this opportunity to review and comment on the Draft WQC. We also appreciate the time SWRCB staff spent with DWR staff to discuss an early version of the Draft WQC and the supporting Final Environmental Impact Report (EIR) prepared by DWR as lead agency under the California Environmental Quality Act (CEQA). In July 2008, DWR certified the EIR which identified and analyzed the March 2006 Settlement Agreement for Licensing of the Oroville Facilities (Settlement Agreement) as the preferred project for issuance of a new 50 year hydropower license. The SWRCB, as a responsible agency under CEQA for the proposed project, will rely on the EIR for CEQA compliance related to issuance of the water quality certification. The completion of the Settlement Agreement and EIR represents approximately 10 years of collaboration among many federal and state agencies and stakeholders to prepare a project proposal that would meet requirements of FERC, as well as other state and federal agencies, such as the SWRCB.

In September 2008, a SWRCB letter acknowledged the receipt of the EIR and DWR's application for water quality certification, which had been resubmitted in August 2008. The SWRCB acknowledged that DWR's application for water quality certification, along with the FERC license application and other

documents from the FERC files that were incorporated by reference in the certification application, met the application filing requirements specified in the California Administrative Code Title 23, Section 3856.

During our discussions with SWRCB staff on water quality certification requirements, the SWRCB emphasized its need to develop measures that are enforceable and that honor its independent decision-making and jurisdictional authorities. The Settlement Agreement was developed in cooperation with several agencies with regulatory responsibilities and is purposely designed to not diminish their authority while establishing a collaborative approach to problem solving that is intended to supplement the traditional "command and control" regulatory framework. Other agencies with regulatory authority such as the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and California Department of Fish and Game (DFG) have endorsed the collaborative approach.

The collaborative approach is best exemplified by the establishment in the Settlement Agreement of the Ecological Committee that will help plan and guide the implementation of the license measures. The Ecological Committee is composed of representatives from the state and federal fish and wildlife agencies as well as the SWRCB, the Central Valley Regional Water Quality Control Board, and other parties to the Settlement Agreement. While each participating regulatory agency maintains its regulatory authority, it is understood that robust discussions leading to consensus in the Ecological Committee can produce broader based support and facilitate implementation of actions by resolving potential conflicts among competing resource needs. DWR believes, as explained in our attached comments, that proposed conditions in the Draft WQC requiring SWRCB Deputy Director final approval of plans that have already been accepted by the Ecological Committee would be inconsistent with both the letter and the spirit of the Settlement Agreement and would lead to unnecessary delays. Because the plans will be subject to final approval by FERC, DWR believes the process under FERC should be relied upon by the SWRCB and conditions in the WQC should not create a duplicative level of review.

DWR's attached comments identify other inconsistencies between conditions in the Draft WQC and the Settlement Agreement. DWR believes these inconsistencies are unnecessary, the conditions creating the inconsistencies are not supportable, and they threaten to undermine the hard won consensus on

complex ecological issues that is embodied in the Settlement Agreement. As discussed in our attached comments, DWR has most concerns with changes proposed in the WQC that reference use of the river valve in Condition S7, that set water temperature requirements in Condition S8 and insert the Habitat Expansion Agreement (HEA) as a requirement in Condition S9.

DWR believes that these inconsistencies between the Draft WQC and the Settlement Agreement result from the analysis in the Draft WQC not reflecting the tremendous technical analysis, coordination, and consultation that occurred among the parties to the collaborative process. The Settlement Agreement conditions were carefully crafted after consideration of the results of over 70 technical studies that were collaboratively designed with assistance of agency technical experts and stakeholders and which produced over 160 reports, consisting of approximately 35,000 pages of data and information on issues of importance to agencies and stakeholders. The studies and reports form the scientific and technical basis for the Settlement Agreement actions. This rigorous and sound documentation supporting the Settlement Agreement and EIR allowed 53 organizations participating in the collaborative process to agree that the Settlement Agreement is the preferred project forming the conditions required for a new FERC license.

In addition, this collaborative process included the SWRCB staff who extensively participated in an advisory role during the technical collaboration and Settlement Agreement negotiations, and their role and input are not acknowledged in the Draft WQC. Also, a SWRCB board member individually participated in an advisory role during negotiations of the Settlement Agreement. Their participation resulted in Settlement Agreement provisions specifically designed to address potential requirements of a water quality certification that would be needed for many of the proposed actions. DWR is disheartened that the conditions in the Draft WQC fail to support the collaborative process or recognize the efforts made to develop appropriate actions that would satisfy SWRCB certification. DWR believes that this collaborative process has great merit and is valued by the Settlement Agreement parties as forward-thinking in facilitating the desired actions in the Settlement Agreement. These actions will become required by FERC, if approved, and be subject to a FERC process that allows for oversight by agencies and stakeholders. DWR believes that if the conditions in the Draft

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WQC that are inconsistent with the Settlement Agreement stand, they will delay implementation of the proposed project and could have a chilling effect on other licensees who are similarly seeking guidance from SWRCB staff during the developmental stages of their own certification documents.

Therefore, in consideration of the above, DWR requests that the SWRCB make important changes to the Draft WQC as specifically described in the Attachment to this letter. DWR believes these changes are necessary to produce a final certification that will engender widespread support while not compromising any of SWRCB requirements under state and federal law.

If you have any questions concerning this letter, please feel free to contact Cathy Crothers, Assistant Chief Counsel, at (916) 653-5613, or [crothers@water.ca.gov](mailto:crothers@water.ca.gov) or me at (916) 657-4963 or [ramirez@water.ca.gov](mailto:ramirez@water.ca.gov).

