



February 23, 2010

Mr. Russ Kanz
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000
Via email: rkanz@waterboards.ca.gov

RE: Comments to Draft: In the matter of Water Quality Certification for the Department of Water Resources – Oroville Facilities, Federal Energy Regulatory Commission Project No. 2100

Dear Mr. Kanz:

The State Water Contractors (SWC) and the Metropolitan Water District of Southern California (MWD) (collectively SWC/MWD) provide the following comments to the above referenced Draft Water Quality Certification (Draft WQC). The SWC/MWD appreciate the opportunity to comment on the staff Draft WQC before the State Water Resources Control Board (Water Board) issues a final version. The SWC/MWD also thank the Water Board staff for granting the SWC/MWD's request for an extension of time to file these comments by February 23, 2010.¹

The Settlement Agreement (SA) underlying the new license application at the Federal Energy Regulatory Commission (FERC)² is supported by over 70 parties, including all of the state and federal resource agencies that participated in the relicensing effort, and represents a balance that protects the resources of the Feather River, the interests of the communities around Lake Oroville, interests of various NGOs, and the water supply and economic interests of the licensee Department of Water Resources (DWR) and the SWC/MWD.

¹ See February 9, 2010 email correspondence between Water Board Staff Counsel Marianna Aue and State Water Contractors counsel Thomas M. Berliner.

² See *Settlement Agreement for Licensing the Oroville Facilities, FERC Project No. 2100 (SA)* filed March 24, 2006 in FERC Docket No. P-2100.

The Water Board states that the SA “contains a process to address water quality certification conditions that are inconsistent with the SA”,³ but the SA indicates that such process will occur only if no party initiates dispute resolution.⁴ The SWC/MWD believe that if the Draft WQC becomes final as written, the resulting changes to the FERC license will disrupt the balance reached in the SA. Therefore, the SWC/MWD request that the Water Board reconsider the terms of the Draft WQC in light of the comments below and undertake revisions to the Draft WQC in order to avoid jeopardizing a finely tuned and broadly supported SA, as well as to avoid the necessity of considering dispute resolution under the SA or withdrawal from the Habitat Expansion Agreement (HEA).⁵

In Section 5 of the Draft WQC, the Water Board reviews, critiques, and in several cases modifies certain measures set forth in the SA addressing biological resources. These modifications are reflected in the specific conditions (S1 through S22) and general conditions (G1 through G13) set forth in Section 6 of the Draft WQC. The instant comments will not review each and every proposed modification to the SA that is contained in the Draft WQC, but rather focus on (1) general concerns with the Water Board’s proposed conditions as they relate to the Water Board’s authority to impose such conditions, and (2) certain specific conditions in the Draft WQC.

I. The Water Board’s Authority Under Section 401 of the Clean Water Act (CWA)

The Water Board has the authority to condition Section 401 Certification upon limitations necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law.⁶ However, the U.S. Supreme Court has noted that “that authority is not unbounded.”⁷ Other courts have noted that Section 401 authorizes states to impose *only*

³ Draft WQC, at 3.

⁴ See SA, Section 4.5.2.1 (Section 401 Certification Inconsistent with Settlement Agreement): “If the California State Water Resources Control Board issues the Section 401 Certification and any provision of the Section 401 Certification is inconsistent with the Settlement Agreement, this Settlement Agreement shall be deemed modified to conform to the provisions of the Section 401 Certification, unless a Party provides notice to the other Parties that it objects to the Inconsistency and initiates dispute resolution within 30 days after the issuance of the Section 401 Certification.”. See also Section 11.2.2 (Materially Inconsistent Water Quality Certifications) of the August 2007 *Habitat Expansion Agreement for Central Valley Spring-Run Chinook Salmon and California Central Valley Steelhead* (HEA): “In the event the SWRCB either: (a) issues a water quality certification pursuant to Section 401 of the Clean Water Act (“401 Certification”) for inclusion in any of the New Project Licenses that is materially inconsistent with the terms of this Agreement; (b) fails to explicitly state in any such 401 Certification that the SWRCB will exercise any reserved authority relative to Fish Passage in such a manner that is consistent with the terms of this Agreement; or (c) denies 401 Certification for any of the Feather River Hydroelectric projects, then any party shall have the right to withdraw from this agreement.”

⁵ The SWC/MWD would be willing to discuss an “Appendix B” type of approach regarding issues of concern to the Water Board that are not appropriately included in a Section 401 Certification.

⁶ The state certification “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [Sections 301, 302, 306, or 307 of the CWA] ... and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.” 33 U.S.C. § 1341(d).

⁷ *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (“PUD No. 1”), 511 U.S. 700, 712 (1994).

conditions that relate to water quality,⁸ and states' authority under Section 401 is "circumscribed in notable respects."⁹

The Water Board has acknowledged the limits of its jurisdiction. For example, in a 2007 decision discussing mitigation measures, the Water Board noted "the mitigation can and should be adopted by the FERC and placed as conditions in the License" however, it is "legally infeasible for the State Water Board to ensure the implementation of mitigation measures that are outside the scope of the State Water Board's jurisdiction under section 401 of the Clean Water Act."¹⁰ In a 2003 decision regarding fishery protection and water right issues on the lower Yuba River, the Water Board indicated the geographical bounds of its authority within a particular proceeding: "Modification or regulation of out-of-basin factors goes beyond the issues under consideration in this proceeding and, in some cases, beyond the jurisdiction of the SWRCB."¹¹

Therefore, to the extent that the Water Board seeks to impose conditions in the Draft WQC that relate to waterways other than the Feather River (such as the HEA), to terrestrial resources, or to any other non-jurisdictional matters, the Water Board has exceeded the scope of its authority.