Sincerely,

**Original signed by**

Henry M. Ramirez, Chief  
Hydropower License Planning and Compliance  
Executive Division

Attachment

cc: Vicky Whitney  
Andrew Sawyer  
Marianne Aue  
Les Grober

## ATTACHMENT

### I. General Comments on the Water Quality Certification

#### Board Reasonable Use Standard Must be Applied in Evaluating Proposed Project and in Developing Conditions for a Water Quality Certification

In order to issue a water quality certification, the State Water Resources Control Board (SWRCB or Board) must find that there is *reasonable assurance* that the project will comply with water quality standards. 40 CFR § 121.2(a)(3). Section 303 of the Clean Water Act (CWA) requires the State to institute comprehensive water quality standards establishing water quality goals for all interstate waters. The State of California, through the State Water Resources Control Board, implements and enforces the CWA pursuant to the Porter-Cologne Act. (Cal. Water Code § 13000 et seq.) As noted in the draft certification, the regional water boards have adopted, and the Board has approved, basin plans for each watershed basin in the State. The basin plans designate the beneficial uses of watersheds within each basin, and water quality objectives designed to protect those uses pursuant to Section 303 of the CWA (33 U.S.C. § 1313.)

The standard that the Board must apply in its analysis of the proposed project, the Settlement Agreement for Licensing of the Oroville Facilities (Settlement Agreement), is whether the federally licensed activity will reasonably protect the beneficial uses set forth in the Basin Plan. Throughout, though not consistently, in the Draft WQC, the Board applies a more restrictive “fully protect” standard in its review of the Settlement Agreement measures’ impacts on beneficial uses. As a result, the Draft WQC incorrectly determined that beneficial uses were not “fully protected” and prescribed Specific Conditions, without explanation, that were more protective than required by a water quality certification.

Specifically, the Board must analyze whether a new project license for the Oroville Facilities based upon the Settlement Agreement will reasonably protect the designated beneficial uses. The Porter-Cologne Act clearly specifies the standard as “reasonable protection” when analyzing impacts to water quality. Section 13241 of the Water Code covers water quality objectives and beneficial uses, and states, “Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the *reasonable protection* of beneficial uses and the prevention of nuisance...” (Cal. Water Code § 13241.) (emphasis added.) Further, the Regional Water Quality Control Boards are to establish water quality objectives under Porter-Cologne Act. “Water quality objectives” are defined as “the limits or levels of water quality

constituents or characteristics which are established for the *reasonable protection of beneficial uses* of water or the prevention of nuisance within a specific area.” (Cal Water Code § 13050(h) (emphasis added.) The California Supreme Court has recently discussed the objectives of the Porter-Cologne Act, and noted that “[I]ts goal is ‘to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.’” (*City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4<sup>th</sup> 613, 619.

In the past, the Board has relied upon a reasonableness standard when issuing water quality certifications. See, e.g., *In the matter of Petitions for Reconsideration of Water Quality Certification for Re-operation of Pyramid Dam for the California Aqueduct Hydroelectric Project*, FERC No. 2426, Order WQ 2009-0007 (August 4, 2009) (Pyramid Dam WQC Order) at 5. DWR has not identified any previous Board certification that has relied upon the Draft WQC’s “fully protected” standard. In the Draft WQC, the Board provides no justification for its application of this more stringent standard.

In the Draft WQC, the Board has amended many measures from the Settlement Agreement and included them as water quality certification conditions (conditions), stating that they “...are necessary for the Project to fully protect the beneficial uses.” (Draft WQC at page 3). If the Board approves the WQC as written, it will have applied an incorrect legal standard and exceeded its statutory authority by requiring more stringent conditions in order to meet a “fully” protect standard, rather than a “reasonable” protection standard. The conditions in the Draft WQC that are based on this more stringent standard are therefore not legally justified. As explained below, the PM&E measures contained in the Settlement Agreement, which were agreed upon by all applicable regulatory agencies and developed in conjunction with Board staff, were developed to assure that all of the beneficial uses in Basin Plan would be reasonably protected. A correct analysis using the appropriate legal standard would have found that the measures set forth in the Settlement Agreement would meet requirements of a water quality certification and no additional restrictions would be needed in a certification that included the actions from the Settlement Agreement.

The Environmental Impact Report (EIR) analyzed each beneficial use in the Basin Plan under both existing conditions as well as the Proposed Project, which is comprised of the actions set forth in the Settlement Agreement. In its analysis of the existing conditions, the EIR found that “Current operations of the Oroville Facilities supports and reasonably protects, or has no adverse effect on (as in the case of coldwater spawning in Lake Oroville), all beneficial uses specified in the Basin Plan for Project waters and are described below.” (DEIR page 4.2-15.)

The EIR then analyzed each beneficial use under the Proposed Project, and found that each beneficial use would either be protected, or in many cases, enhanced. The beneficial use that the Draft WQC primarily addresses is cold water on the Feather River from the Fish Barrier Dam to the Sacramento River. This beneficial use (cold water habitat, migration, and spawning) was analyzed in the EIR (DEIR pages 5.2-23 through 5.2-26. With regard to cold water habitat, the EIR analyzed the temperature improvement actions called for in the Settlement Agreement, as well as many habitat improvement actions, including the gravel supplementation, side channel improvement, and riparian and floodplain improvement programs, and found that "The Proposed Project would have a substantial beneficial effect on coldwater habitat for Chinook salmon and steelhead in the lower Feather River." (DEIR at page 5.2-23). The EIR also found that the Proposed Project would also have beneficial effects on both migration and spawning. (DEIR at pages 5.2-25 through 5.2-26.) As demonstrated by the analysis in the EIR, the Proposed Project as set forth in the Settlement Agreement has a great number of actions which will benefit the coldwater fishery habitat and associated beneficial uses, which are currently being met even without the Proposed Project.

#### Plans Developed Pursuant to the Settlement Agreement Should not Require Deputy Director Final Approval

In Section 4.0 of the Draft WQC the Board states that certain measures as written in the Settlement Agreement will not be enforceable, and has therefore modified certain articles of the Settlement Agreement to require the submission of studies or plans to the Deputy Director for review and approval. While DWR understands the Board's concerns with regard to enforceability of the terms of the Settlement Agreement, it should be noted that the Settlement Agreement was developed in a collaborative manner with all applicable regulatory agencies, including representatives from the Board. While the Settlement Agreement was carefully drafted to state that it was neither to be construed as a pre-decisional determination by a public agency nor to limit or affect the authority of any public agency to carry out its statutory or regulatory responsibilities, it is imperative to note that the regulatory agencies who signed the Settlement Agreement acknowledged that the articles set forth in the Settlement Agreement "...satisfy the statutory, regulatory, or other legal requirements for the protection, mitigation, and enhancement of natural resources, water quality, recreation, and cultural and historic resources affected by the Project under the New Project License; and ... the Public Agency's statutory, regulatory, or other legal responsibilities are, or can be, met through approval without material modification of this Settlement Agreement and subsequent implementation of the New Project License." (Settlement Agreement, Section 3.1, pages 7 through 8).

It is anticipated that FERC will adopt the Settlement Agreement with minor, if any, modifications, and the articles contained in it will become the terms and conditions under which DWR will operate the Project. The license will be fully

enforceable by FERC. In addition, the regulatory agencies will maintain their individual enforcement authority through the respective statutes they operate under, including the Endangered Species Act and the California Endangered Species Act. This is true of any condition that the Board includes in the water quality certification. The Settlement Agreement is also enforceable contractually by any Party to the Settlement Agreement.

If the Board's concern with certain aspects of the terms of the Settlement Agreement is that they are not sufficiently prescriptive or lack certainty, it should be noted that the articles in the Settlement Agreement call for specific actions to be undertaken and goals to be achieved by DWR, such as channel improvement or floodplain restoration, and therefore it is unquestioned that DWR will meet these obligations, save for an event or circumstances beyond its reasonable control (Settlement Agreement Section 7.6.1, page 32).

With regard to the proposed condition that certain plans, once approved by the Ecological Committee, be sent to the Deputy Director of the Board for final approval and potential modification, DWR believes this is unnecessary, and in some cases uncalled for, in light of the requirement that all such plans be developed in coordination with the Ecological Committee, on which the Board will sit. It was understood by the Parties to the Settlement Agreement, including Board staff, that the Settlement Agreement could not address in sufficient detail all the actions necessary to meet the objectives of the Settlement Agreement, so the Settlement Agreement calls for the development of the detailed plans after license issuance. The development of those plans will be done in coordination with the Ecological Committee, which is comprised of all the regulatory agencies who participated in the development of the Settlement Agreement, including both the SWRCB as well as the Regional Water Quality Control Board.

In the Draft WQC, Board staff assert that it is not appropriate to make the Ecological Committee structure an enforceable condition of water quality certification, because only certain government entities are formally vested with the authority and responsibility to protect such uses and resources, and are publicly accountable for these duties. It should be noted that the very agencies Board staff is referring to, such as DFG, State and Regional Water Boards, NMFS, FWS, are members of the Ecological Committee, and the participation of those agencies is essential to the successful implementation of the license. These agencies will have a tremendous amount of input and influence in developing the final plans. It is anticipated that the staff members who attend the meetings will be in full communication with their management during the development of the plans, and that the final plans will address the needs of each respective regulatory agency, including both the State and the Regional Boards, to the extent any inconsistent regulatory needs can be reconciled. The purpose of the Settlement Agreement is to facilitate implementation of projects and the belief that this can be accomplished by cooperation of all regulatory agencies through the Ecological Committee.



Further, the Draft WQC calls for final approval of plans by the Deputy Director in areas which are unrelated to water quality, and which DWR can find no basis for the Board to assert having final authority over. Examples include S9 (Habitat Expansion), S15 (Oroville Wildlife Area Management Plan), S17 (Minimizing of Disturbances to Nesting Bald Eagles) and S19 (Protection of Valley Elderberry Longhorn Beetle). DWR can find no reference to any of these actions being called for under the existing beneficial uses in the Basin Plan, nor has Board staff provided any evidence in the record as to why these actions are necessary to meet the existing beneficial uses in the Basin Plan. As noted above, the agencies explicitly charged with protecting these resources, including NMFS, USFWS, and DFG, are members of the Ecological Committee, will develop the plans with DWR, and will also independently protect the resources in question through the exercise of their authority under the Endangered Species Act and/or the California Endangered Species Act.

The need for the plans to go to the Deputy Director for final approval after they have been developed by the very agencies responsible for the protection of the resources is ultimately duplicative, unnecessary, and could result in unnecessary delays in achieving the goals of the Settlement Agreement and the terms of the license. DWR therefore respectfully requests that the Board remove the requirement that all plans go to the Deputy Director for final approval, and retain the structure for the development of the plans as set forth in the Settlement Agreement.

## **II. Comments on Specific Conditions in the Draft WQC**

DWR does not oppose including the Settlement Agreement actions that address beneficial uses defined in the basin plans as "Specific Conditions" of the Draft WQC. However, DWR requests that the WQC Specific Conditions not substantively change the SA actions as this creates inconsistency with the Settlement Agreement. In addition, a few of the Specific Conditions in the Draft WQC, or the rationale for the Conditions, should be deleted or revised because the proposed project, which is the Settlement Agreement, does not impact the beneficial use and the additional restrictions imposed by the Draft WQC Specific Conditions go beyond what is required under the regulatory requirements of a water quality certification.