The Draft WQC also exceeds the Water Board's authority in other fundamental ways. Certain Draft WQC conditions are based on an incorrect and unduly strict "fully protect the beneficial use" standard.¹² The correct standard under EPA regulations is that a Section 401 certification must include conditions necessary to achieve "reasonable assurance" of compliance

⁸ *American Rivers v. FERC*, 129 F.3d 99, 107 (2nd Cir. 1997) ("This is plainly true. Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."), citing *PUD No. 1*, at 712.

⁹ *Id.* at 115 ("First, applicants for state certification may challenge... any state-imposed condition that exceeds a state's authority under § 401. In so doing, licensees will surely protect themselves against state-imposed *ultra vires* conditions. Second, even assuming that certification applicants will not always challenge *ultra vires* state conditions, the [Federal Energy Regulatory] Commission may protect its mandate by refusing to issue a license which, as conditioned, conflicts with the [Federal Power Act]. In so doing, the Commission will not only protect its mandate but also signal to states and licensees the limits of its tolerance"). On the issue of FERC's exclusive authority over licensing and regulation of the hydropower project itself, see generally *California v. FERC*, 495 U.S. 490 (1990).

¹⁰ In the Matter of Petition for Reconsideration of PACIFIC GAS & ELECTRIC COMPANY; Water Quality Certification of the Pit 3, 4, and 5 Hydroelectric Project Federal Energy Regulatory Commission Project Number 233, Order No. WQ 2007-0001, 2007 Cal. ENV LEXIS 37, at *15-*16.

¹¹ In the Matter of FISHERY RESOURCES AND WATER RIGHT ISSUES OF THE LOWER YUBA RIVER Involving Water Right Permits 15026, 15027, and 15030 Issued on Applications 5632, 15204, and 15574 of Yuba County Water Agency, Licenses 3984 and 3985 Issued on Applications 9927 and 12371 of Cordua Irrigation District License 4443 Issued on Application 9899 of Hallwood Irrigation District, and Other Water Divisions by Various Parties Under Claim of Riparian Rights, Pre-1914 Appropriative Rights, and Contractual Rights, Revised Decision 1644, 2003 Cal. ENV LEXIS 103, at *69 (emphasis added).

¹² *See, e.g.*, Draft WQC, at 3-4. ("State Water Board staff reviewed the PM&E measures in both Appendices A and B of the SA to determine which of the measures are necessary for the operation of the Project to meet the water quality standards in the Basin Plan. The following measures from Appendices A and B, as amended herein, are necessary for the Project to *fully protect the beneficial uses*: [list of measures]... State Water Board staff has determined that certain measures as written in the SA are either not enforceable, will not *fully protect the beneficial uses*, or will not meet water quality standards in a timely manner.") (emphasis added).

with water quality standards.¹³ California law similarly provides for the “reasonable protection of beneficial uses.”¹⁴ The water quality conditions in the SA clearly meet the “reasonable assurance” standard without the modifications in the Draft WQC. The Water Board has erred in making changes to the SA conditions to comport with a stricter standard that finds no support in applicable law.

The Draft WQC has also exceeded the Water Board’s authority by changing SA temperature conditions in a manner that is unsupported in the record, including extensive National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) analysis¹⁵ that has been prepared by FERC and DWR. Indeed, the Draft WQC contains no analysis of the potential environmental impacts of certain changes it makes to SA temperature conditions. This not only is counter to NEPA and CEQA but also contrary to the requirement that all FERC license conditions, including those adopted through the Section 401 process, must be supported by “substantial evidence.”¹⁶

II. Comments on Specific Conditions in Draft WQC

A. Feather River Temperature Requirements

The Draft WQC states: “Compliance with the water temperatures in the Tables 1 and 2 in the SA are necessary for the protection of cold freshwater, spawning, and migration beneficial uses of the Feather River. State Water Board staff understands the complexities of designing, permitting, and constructing some of the proposed facilities modifications. However, the SA lacks the required level of assurances that the water temperatures will be reduced in a timely manner.”¹⁷ The Draft WQC proposes to modify the temperature agreements contained in the SA to convert temperature targets to temperature prescriptions.¹⁸

The adoption of temperature targets was an intensively reviewed and discussed issue in the context of the FERC Alternative Licensing Process (ALP). The ultimate goals are to meet the temperature requirements at Robinson Riffle that are set forth in Table 1 through operational

¹³ 40 C.F.R. § 121.2(a)(3). The EPA regulations require that state water quality standards include an antidegradation policy to ensure that “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12 (a)(1). Only upon a finding that such “degradation” is necessary “to accommodate important economic or social development in the area in which the waters are located” shall the state assure “water quality adequate to protect existing uses *fully*.” 40 C.F.R. § 131.12 (a)(2) (emphasis added). *See also* Cal. Water Code § 13160 (Water Board is “authorized to give any certificate or statement required by any federal agency pursuant to any such federal act that there is reasonable assurance that an activity of any person subject to the jurisdiction of the state board will not reduce water quality below applicable standards....”).

¹⁴ Cal. Water Code § 13050(h) (“water quality objectives” means “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.”).

¹⁵ *See* NEPA, 42 U.S.C. §§ 4321, *et seq*; CEQA, Cal. Pub. Res. Code §§ 21000, *et seq*.

¹⁶ 16 U.S.C. § 8251 (“The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”); *see also* *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659 (D.C. Cir. 1996).