### **S2 Gravel Supplementation and Improvement Plan**

As explained above, this gravel supplementation and improvement plan, described in Condition S2, is enforceable as drafted in the Settlement Agreement and the additional approval and timing requirements proposed in the Condition are unnecessary and counterproductive. As set forth in the Settlement Agreement, the Lower Feather River Habitat Improvement Plan will be developed in consultation with the Ecological Committee, including specifically with USFWS,

NMFS, DFG, and the State Board. The Board's rationale for changing the timing requirements in Condition S2 seems to indicate that the Board is uncomfortable with the language in the Settlement Agreement describing when additional gravel supplementation will occur because timing is not specific. However the Settlement Agreement calls for an adaptive management approach which will provide the appropriate timing for when DWR will take action. Any such actions will be taken in consultation with members of the Ecological Committee, and specifically USFWS, NMFS, and DFG. This will ensure that the objectives of the program are fully met in a timely manner.

The text in the rationale for Condition S2 on pages 5 through 6 states, "This measure is necessary to protect the cold freshwater, spawning, and migration beneficial uses of the Feather River." As explained above, the EIR found that current operations of the Oroville Facilities support and reasonably protect this beneficial use, and that this action would have a beneficial impact on this beneficial use. Further, Board staff present no evidence in the record to support this statement, which is contradicted by the evidence actually in the record. Because this rationale is misleading and unsupported, DWR requests that this sentence be removed from the WQC.

### S3 Channel Improvement Program

While the terms of the Condition S3 closely match those in the Settlement Agreement, the rationale found on page 6 of Draft WQC does not match either this Condition or the Settlement Agreement. DWR requests that the Board modify the rationale to correctly state that the Settlement Agreement calls for the development of a plan within four years of license acceptance and construction within ten years, rather than over a five year period.

In addition, the text in the rationale for this condition on page 6 states, "This measure is included in the certification to protect the cold freshwater, spawning, and migration beneficial uses of the Feather River." As explained above, the EOR found that current operations of the Oroville Facilities support and reasonably protect this beneficial use, and that this action would have a beneficial impact on this beneficial use. Further, Board staff present no evidence in the record to support this statement, which is contradicted by the evidence actually in the record. Because this rationale is misleading and unsupported, DWR requests that this sentence be removed from the WQC.

### S4 Structural Habitat Supplementation and Improvement Program

The text in the rationale for this Condition on page 6 states, "This measure is included in the certification to protect the cold freshwater, spawning, and migration beneficial uses of the Feather River." As explained above, the EOR found that current operations of the Oroville Facilities support and reasonably protect this beneficial use, and that this action would have a beneficial impact on

this beneficial use. Further, Board staff present no evidence in the record to support this statement, which is contradicted by the evidence actually in the record. Because this rationale is misleading and unsupported, DWR therefore requests that this sentence be removed from the WQC.

#### S5 Fish Weir Program

The schedule set forth in Condition S5 does not match those in the Settlement Agreement. The dates for this Settlement Agreement action were carefully crafted with the agreement of all the parties to the Settlement Agreement, including NMFS and DFG, agencies with regulatory responsibility for the fish benefiting from this program. The Board provided no evidence to support the need for dates different than those contained in the Settlement Agreement. DWR requests that the Board modify the Condition S5 to match the schedule set forth in the Settlement Agreement.

Further, the text in the rationale for this condition on page 7 states that the submittal of an anadromous fish segregation weir plan is necessary "to fully protect the beneficial uses." As explained above, this is not the correct legal standard upon which to analyze the proposed project (the Settlement Agreement) and develop a regulatory condition. The analysis in the EIR found that current operations of the Oroville Facilities support and reasonably protect this beneficial use, and that this settlement Agreement action would have a beneficial impact on this beneficial use. Board staff present no evidence in the record to support this statement. Because this rationale is misleading and unsupported, DWR requests that this phrase be removed from the WQC.

#### S6 Riparian and Floodplain Improvement Program

The rationale for Condition S6 on page 6 incorrectly states, "[t]he first 50 percent of the project will be fully implemented within 15 years of license issuance, and the second 50 percent will be implemented within 25 years of license issuance." Percentage completion is not described in either the Settlement Agreement or the FERC EIS. Because demand for gravel extraction will guide the timeframe for completion, DWR asks that this incorrect statement be deleted from the rationale in the WQC.

#### S7 Feather River Fish Hatchery

The Condition S7 has modified this action in the Settlement Agreement in several key respects. First, it now requires that DWR provide all necessary funding to DFG to implement this Condition and shall ensure the continued operation of the Feather River Fish Hatchery in cooperation with DFG. DWR did commit to provide all necessary funding to DFG as part of Appendix B of the Settlement Agreement. It should be noted that Appendix B includes additional agreements with parties to the Settlement Agreement that are not FERC

jurisdictional but provide benefits for the resources or the community beyond FERC regulatory requirements. The requirement to fund another state agency is not within the jurisdiction of either FERC or the Board. Further, Board staff provide no rationale to explain why this term in Condition S7 needs to be included in the WQC in order to reasonably protect any of the beneficial uses in the Basin Plan, which are already being met under the existing Project operations. DWR therefore requests that this requirement be removed from the Condition.

In addition, the rationale for Condition S7 on page 9 contains a serious misinterpretation of the Settlement Agreement with regard to the use of the river valve to meet the temperature targets and requirements. Contrary to the statement in the rationale of the Draft WQC, the Settlement Agreement does not anticipate that DWR will use the river valves for meeting the hatchery temperature requirements. Settlement Agreement Article A107 does call for certain measures to be taken by DWR in order to meet temperature requirements. However, the article does not specifically call for the use of the river valve to meet either the requirements or the targets, and at no point has DWR ever committed to using the river valve to meet temperature requirements under any circumstance, even after refurbishment. Furthermore, the ability to refurbish, repair, and safely use the river valve is unknown, and DWR cannot commit to using it as a temperature control device. DWR is willing to study and evaluate the repair and refurbishment of the river valve and will consider its use as a temperature control device if it can be done so safely, but the use of this facility must be at the discretion of DWR. DWR therefore requests that any reference to the use of the river valve to meet either temperature requirements or targets beyond what is called for in SA A107.2 be removed from the WQC. DWR also requests that the requirement on page 28 to submit a schedule for the repair or refurbishment of the river valves be deleted as the operation and maintenance of the river valve should not be a consideration of any terms or conditions in WQC.

#### S8 Flow/Temperature to Support Anadromous Fish

The Condition S8 modifies the flow requirements set forth in the Settlement Agreement by establishing a vague condition that the Deputy Director can set a flow criteria to accommodate spawning of anadromous fish. This Condition fails for several reasons. First, Condition S8 provides no metric by which to determine what flow may be required or why. Second, and more importantly, Board staff provide no evidence or rationale as to why, or how, this change is necessary to reasonably protect the beneficial uses, which are currently being met under existing Project operations.

The rationale for this Condition is not supported by the record. First, page 11 of the Draft WQC states, "Studies have shown it is unlikely that adult Chinook salmon can use the Feather River below the Thermalito Afterbay Outlet except

as a migration corridor.” This is not true. In all years fall run adult Chinook salmon have spawned in that location, the high flow channel, in large numbers. The recent decline in numbers of spawners in the high flow channel has occurred due to the fact that there has been a decline in the population in general, not because the conditions in the high flow channel do not allow for spawning. (See [http://www.water.ca.gov/environmentalservices/frp\\_technicalreports.cfm](http://www.water.ca.gov/environmentalservices/frp_technicalreports.cfm) for Feather River spawning escapement studies from 2001 through 2008).

Second, page 11 also states, “Operation of the Project currently does not fully protect the cold-water beneficial uses. Populations of Sacramento/San Joaquin Valley Chinook salmon are at the lowest levels ever recorded. Board staff believes it is necessary to require more specific timelines in the water quality certification for completion of measures to improve water temperature so as to demonstrate protection of the cold water beneficial uses of the Feather River.” It also states, in pertinent part, that “Compliance with the water temperatures in Table 1 and 2 in the [Settlement Agreement] are necessary for the protection of cold freshwater, spawning, and migration beneficial uses of the Feather River... However, the [Settlement Agreement] lacks the required level of assurances that the water temperatures will be reduced in a timely manner. To achieve compliance with the water quality standards, the water quality certification includes conditions that will assure water temperature objectives are met.”

Based upon this reasoning, Board staff have modified the temperature requirements and related conditions set forth in Article A108 of the Settlement Agreement. The Condition S8 now includes a requirement that DWR meet new temperature requirements (rather than targets) and a new requirement that DWR operate the Project to protect the cold water beneficial uses in the High Flow channel to the extent reasonably achievable. Though DWR has informed Board staff that the studies conducted as part of the relicensing effort, as well as the record before the Board, show that these temperatures can not currently be achieved at all times. Because of the inability to always achieve the temperatures established in Article A108, the parties of the Settlement Agreement agreed that these temperatures should be targets, rather than requirements, Board staff has nevertheless retained the temperatures as requirements, although the requirement is conditioned upon possible modification by the Board Deputy Director.

The condition S8 only allows for the possibility that this temperature requirement may be modified, and only if DWR can demonstrate to the satisfaction of the Deputy Director that it cannot feasibly meet these water temperature requirements using current facilities, and within one year of such a showing it must submit an interim plan for the Deputy Director approval that includes measures to reduce water temperatures. It further states that if DWR cannot meet the water temperature requirements without facility modifications, it must submit a long-term facility modification(s) and operations plan to the Deputy

Director for approval, and such a plan must demonstrate compliance with Table S8 temperatures within ten years of license issuance. Finally, DWR may submit alternative temperature requirements to provide for the reasonable protection of the cold water beneficial uses only after any such facility modifications have been completed, and only if DWR demonstrates to the satisfaction of the Deputy Director that the temperature requirements cannot be achieved .

The inclusion of this Condition as written is not supportable based upon the evidence before Board staff. As discussed previously, the applicable standard for developing water quality certification conditions is whether a measure will reasonably, rather than fully, protect a beneficial use. The EIR not only found that current operations of the Oroville Facilities support and reasonably protect these beneficial uses, but that the Proposed Project, as set for the in the Settlement Agreement, would have a beneficial impact on them. Further, Board staff cite to no evidence to support the assertion that the operation of the Project does not currently protect the cold-water, spawning, or migration beneficial use, or that compliance with the applicable water quality standard and/or beneficial use is not currently being achieved by the Project under current conditions. Nor is there an explanation of why the cold water beneficial uses will not be met by the added benefits of implementing actions set forth in the Settlement Agreement. Board staff have not presented any evidence showing that it is necessary to set temperature requirements, rather than targets as called for in the Settlement Agreement, or to require different timelines for potential facility modifications than as set forth in Article A108.4 of the Settlement Agreement. In addition, the terms "reasonably achievable" and "to the satisfaction of the Deputy Director" are vague standards at best, and provide no measurable metric by which to determine whether DWR has met its obligations under this condition.