¹⁷ Draft WQC, at 11.

¹⁸ Draft WQC S7 and SA 107.

and physical measures (SA Article A108.1¹⁹) and to manage, to the extent reasonable, the temperatures at the FERC boundary below the outlet from the Thermalito Afterbay that are set forth in Table 2 based on proven achievable results (Article A108.2).

More specifically, Table 1 contains the temperature requirements for Robinson Riffle, which are, in fact, targets until Facilities Modifications are constructed. Table 2 contains the target temperature compliance levels measured at the downstream project boundary and is intended as a starting point for the development of Table 2A, which will be developed based on a five year testing period of Facilities Modifications. Article 108 requires DWR initially to attempt to meet temperatures specified in Table 1 by means of operational changes (curtailing pumpback, removing shutters at the Hyatt intake, increasing flows), but specifies that prior to construction of Facility Modifications the Table 1 (Robinson Riffle) temperatures are targets only, and no license violation occurs if the targets are not met. Upon completion of the Facility Modifications, Table 1 temperatures become requirements except under extreme circumstances that are referred to as “conference years.”

Draft WQC S8 requires the Licensee to meet Table 1 requirements, and if unable to do so, to demonstrate to the Water Board that it cannot do so using current facilities, and within one year of license issuance to submit to the Water Board a plan that includes measures to reduce water temperatures. If DWR cannot meet Table 1 temperature requirements without Facilities Modifications, S8 further requires DWR within three years of license issuance to submit a long-term facilities modification and operation plan to the Water Board that demonstrates compliance with Table 1 requirements within ten years of license issuance. If – after Facilities Modifications are complete – DWR demonstrates that it cannot meet Table 1 requirements, DWR shall propose alternate Table 1 requirements to the Water Board for approval. Although the Draft WQC indicates that the water temperatures in the Table 2 are necessary for the protection of beneficial uses of the Feather River as noted above, there is no mention of Article 108 Table 2 (HFC temperature targets as measured at the downstream project boundary) in Draft WQC S8.

The Water Board proposes that the temperature requirements to support anadromous fish become prescriptive, rather than remain targets for the first 10 years following license issuance. The Water Board further states that if DWR can demonstrate that compliance is impossible or unreasonable using existing facilities to meet the temperature requirements, the Deputy Director will relax the prescription in some unstated manner. Apparently the Water Board has not reviewed the extensive temperature studies that were included in the record, nor has it considered that both the EIS and the EIR support the water temperature provisions set forth in the SA.

The resource agencies have recognized that it is impossible to meet the temperature requirements on a reliable basis until a temperature control device is developed and implemented. That is why the targets remain in place until facility modifications are completed. The Water Board’s modification of this proposal is without support in the record. Similarly without support is the contention of the Water Board staff that “the SA lacks the required level of assurances that the water temperatures will be reduced in a timely manner.” Article 108 contains a mandate that temperatures will be met by completion of facilities modification. Prior to

¹⁹ All future references to Articles shall be a reference to the designated Article number as set forth in the Settlement Agreement filed with FERC on March 24, 2006. (*See supra* n. 2)

completion of facilities modification, temperatures will be met the vast majority of the time. Based on modeling completed as part of the Reconnaissance Study of Potential Future Facilities Modifications (DWR 2006), temperature requirements at Robinson Riffle were exceeded in 40 weeks of the 30-year period of record, representing a 97-percent level of compliance on a weekly basis.²⁰ The Article sets forth a deliberate and defined process, and the Appendix B agreement – that DWR commence a Facilities Modification reconnaissance study prior to license issuance – already has been met. Therefore, it is readily apparent that the temperature provisions of the SA satisfy the standard of “reasonable assurance” of compliance with water quality standards.²¹

Further, the Water Board has not prepared any environmental documentation that addresses the impact of compliance with a water temperature prescription. Among the likely impacts would be depletion of storage in Lake Oroville, significant depletion of the cold water pool behind Oroville Dam, and potentially the substantial loss of clean renewable hydropower with the attendant increases in greenhouse gases. The EIS and the EIR both recognize and support the need for further modification as set forth in the SA. Regarding Article 108 (Flow/Temperature to Support Anadromous Fish) FERC’s final EIS states: “DWR has proposed a reasonable time frame for investigating, reporting, and possibly modifying facilities to allow operational flexibility that would ensure release of colder water in the Feather River. We note that even if DWR does not modify their facilities, the lower water temperatures would become requirements thereby helping to ensure that colder water temperatures would exist in the Feather River.”²²

The Draft WQC is ambiguous in requiring that DWR use “existing facilities” to meet temperature requirements for the low-flow reach, and it could be construed to include use of the river valve.²³ Condition S8 provides no clarification to this ambiguity in its requirement that “Licensee shall operate the project to not exceed the water temperatures in Table S8.” The Draft WQC refers to the July 22, 2009 incident (in which five DWR staff were injured) that occurred while testing the river valves at Oroville Dam after repairs had been made that were in part intended to increase the flow rates through the valves.²⁴ The Draft WQC adds a condition that the licensee submit within six months of license issuance a plan and schedule for repair or refurbishment of the river valves, which shall include the steps and time necessary to evaluate, design, and complete the repair or refurbishment of the river valves. Clearly, Water Board staff must acknowledge that compliance with the Table 1 temperature requirement is not possible at license issuance. It is unreasonable to include such a mandatory condition considering the many factors set forth above.