Finally, it should be noted that the substantial change in this condition from what is set forth in the Settlement Agreement would constitute a material modification of the Settlement Agreement, which could result in the unraveling of the Agreement. Under the Relicensing Settlement, SWRCB's inclusion of this modified requirement would constitute a material modification to or addition to any Proposed License Article in any . . . CWA Section 401 Certification issued in conjunction with the New Project License," (Settlement Agreement, Section 1.5.8), thereby giving any party the right to declare an inconsistency, and invoke the dispute resolution and withdrawal provisions of that agreement.

Based upon the discussion set forth above, DWR requests that the requirements in this Condition be made consistent with those set forth in Article A108 the Settlement Agreement.

S7 and S8 Inability to Meet Temperature Requirements Due to Events Beyond DWR's Control

This condition allows for DWR to notify the Deputy Director if it is unable to meet the temperature requirements in Sections S7 and S8 due to an event or circumstances beyond its control, along with a statement of specific actions that DWR will take to address the event and manage the coldwater pool. While DWR does not change its request that S7 and S8 be modified as set forth above, it also requests that this section include an explicit acknowledgment that if such an event or circumstances occur, that DWR will not be held in violation of the WQC.

### S9 Habitat Expansion

The inclusion of the Habitat Expansion Agreement (HEA) as a Condition of the WQC is unnecessary, and raises substantial issues related to regulatory jurisdiction and enforceability. As an initial matter, the need for the inclusion of Condition S9 is not supported by the evidence in the record. Page 12 of the draft water quality certification states, "State Water Board staff concludes that in order to provide reasonable protection for the cold freshwater, spawning, and migration beneficial uses, from the ongoing impacts the Project is having and will continue to have on those uses, expansion of habitat as envisioned in the HEA, to at least partially offset the loss of habitat caused by the Project, is necessary." As explained above, the EIR found that current operations of the Oroville Facilities support and reasonably protect these beneficial uses, and Board staff presents no substantial evidence that these uses are not currently being met. Further, the EIR concluded that this action would have a beneficial impact on the beneficial uses. (See DEIR pages 5.1-7, 5.4-14 through 5.4-15 and 5.4-20).

Moreover, the inclusion of this of the HEA in the Draft WQC has the potential to unravel both the Settlement Agreement and the HEA. If the Board includes it as a condition, this would constitute an "inconsistency" under both the HEA and Settlement Agreement for Licensing of the Oroville Facilities (Relicensing Settlement). The Relicensing Settlement contemplates the HEA strictly as a contractual obligation, and specifically excludes its measures from the list of proposed license articles agreed to in the Settlement Agreement. Thus, under the Relicensing Settlement, SWRCB's inclusion of this habitat expansion plan would constitute a material modification to or addition to any Proposed License Article in any . . . CWA Section 401 Certification issued in conjunction with the New Project License," (Settlement Agreement, Section 1.5.8), thereby giving any party the right to declare an inconsistency, and invoke the dispute resolution and withdrawal provisions of that agreement. Inclusion of the habitat expansion plan also would be materially inconsistent with the terms of the HEA, thereby triggering the parties' rights of withdrawal under that agreement.

Inclusion of the HEA would also disturb fundamental objectives of both the Settlement Agreement and the HEA. First it removes cost caps, which were essential elements of both agreements. Second, a fundamental purpose of the HEA is to contractually allocate responsibility between DWR and Pacific Gas and Electric Company (PG&E) for undertaking habitat expansion activities. Including

a condition in the WQC for the Project that requires DWR to undertake a habitat expansion plan, however, will disturb this arrangement.

The inclusion of the HEA as a WQC Condition raises complicated jurisdictional issues. Despite SWRCB Staff's assertions to the contrary, SWRCB's action of including a habitat expansion plan as a condition of the WQC risks conferring concurrent jurisdiction on FERC to oversee the scope and completion of this plan. In addition, a WQC Condition requiring DWR to prepare and undertake a post-licensing plan for habitat expansion could result in an expansion of the FERC Project boundary to include areas far from the Oroville Facilities, which is an outcome that both the Settlement Agreement and the HEA seek to avoid.

Due to the myriad of issues that the inclusion of the HEA as a condition of the WQC would raise, DWR believes that the appropriate course would be for the Board to reserve authority to impose habitat expansion measures in the event that the habitat expansion measures contemplated under the HEA are not implemented. Therefore DWR requests that this condition, which is contemplated under both the HEA and Relicensing Settlement, be rewritten as follows:

In the event the habitat expansion measures contemplated under the "Habitat Expansion Agreement for Central Valley Spring-Run Chinook Salmon and California Central Valley Steelhead" (August 2007) are not completed, the Deputy Director reserves authority to modify the conditions of this water quality certification to meet requirements of the Water Quality Control Plan for the Sacramento and San Joaquin River Basins, and to mitigate for impacts to beneficial uses, including cold water habitat, blockage of migration, and spawning habitat.

#### S12 Comprehensive Water Quality Improvement Program

S12 d) 1.) This Condition requires DWR to conduct profile measures at one meter intervals at various locations, including Lake Oroville at Dam Station 1. Measuring physical data at the Lake Oroville at Dam Station at 1 meter intervals from surface to substrate will be more time intensive requiring specialized equipment, and is not economically feasible. In the past, DWR staff has conducted profile measurements in the following manner:

- One meter intervals from surface to 30 meters depth;
- 3 meter intervals from 33 to 60 meters depth;
- 5 meter intervals from 65 to 100 meters depth;
- 10 meter intervals from 110 meters depth to substrate.