In light of the foregoing, the SWC/MWD recommend including the proposed SA Article 108, as originally proposed, in the project license because this program “would improve habitat suitability in terms of lower water temperatures and provide the maximum weighted usable area

²⁰ See Department of Water Resources’ December 2006 “Reconnaissance Study of Potential Future Facilities Modifications - Oroville Facilities Settlement Agreement Implementation - FERC Project No. 2100” (transmitted to Russ Kanz on January 5, 2007).

²¹ See discussion of “reasonable assurance” standard *supra*.

²² FEIS, Section 5, Staff’s Conclusions, at p. 370.

²³ Draft WQC, at 11.

²⁴ See Draft WQC, at 9.

for anadromous fish in the low flow and high flow channels.”²⁵ Similarly, the environmental impacts analysis in DWR’s EIR states: “Potential future structural modifications under SA Article A108 designed to further reduce water temperatures would likely further enhance the migration of Chinook salmon by enhancing the suitability of coldwater fisheries immigration water temperatures farther downstream in the lower Feather River. These potential future facilities modifications would be subject to a subsequent environmental analysis to determine the relative benefits and impacts on coldwater migration and to develop appropriate mitigation measures prior to selection and approval by DWR and FERC.”²⁶ The Water Board’s proposed requirements set forth in S8 neglect the various considerations of the resource agencies that developed Article 108, and the support for that approach by FERC staff in the EIS and by DWR in the EIR.

B. Habitat Expansion Agreement

The Water Board has exceeded its authority by including the HEA²⁷ in the Draft WQC. In the Draft WQC, the Water Board 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.”²⁸ However, contrary to the Water Board’s characterization, as described in the HEA itself, the specific goal of the HEA is to expand habitat sufficiently *within the Sacramento River basin*, to accommodate an increase of approximately 2,000 to 3,000 spawning spring-run Chinook salmon (which is also expected to accommodate some amount of habitat for spawning steelhead).²⁹

²⁵ FEIS, Section 5, Staff’s Conclusions, at p. 370.

²⁶ Draft EIR, at p. 5.2-25.

²⁷ August 2007 *Habitat Expansion Agreement for Central Valley Spring-Run Chinook Salmon and California Central Valley Steelhead* (HEA). See <http://www.sac-basin-hea.com/Shared%20Documents/Habitat%20Expansion%20Agreement%20Aug07COMPLETE.pdf>

²⁸ Draft WQC at 12. The Specific condition reads as follows: “S9. Habitat Expansion. Within two years of license issuance, the Licensee shall complete identification, evaluation and recommendation of habitat expansion action(s) to expand spawning, rearing and adult holding habitat to accommodate a net increase of 2,000 to 3,000 spring-run Chinook salmon for spawning. If the final habitat expansion plan developed through the Habitat Expansion Agreement (HEA) includes a schedule for completion of the recommended actions, is submitted to the Deputy Director for review, modification as appropriate, and approval within two years of license issuance, and is timely and appropriately implemented, the Licensee shall be deemed to have met the requirement for habitat expansion. For the purposes of this condition, if the Deputy Director does not either act on the Licensees’ request for approval of the plan or identify the need for additional information or actions within 60 days of submission, the plan shall be deemed approved. The State Water Board reserves the authority, delegated to the Deputy Director, to modify this condition if the goals of the habitat expansion plan are not met within the timelines in the plan, or if the Licensee withdraws from the HEA before the approved, final habitat expansion plan is fully implemented. If Pacific Gas and Electric Company (PG&E) does not agree to the plan, or refuses to implement the HEA, and the Licensee so requests, the Deputy Director will modify this condition as necessary to provide that the Licensee’s responsibility is consistent with only the Licensee’s share of the loss of habitat attributable to both PG&E’s upstream facilities and the Project.” Draft at 33-34.

²⁹ See HEA, Section 2.2 (Habitat Expansion Threshold): “The specific goal of the Agreement is to expand spawning, rearing and adult holding habitat sufficiently to accommodate an estimated net increase of 2,000 to 3,000 Spring-Run for spawning (“Habitat Expansion Threshold”) in the Sacramento River Basin, as compared to the habitat available under any relevant Existing Requirements or Commitments. The Habitat Expansion Threshold is focused on Spring-Run as the priority species, as the expansion of habitat for Spring-Run typically Accommodates Steelhead as well.”

The Water Board's authority with respect to Section 401 certification is limited to protection of beneficial uses of the Feather River.³⁰ In its July 2009 draft Biological Opinion for the Oroville Facilities, the National Marine Fisheries Service (NMFS) recognized that the HEA does not protect beneficial uses on the Feather River.³¹ The HEA likely will not be implemented on the Feather River, therefore the Water Board has no authority pursuant to Section 401 to require a FERC licensee to undertake a project in another watershed. Given that the HEA was never designed to protect beneficial uses on the Feather River, that it likely will be implemented in a different watershed, and that its purpose is to expand habitat for salmonids in the Sacramento River basin, the Water Board's contention that the HEA is designed to protect beneficial uses in the Feather River is arbitrary and capricious.

Furthermore, habitat in the Feather River will be enhanced for beneficial uses through the multiple protection, mitigation, and enhancement measures (PM&Es) being implemented through the SA. At no point has it been documented that the PM&Es are insufficient to protect beneficial uses in the Feather River. Enhanced habitat for salmonids will be provided through a variety of PM&Es, including:

- improved access to the cold water pool in Lake Oroville
- increased flows in the LFC to provide the maximum area of suitable spawning habitat potentially available to Chinook salmon
- temperature management in the LFC and HFC to improve water temperature conditions for spawning, egg incubation, rearing and holding habitat
- in-river improvements including gravel replenishment to mitigate for the cumulative impacts of the project on the quantity and quality of spawning gravels available for steelhead and Chinook salmon
- placement of woody debris to provide in-stream cover and increase the salmonid juvenile rearing habitat quality of shallow-edge habitats within riffles, glides, and pools
- creation of spawning side channels to increase the quality and complexity of salmonid spawning and rearing habitat
- riparian and floodplain improvements to improve the quantity and quality of juvenile salmonid rearing habitat
- high flow event velocity refuge for juvenile salmonid rearing; and other measures.

These measures were approved in the SA and the NMFS biological opinion.

³⁰ See discussion *supra*, at Section I.

³¹ See July 2, 2009 Oroville Dam Draft Biological and Conference Opinion, filed in FERC Docket No. P-2100, at Section 3.4.13 (Habitat Expansion Agreement): "NMFS reserves its authority under Federal Power Act Section 18 to prescribe the construction, operation and maintenance of fishways for the project during the term of the license as provided in the HEA."; Section 6.2.2 (Oroville Dam and Blockage of the River Channel): "Although the exact locations have not been determined, the long-term implementation of the Habitat Expansion Agreement is designed to increase the abundance, spatial distribution, and ultimately the genetic or life history diversity of the CV spring-run Chinook salmon and CV steelhead, and reduce the risks to the ESU related to catastrophic events. *The HEA will have no effect on the spring-run Chinook salmon in the Feather River.*" (emphasis added). The same is true for the other fisheries that are the subject of the draft Biological Opinion, including steelhead, winter run Chinook salmon and green sturgeon.

Since development of the HEA is still underway, the Water Board concedes it is “impossible for this certification to specify the locations for habitat expansion actions.”³² Therefore the Water Board proposes to establish a “performance goal consistent with the HEA.”³³ However, what is known is that the Feather River has not been selected as a site for the HEA.³⁴ By proposing an uncertain “flexible” condition that establishes a specific performance goal that is alleged to be “consistent with the HEA” but that does not limit the Water Board’s ability to reject a plan that otherwise would comply with the HEA, the Water Board staff’s proposed Draft WQC impermissibly seeks to expand the Water Board’s authority.

The Draft WQC also “*reserves the authority to modify the condition* if the goals of the habitat expansion plan are not met within the timelines in the plan, if Pacific Gas and Electric Company does not implement or participate in the plan, or if the DWR withdraws from the HEA before the approved, final habitat expansion plan is fully implemented.”³⁵ This condition essentially grants the Water Board unlimited discretion to impose future obligations on DWR, which deprives DWR of the certainty to which it is entitled as a FERC licensee.³⁶ By reserving the ability to amend the criteria even if DWR has apparently complied with the HEA, the Water Board has issued a condition that is vague and illusory, thereby exposing the licensee to an arbitrary standard.

The inclusion of the HEA is troubling not only from a legal perspective, but also from a policy perspective. The HEA is an off-license agreement, not a part of the SA, and not intended to be subject to FERC’s jurisdiction. The HEA itself is the product of intensive negotiations and represents a carefully crafted multi-party settlement of a complex issue – the viability of fish passage to the upper Feather River watershed under a prescriptive Federal Power Act (FPA) Section 18 approach³⁷ versus the enhancement of habitat for salmonids in the Sacramento Valley. Needless to say, the viability of fish passage was seriously questioned and through the creative work of multiple parties, a solution was devised under the SA that met the interests of NMFS in increasing spawning habitat in the Sacramento Valley. A key provision of the HEA was that it not be included in the FERC license for either DWR or PG&E. By including it in the final WQC, the Water Board would bring the HEA under the FERC license – an inappropriate act that was neither intended nor expected by the parties that crafted its terms, and one that could result in greatly complicating HEA implementation. For example, it serves as an open invitation to FERC to impose its views, including its opposition to cost caps, on habitat matters that the Settlement Parties believe are best resolved outside the FERC forum.

The significant departure from the terms of the HEA by the Water Board staff proposal sends a negative message to those inclined to enter into off-license settlements to resolve issues with resource agencies that otherwise might result in contested proceedings in the relicensing

³² Draft WQC at 13.

³³ *Id.*

³⁴ The proposed HEA projects are located on the Yuba River and the Battle Creek Three-River complex. See <http://www.sac-basin-hea.com/Draft%20Habitat%20Expansion%20Plan/Draft%20Habitat%20Expansion%20Plan.pdf>

³⁵ Draft WQC at 13 (emphasis added).

³⁶ 16 U.S.C. § 799. See also *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983) (the Federal Power Act “was designed to insure that the licenses granted by FERC promote secure licensee expectations.”).

³⁷ 16 U.S.C. § 811 (2005).

process. The NMFS has touted the HEA as a successful model for resolving such resource disputes. By its proposed condition, staff is jeopardizing all such future settlements. Accordingly, the SWC/MWD recommend that the Water Board strike the provisions relating to the HEA from the Draft WQC. If the Water Board is interested in an off-license agreement such as those set forth in Appendix B of the proposed license, the SWC/MWD would welcome such a discussion.

C. Modification of the Schedules to Undertake or Complete Biological Resource Actions

The Water Board staff has modified several of the schedules for implementing biological resource actions. Generally, the Water Board staff provides no rationale for modifying these schedules, and these modifications are without support in the record.