DWR requests that the one meter interval does not apply to sample areas in the immediate vicinity of Oroville Dam.



S12 l) In addition to developing a plan for the sampling for cyanobacteria, this condition contains a requirement that the plan include procedures to protect the public from harmful cyanobacteria and harmful levels of cyanotoxins. This is not a required action under the Settlement Agreement, and the requirement to protect the public from harmful cyanobacteria and harmful levels of cyanotoxins is extremely vague and does not provide a clear standard for when DWR would be found to be in violation of this requirement, if at all. There is no evidence in the record that cyanobacteria occurs within the Project boundary, and certainly no evidence that it is occurring as a result of Project operations. Further, there is no evidence in the record that methods exist to either control cyanobacteria or to fully protect the public from either the bacteria or harmful levels of cyanotoxins. DWR therefore agrees to monitor for cyanobacteria, and is amenable to posting public notifications as necessary, but requests that the requirement to protect the public from harmful cyanobacteria and harmful levels of cyanotoxins be removed.

S 13 e) This condition requires DWR to submit a plan to the Deputy Director for approval to protect public health at the North Forebay area, and if the Deputy Director determines that there is a risk to the public, DWR must develop a plan to reduce pathogens to levels necessary to protect public health. As has been explained to Board staff, it is believed that this problem may be largely due to the presence of waterfowl and other wildlife, and there are no practicable methods to remove them from the forebay or to reduce the resultant pathogens that enter the waters as a result. DWR therefore requests that the requirement to submit a plan to protect public health (beyond posting of signs and potential closures) and/or to reduce pathogen levels be removed from the WQC.

#### S15 Oroville Wildlife Management Plan

DWR reiterates its request that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth above.

#### S16 Protection of Vernal Pools

Board staff have not articulated how the prevention of take of threatened or endangered species is mandated by either the Clean Water Act or the Porter-Cologne Act, or that the duty to prevent such take lies with the Board rather than with the USFWS, which is charged with the protection of the species in question and has established the necessary protections in both the Settlement Agreement and in its Biological Opinion for the Oroville Facilities. Therefore, DWR requests that this condition be removed in its entirety. In the alternative, DWR requests that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth earlier in these comments.

#### S17 Minimization of Disturbances to Bald Eagles

Board staff have not articulated how the prevention of take of threatened or endangered species is mandated by either the Clean Water Act or the Porter-Cologne Act, or that the duty to prevent such take lies with the Board rather than with the USFWS, which is charged with the protection of the species in question and has established the necessary protections in both the Settlement Agreement and in its Biological Opinion for the Oroville Facilities. Therefore, DWR requests that this condition be removed in its entirety. In the alternative, DWR requests that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth earlier in these comments.

#### S18 Protection of Giant Garter Snake

Board staff have not articulated how the prevention of take of threatened or endangered species is mandated by either the Clean Water Act or the Porter-Cologne Act, or that the duty to prevent such take lies with the Board rather than with the USFWS, which is charged with the protection of the species in question and has established the necessary protections in both the Settlement Agreement and in its Biological Opinion for the Oroville Facilities. Therefore, DWR requests that this condition be removed in its entirety. In the alternative, DWR requests that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth earlier in these comments.

#### S19 Protection of valley Elderberry Longhorn Beetle

Board staff have not articulated how the prevention of take of threatened or endangered species is mandated by either the Clean Water Act or the Porter-Cologne Act, or that the duty to prevent such take lies with the Board rather than with the USFWS, which is charged with the protection of the species in question and has established the necessary protections in both the Settlement Agreement and in its Biological Opinion for the Oroville Facilities. Therefore, DWR requests that this condition be removed in its entirety. In the alternative, DWR requests that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth earlier in these comments.

#### S20 Protection of red-Legged Frog

Board staff have not articulated how the prevention of take of threatened or endangered species is mandated by either the Clean Water Act or the Porter-Cologne Act, or that the duty to prevent such take lies with the Board rather than with the USFWS, which is charged with the protection of the species in question and has established the necessary protections in both the Settlement Agreement and in its Biological Opinion for the Oroville Facilities. Therefore, DWR requests that this condition be removed in its entirety. In the alternative, DWR requests that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth earlier in these comments.

#### S21 Construction and Recharge of Brood Ponds

On page 16 of the draft water quality certification, Board staff cite to the need for this condition in order to “assist in protecting the wildlife habitat beneficial use.” However, as noted previously, the EIR found that all beneficial uses are reasonably protected under current Project Operations, and on DEIR page 5.2-22 that this action, along with a number of other wildlife enhancement actions, would enhance the wildlife habitat beneficial use. Board staff has not presented any evidence that this beneficial use is not being met, or that this particular condition is necessary to reasonably protect, rather than enhance, the beneficial use. Therefore, DWR requests that this condition be removed in its entirety. In the alternative, DWR requests that the Board remove the requirement for final approval of this plan by the Deputy Director for the reasons set forth earlier in these comments.

### **III. Comments on General Conditions**

G2: This condition imposes a general obligation to comply with “all applicable requirements” of the Basin Plan without specifying those requirements. The vagueness of the condition is exacerbated by the qualifier “except as may be modified by the specific conditions of the certification.” DWR assumes that it is the responsibility of the certifying agency, in this case the Board, to determine the applicable Basin Plan requirements and incorporate those in the WQC. DWR intends to comply with the WQC. In addition, the Board’s broad interest in Basin Plan compliance is protected by the reservations of authority in Conditions G9, G10 and G11. This general condition should be deleted as vague and unnecessary.