For example, the Water Board staff has changed the schedule for submittal of the first comprehensive monitoring and adaptive management summary report for the Lower Feather River Habitat Improvement Plan,³⁸ from the sixth year following license issuance (as set forth in SA) to the fifth year following license issuance. The Water Board staff has compressed the schedule for gravel replenishment³⁹ from a minimum of ten years after license issuance to a mandatory review and approval of a gravel replenishment plan within eight years of license issuance and to accomplish gravel restoration by the tenth year. Without evidentiary support, the Draft WQC simply states that this measure is necessary to protect the cold fresh water, spawning and migration beneficial uses of the Feather River.⁴⁰ However, the Water Board staff fails to mention that gravel replenishment is occurring at the front end of the license and therefore there will have been extensive gravel replenishment in the first year of the license, and that the agreed-to biological need for further replenishment should be considered in the tenth year following the last gravel replenishment program.

The initiation and completion timelines were reviewed extensively by the resources agencies that participated in the ALP. The resource agencies gave consideration to issues of practicality, workload, the ability to approve various plans, and the ability to secure related permits in a timely manner. Given the substantial Water Board staff workload associated with the many actions required by the SA in this relicensing and other regulatory proceedings involving the Water Board in California, it is unreasonable to arbitrarily compress timelines without showing related environmental benefits.

D. Comprehensive Water Quality Monitoring Program

The Draft WQC states: “State Water Board staff agrees that the development of a water quality monitoring plan is important to ensure the water quality affected by the project meets the water quality standards.”⁴¹ The Draft WQC adds the following condition, in which the Water Board reserves the authority to require the Licensee to conduct studies and, if appropriate, develop a methyl mercury management plan:

³⁸ See Draft WQC S1 and SA Article 101.

³⁹ See Draft WQC S2 and SA Article 102.

⁴⁰ See Draft WQC, at 5.

⁴¹ Draft WQC, at 14.

The State Water Board reserves the authority to require Licensee to conduct studies and, if appropriate, develop a methyl mercury management plan. If ongoing or future research and monitoring data indicate that the reservoirs or other aspects of power operations increase mercury methylation rates, the Deputy Director may require Licensee to prepare and submit for approval a study plan, including studies, to identify: (1) DWR's contribution to the methyl mercury problem; (2) potential measures to reduce the amount of methylated mercury in the waters affected by Licensee's operations, as well as to protect human health; and (3) an evaluation of the feasibility of those measures. ... The Deputy Director reserves jurisdiction to require a plan to address any Basin Plan violations identified in this monitoring which the Deputy Director finds the project causes or to which it significantly contributes."⁴²

Depending on the level of sampling required by the Water Board (number of locations, frequency, and laboratory procedures required), the development and implementation of this plan, and other related plans,⁴³ could represent a significant new cost to the licensee. Mercury management is a state-wide problem for which management solutions have been elusive.⁴⁴ The SWC/MWD agree that DWR should respond to reasonable public policy regarding solutions, but that DWR should not be held to a standard that is different than required in other similar circumstances. The current Draft WQC language should not be open-ended and should instead require DWR to implement a mercury management plan that is consistent with state-wide policy.

In addition, the Draft WQC states "Staff has also become aware that cyanobacteria have been observed in Lake Oroville. Certain types of cyanobacteria can produce cyanotoxins that are harmful to humans, pets, and wildlife. The water quality certification includes conditions that the water quality monitoring plan includes cyanobacteria monitoring, testing for cyanotoxins, and procedures for protecting the public from cyanotoxins. The condition in the water quality certification improves enforceability of the monitoring plan described in the SA."⁴⁵ Accordingly, the Draft WQC adds several conditions, including the following:

Within six months of license issuance the Licensee shall submit a plan to the Deputy Director for modification and approval to protect the public from harmful cyanobacteria. The plan shall include sampling locations, sampling methodology, and laboratory procedures to monitor for the presence of harmful cyanobacteria and cyanotoxins within Project waters. The plan shall include procedures for protecting the public from harmful levels of cyanotoxins. The plan shall be consistent with the Statewide Guidance for Blue-Green Algae.⁴⁶

⁴² Draft WQC, at 39-40. The Draft WQC also adds the following provision: "The Program shall use accepted methodologies for field sampling and laboratory analysis and shall be consistent with State of California's Surface Water Ambient Monitoring Program Quality Assurance Program Plan." Draft WQC, at 35-36.

⁴³ See also the addition of a condition at S14 (Public Education Regarding Risks of Fish Consumption): "The plan shall include the collection and analysis of fish tissues and if necessary, the posting of consumption advisory notices at key locations."

⁴⁴ See, e.g., http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/lakes_study/lakes_report_v1.pdf

⁴⁵ Draft WQC, at 14.

⁴⁶ Draft WQC, at 39.

The algal bloom in Lake Oroville most likely was due to elevated phosphorus levels from the Middle Fork of the Feather River. Any monitoring plan should take into consideration the likelihood of elevated levels of phosphorus being the causative agent for cyanobacteria blooms. Monitoring should be limited to summer periods when water temperatures rise to 18°C or higher, providing the temperature regime necessary for blooms to occur, and should be limited to visual scans in areas known to have historical elevated levels of phosphorus and/or where blooms have been reported to occur in the past. Procedures for protecting the public should be limited to posting signs at boat launch ramps warning against water contact until the bloom exhausts itself.

E. Use of the HFC for Spawning.

The Draft WQC states that “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.”⁴⁷

The SWC/MWD submit that this is a factually incorrect statement and may well be the unsubstantiated basis for the Draft WQC conclusion that beneficial uses are not being “fully protected” under the SA. As is indicated in the DWR Final Report for SPF-10, Tasks 1D and 1E, June 2004⁴⁸ and Task 2B,⁴⁹ 38 percent of the spawning Chinook population in the lower Feather River spawn in the High Flow Channel (HFC), *i.e.*, below the Thermalito Afterbay Outlet. The actual number of fish spawning in the HFC are expected to increase under the new license as in-stream and riparian corridor improvements are implemented and some facilities modification is constructed to reduce water temperatures.

Also, the Draft WQC states that “Water temperature monitoring in 2002 and 2003 showed that the temperature of water released from Thermalito Afterbay was as much as 11.3°F higher than that of incoming water. DWR concluded that increased incidence of disease, developmental abnormalities, increased in-vivo egg mortality, and temporary cessation of migration could occur due to elevated water temperatures in some areas of the lower Feather River. Operation of the Project currently does not fully protect the cold-water beneficial uses.”⁵⁰ This statement also appears to reference the Final Report for SPF-10.⁵¹

⁴⁷ Draft WQC, at 7.

⁴⁸ Final Report, SPF-10, Executive Summary, at RS-1 (“However SP-F10 Task 1D conceptually overlaps with other study plans and information presented in the Final Reports associated with SPF10 Task 2B and SP-F10 Task 2C also help elucidate the effects of water temperatures on pre-spawning adult salmonid production.”)

⁴⁹ *Id.* at 6-3 (“Fewer Chinook salmon spawn in the HFC than in the LFC. Escapement estimates, based on carcass survey data from 2000 through 2003, suggest that only 38 percent of the spawning Chinook salmon population in the lower Feather River spawn in the HFC.”)

⁵⁰ Draft WQC, at 11.

⁵¹ Final Report for SPF-10, Tasks 1D and 1E, June 2004, at RS-2, RS-3 (“Daily and weekly thermograph water temperature data never exceeded the index value of 20°C (68°F) during the 2003 adult spring-run Chinook salmon immigration and holding period. Therefore, continued operation of the Oroville facilities in a manner consistent with current operations would be expected to result in water temperatures conducive to adult spring-run Chinook salmon immigrating and holding in the lower Feather River.”), and at 6-3 (“Pre-spawn mortality estimates also were high in the LFC, during periods when water temperatures were within acceptable water temperature ranges, suggesting that water temperature may be only partially responsible for pre-spawn mortalities”).

There is no argument that elevated water temperatures can be problematic for adult Chinook salmon in “some areas” and during “some periods of time” in the Feather River. However, the same can be said for every salmon river in the Central Valley, including natural rivers considered to be “ideal” for salmonids, such as Deer, Mill and Butte Creeks. In fact, historical surveys indicate that spring run on the San Joaquin River tolerated warmer temperature quite well. Nevertheless, Articles A107, A108, and B108 of the settlement agreement were developed to reduce the periods of time and areas in the Feather River when and where temperature may be problematic for salmon. As noted in the DWR reports cited herein, continued operation of the Project consistent with current operations is expected to result in acceptable water temperatures to support spring-run Chinook immigrating and holding, and pre-spawn mortality is not simply a function of water temperature but is likely a complex interaction of multiple factors. The Draft WQC should be revised consistent with these facts.

III. General Comments on Draft WQC

A. Potential Modification of the Settlement Agreement (SA)

The Draft WQC states that the SA contains a process to address water quality certification conditions that are inconsistent with the SA.⁵² That statement incorrectly characterizes certain sections of the SA, in that what is actually provided is a dispute resolution mechanism (Section 5) and for the potential withdrawal from the SA by an aggrieved party (Section 6). There is no simple mechanism for modifying the SA, as it is a finely balanced agreement that weighed a multitude of factors in arriving at a balanced and workable agreement. The signatories recognize the delicate balance that was achieved by the SA and signed onto it in appreciation of the need to address biological, recreation, and other issues comprehensively and in a manner that was practical, result-oriented, and affordable.

B. Land-Based Activities

In granting certification pursuant to Section 401(d), the Water Board is authorized to set forth any limitations necessary to assure that the applicant will comply with any limitations under Section 303 of the CWA⁵³ and with any other appropriate requirement of state law. In the context of Section 303 of the CWA, a “water quality standard” specifies a body of water’s designated uses and water quality criteria, taking into account the *water’s* use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, as well as its use and value for navigation.⁵⁴

The Draft WQC includes several measures that are solely related to activities on land. For example, the Draft WQC includes conditions related to the Oroville Wildlife Management Plan (S15), protection of vernal pools (S16), minimization of disturbances to nesting bald eagles (S17), and protection of valley elderberry longhorn beetle (S19). These conditions precisely mirror those listed in the SA; however, the SA was not limited to activities reasonably related to

⁵² Draft WQC, at 3 (“However, the SA also contains a process to address water quality certification conditions that are inconsistent with the SA.”).

⁵³ 33 U.S.C. § 1313.

⁵⁴ 33 U.S.C. § 1313(c)(2)

water quality, and these matters were appropriately covered in therein. To the extent that the Draft WQC imposes conditions that relate to terrestrial wildlife, the Water Board has exceeded its authority and these conditions should be eliminated from the Draft WQC.