G3: This condition also suffers from vagueness and requires the licensee to comply with future unknowns. It suggests that changes in water quality standards could supersede the specific conditions in the WQC and thus the FERC license. DWR believes this condition is unnecessary because Conditions G9, G10 and G11 reserve the Board’s authority to modify the WQC to ensure compliance with water quality objectives and beneficial uses including changes to those objectives and uses. Finally, the condition requires the licensee to “take all reasonable measures to protect the beneficial uses” of the river without specifying those measures. As stated above, DWR believes it is the certifying agency’s responsibility to determine what specific measures should be included in the WQC to protect beneficial uses; and DWR intends to comply with the WQC. This general condition should be deleted as vague and unnecessary.

G6: This condition appears to seek to establish independent, direct enforcement of the WQC outside of the FERC process. However, the conditions of the WQC become conditions of the FERC license by operation of law. It is well established that any remedies to a FERC license must be sought before FERC, subject only to judicial review in the U.S. courts of appeals. (*City of Tacoma v. National Marine Fisheries Service*, 383 F.Supp. 2d 89 (D.D.C. 2005)).

Therefore, DWR disagrees that there are “any remedies, penalties, process or sanctions” outside of a license amendment or compliance proceeding at FERC for enforcement of the WQC.

G7: This condition is overbroad in several respects. It says DWR must get Board approval for “any change” to the Oroville Facilities, including *but not expressly limited* to changes that affect the WQC. This could result in interference with FERC dam safety and engineering review of project changes, as well as other project changes that have no effect on the WQC. In contrast, Condition 5 of the Board’s recent WQC for DWR’s license amendment to Project 2426 for the reoperation of Pyramid Dam reads as follows:

Licensee must submit any change to the California Aqueduct Hydroelectric Project that affects the operation of Pyramid Dam *that would have a significant or material effect on the findings, conclusions, or conditions of this certification* to the Deputy Director for prior review and written approval. [emphasis added]

G9: DWR notes that exercise of the reserved authority would be subject to notice and opportunity for hearing under Condition G12.

G10: DWR notes that exercise of the reserved authority would be subject to notice and opportunity for hearing under Condition G12.

G11: DWR notes that exercise of the reserved authority would be subject to notice and opportunity for hearing under Condition G12.

G13: Elsewhere in its Comments DWR addresses the Attachment A measures on a case by case basis.

#### **IV. Comments on Mitigation, Monitoring and Reporting Plan**

Water Quality Page 2, Mitigation Measure 1: More clarification from the Board is needed here for instream work. The side channel work called for Article A103 of the Settlement Agreement consists of alterations to the course of a stream, but most of the Best Management Practices (BMPs) proposed under the mitigation measure, such as, the re-seeding, mulching, and slope stabilization, do not apply to instream work since they were developed for erosion control in forest and construction operations. More importantly, most of the riffles that will be affected are static features, basically with gravel that has not moved in over 40 years, with resultant very low permeability in the subsurface. DWR will need to break these riffles up to remove the accumulated fines to increase permeability. DWR is also proposing to rake the coarse cobbles on the surface into windrows to stabilize supplementation gravel. The Sacramento River Water Quality Control Plan specifies that for natural turbidities between 1 and 5, increases in turbidity cannot exceed 1 NTU. DWR requests that exceptions be made to the

Plan to allow for the increased turbidity, otherwise the called for activities will have to be modified to the detriment of the fish. DWR requests clarification on appropriate BMPs for in-river construction activities.

Water Quality Page 2, Mitigation Measure 2: This measure calls for measures to be implemented as necessary to reduce or mitigate impacts to black bass in the Thermalito Afterbay from reduced water temperatures that may impact black bass. It states that plans for construction of facilities modifications required in condition S8 (and corresponding Settlement Agreement Article A108) must include measures to reduce or mitigate potential black bass habitat degradation. DWR requests that this mitigation measure be removed from the MMRP. The EIR recognized that potential future facilities modifications may have an adverse impact on warmwater fisheries in the Thermalito Afterbay, and stated that this potential impact would be fully evaluated in subsequent project-specific CEQA analysis.

This mitigation measure, as written, does not allow for a decision to be may made as to whether mitigation for any adverse impacts to the black bass in the afterbay is warranted or should be adopted after the project-specific analysis is completed. CEQA allows for a project to move forward without fully mitigating for all impacts if the lead agency adopts a Statement of Overriding Considerations. The action called for in A108 and S8 are for the benefit of coldwater beneficial uses and listed species. Black bass are neither native nor endangered, and mitigation for any impacts to the population in the afterbay may not be justified after project-level analysis. Further, as noted on page 3-8 of the Final Environmental Impact Report for the Oroville Facilities Relicensing, the water bodies within the Project boundary, which reasonably includes the Thermalito Afterbay, are considered cold water bodies for the purposes of the beneficial uses analysis. Therefore, the requirement to mitigate for any potential impacts to warm water fish in the Thermalito Afterbay is not only premature, but also unwarranted as a requirement to protect a beneficial use in the Basin Plan. DWR therefore requests that this mitigation measure be removed from the MMRP.

Wildlife Resources, page 5, Mitigation Measure 3: This measure calls for, among other things, that surveys be conducted prior to beginning construction. It does not specify the type of survey to be conducted, the parameters of such surveys, etc. DWR therefore requests that the Board clarify this requirement. DWR also requests that the term "to the extent required by those agencies." DWR also requests that the seventh bullet be amended to read "Retain mature trees to the extent possible and minimize use of non-native landscaping." This will allow for more flexibility in carrying out the projects, which will be designed in consultation with and permitted by the applicable wildlife agencies, including USFW and DFG.