C. *The General Conditions Raise Concerns Regarding the Extent of the Water Board's Authority.*

1. *Several Draft WQC Conditions Are Overbroad*

SWC/MWD have two key concerns regarding the General Conditions included in the Draft WQC (Conditions G1-G13). First, the General Conditions contain numerous broad reservations of authority proposed by the Water Board staff to unilaterally amend or otherwise reopen the certification and the new license (G1, G8, G9, G10 and G11). Second, the Draft WQC Condition G7 purports to require that the licensee submit “any change to the Oroville facilities” to the Board for review and approval. These conditions are beyond the Board’s authority.

a. *Lack of Authority to Modify 401 License Conditions Unilaterally*

The terms of a Section 401 certification only have force and effect when they are included as conditions in a federal license or permit, such as a hydroelectric license. The inclusion of Section 401 conditions in a federal hydroelectric license does not change the federal nature of the license, nor does it create separate state authority to amend the terms of the license. Such authority resides with the licensing agency, in this case FERC.

Section 401 establishes a framework for states to incorporate into a federal license or permit requirements necessary to achieve “reasonable assurance” of compliance with water quality standards.⁵⁵ However, Section 401 certification is not an open-ended process that extends throughout the term of a hydroelectric license. Instead, it is a one-time occurrence in the context of a federal licensing process. A state certifying agency such as the Water Board must act on a certification “within a reasonable period of time (which shall not exceed one year)” after receipt of a request for certification.⁵⁶ Therefore, the Board may not reserve authority in a Section 401 certification to unilaterally require additional measures after the one-year deadline. This reading of the CWA was affirmed by the U.S. District Court for the Western District of Washington in *Airport Communities v. Graves*.⁵⁷ The District Court concluded that the one-year time bar in Section 401 means that any conditions issued following the one-year period should be treated as recommendations rather than as requirements.⁵⁸

EPA regulations lend further support to the conclusion that that Water Board does not have unilateral authority to amend its Section 401 certification and the FERC license. The regulations provide that the “certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the

⁵⁵ 40 C.F.R. § 121.2(a)(3).

⁵⁶ 33 U.S.C. § 1341 (a)(1).

⁵⁷ 280 F.Supp. 2d 1207 (W.D. Wash. 2003).

⁵⁸ *Id.* at 1215.

Regional Administrator.”⁵⁹ Consequently, for the terms of the Section 401 certification and the license to be changed over the course of the license, FERC and the licensing agency must agree, along with others.

In addition, Section 6 of the FPA provides that a hydroelectric license “may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days’ public notice.”⁶⁰ In other words, FERC and the licensee are authorized by the FPA to amend a license, but that authority does not extend to the Water Board.

Therefore, both the CWA and FPA make clear that the Water Board may not unilaterally alter the terms and conditions of a FERC license by adding new or modified conditions through a reservation of authority in a Section 401 certification. Instead, to the extent that it seeks to modify the terms of the certification through a reservation of authority or otherwise, the Water Board must petition FERC to make such modification pursuant to FERC’s reserved authority to reopen the license.

b. Lack of Authority to Require Board Approval of Any Change to Project

Condition G7 of the draft certification also improperly requires the licensee “to submit any change to the Oroville Facilities, including project operation 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.” The terms of a Section 401 certification must concern water quality.⁶¹ By requiring that “any change to the Oroville Facilities” be submitted to the Water Board for review and approval regardless of whether such a change concerns water quality, the Water Board goes well beyond the water quality authority bestowed upon it under Section 401 of the CWA. For example, as currently drafted, Condition G7 requires that any change to the Oroville Project concerning non-water quality matters such as dam safety, recreation, or wildlife would have to be submitted first to the Water Board for its review and approval prior to being submitted to FERC.

EPA regulations expressly provide that a Section 401 certification shall include “any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity...”⁶² Requiring the licensee to seek Water Board approval of any change to the Project, including those that have absolutely no relationship to the “discharge of the activity” is unlawful.

By purporting to place the Water Board in the role of regulating virtually every aspect of the Oroville Project, the Draft WQC also violates the FPA. The Supreme Court has held that it was Congress’s intent to enact “a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within

⁵⁹ 40 C.F.R. § 121.2 (b).

⁶⁰ 16 U.S.C. § 799.

⁶¹ See, e.g., *American Rivers v. FERC*, 129 F.3d 99, 107 (2nd Cir. 1997).


⁶² 40 C.F.R. § 121.2 (a)(4).

the reach of the federal power to do so.”⁶³ The Court went on to say that “the detailed provisions of the act providing for the federal plan of regulation leave no room or need for conflicting state controls.”⁶⁴ More recently, the Supreme Court in *California v. FERC* held that the FPA preempted California’s regulation of minimum stream flows.⁶⁵ In addition, the U.S. Court of Appeals for the Ninth Circuit has also affirmed that the FPA occupies the regulatory field for FERC-licensed projects and prevents state regulation for anything other than proprietary rights to water.⁶⁶ The Water Board’s authority under the CWA is broad.⁶⁷ However, it does not extend to matters wholly unrelated to water quality.


IV. Conclusion

The SWC/MWD understand that the Water Board is granted considerable authority to impose conditions in its final WQC. The SWC/MWD also recognize that the Draft WQC represents an enormous amount of effort on the part of the Water Board staff. Nevertheless, the SWC/MWD respectfully request that the Water Board consider the comments set forth herein, and issue its final WQC consistent with the SA. With respect to matters covered by the Draft WQC that are not addressed herein, the SWC/MWD submits that it has reviewed and concurs with DWR’s comments on the Draft WQC to the extent not inconsistent with these comments.

Respectfully yours,


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⁶³ See *First Iowa Hydro-Elec Coop. v. FPC*, 328 U.S. 152, 180 (1946).

⁶⁴ *Id.*

⁶⁵ 495 U.S. 490 (1990).

⁶⁶ See *Sayles Hydro Associates v. Maugham*, 985 F. 2d 451, 456 (9th Cir. 1993).

⁶⁷ See *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).