

**DEPARTMENT OF WATER RESOURCES**

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December 10, 2010

Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
Division of Water Rights  
P.O. Box 100  
Sacramento, CA 95812-0100  
Via email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**Re: Comments on Revised Draft Water Quality Certification for Relicensing of Oroville Facilities, Federal Energy Regulatory Commission Project No. 2100**

Dear Ms. Townsend:

The Department of Water Resources (DWR) submits the comments below on the December 3, 2010, State Water Resources Control Board's (Board) Revised Draft Water Quality Certification for the relicensing of the Oroville Facilities, FERC License No.P-2100 (Revised Draft WQC). Pursuant to the Board notice, DWR is providing comments only as to the changes shown to Condition S9 in the Revised Draft WQC. DWR comments herein are supplemental to our prior submitted written comments and we request the Board refer to all of DWR's comments for a complete discussion of DWR's concerns and suggestions in this and other matters regarding adoption of a WQC for the Oroville Facilities.

The Revised Draft WQC includes four options addressing habitat expansion actions that the Board may consider for including in the final WQC. DWR appreciates the Board's willingness to resolve this issue by having these four options for discussion. DWR has reviewed each option and prefers adoption of Option 4 with some modification, as explained below. DWR understands that PG&E also is recommending Option 4. In addition, the State Water Contractors also are recommending Option 4 with some modification.

Option 1

Option 1 is the same as that considered by the Board on October 5 and on which DWR submitted written comments on September 27<sup>th</sup>. DWR reasserts the concerns and opposition to language in this option as explained in our comments of February 23, April 8, and September 27, 2010. DWR believes that the language in this option would require DWR to implement the habitat expansion actions in order to satisfy the condition. The condition would be part of the FERC license and therefore FERC would have approval authority over the scope and implementation of the habitat expansion measures, a situation that the parties to the Settlement Agreement for Licensing of the Oroville Facilities (Settlement Agreement) and also parties to the Habitat Expansion

Agreement (HEA) agreed to avoid. In addition, based on FERC's decisions and policies, the actions required by this condition would result in the expansion of the FERC Project No. 2100 boundary to include an area, or areas, miles from the Oroville Facilities and possibly within the boundaries of other licensees. For these reasons, DWR believes this option would create inconsistency between the Licensing Settlement Agreement and WQC and thus increase the likelihood that the HEA and/or Settlement Agreement may be terminated.

## Option 2

Option 2 is the same as Option 1 but it includes a clause that would extinguish the condition after the Board Deputy Director determines that the goals of the HEA have been achieved based on advice by the National Marine Fisheries Service (NMFS). This option includes, however, the same language requiring DWR to implement the habitat expansion measures and thus, DWR has the same concerns as explained in comments about Option 1 above. Although DWR would prefer Option 4, as modified below, to Option 2, if the Board chooses to follow the staff recommendation and adopt option 2, DWR requests that it be modified to avoid the concerns noted above. DWR believes that the revisions below are necessary so that the condition is extinguished upon NMFS advice that there is an approved Habitat Expansion Plan (HEP) as provided in the HEA. We believe this could minimize jurisdictional conflicts with FERC.

Within two years of license issuance, the Licensee shall complete identification, evaluation and recommendation of habitat expansion actions 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), is accepted by National Marine Fisheries Service, including ~~includes~~ a schedule for completion of the recommended actions, and 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 purpose of this condition, if the Deputy Director does not either act on the Licensee's 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. This term is extinguished when the Deputy Director is advised by ~~determines upon advice from~~ the National Marine Fisheries, that it has approved a Habitat Expansion Plan pursuant to the HEA.

In the event the habitat expansion measures contemplated in the HEA or are not completed and the National Marine Fisheries Service (NMFS) seeks to compel fish passage pursuant to Section 18 of the Federal Power Act as provided in Section A109 of the Settlement Agreement, the State Water Board reserves the authority, delegated to the Deputy Director, to modify this condition of this water quality certification to seek fish passage or other appropriate measures for the purposes of mitigating impacts to migration and spawning habitat on the Feather River as caused by the Oroville Facilities, If NMFS and/or DOI seek to compel

~~fish passage, the State Water Board will not seek to require fish passage in a manner different than that of NMFS and/or the Department of Interior, or implementation of an off-site habitat expansion plan. 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 the 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.~~

### Option 3

DWR finds Option 3 objectionable because it would be inconsistent with the Settlement Agreement. Option 3 would require DWR to develop a habitat expansion plan, which would become part of the FERC license, and which, as explained above in comments to Option 1, parties of the Settlement Agreement agreed to avoid. This inconsistency would make the Settlement Agreement vulnerable to withdrawal by the parties.

### Option 4

DWR understands Option 4 reserves to the State Board Deputy Director the authority to reopen the WQC to consider imposition of fish passage or other measures if the habitat expansion plan under the HEA is not implemented. DWR understands that such a reserved authority would be asserted as provided by General Condition G12 in the Revised Draft WQC and would include notice and opportunity for a hearing before modifying the WQC. DWR believes this Option would be most consistent with the Settlement Agreement because it would establish that, at this time, the Board is not taking any action on habitat expansion under the WQC. Under this approach, FERC would not need to assert oversight of the HEA and its implementation, unless at some later time the Board should reopen the issue because the HEA is not implemented. DWR requests some modifications to Option 4, however, to clarify that any later actions to address this issue is consistent with NMFS decisions regarding fish passage. DWR requests that the Board modify the Option as follows, as shown by DWR's underline and strikeout language:

The State Water Board reserves the authority consistent with General Condition 12, delegated to the Deputy Director, to seek to require fish passage or other measures in the event National Marine Fisheries Service or the Department of Interior seek to compel fish passage pursuant to Section 18 of the Federal Power Act and as provided in the Settlement Agreement because if the final habitat expansion plan developed through the Habitat Expansion Agreement is not implemented. If National Marine Fisheries Service or the Department of Interior seek to compel fish passage, the State Water Board will not seek to require fish

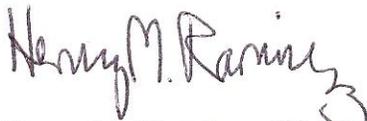
passage in a manner different than that of NMFS and/or DOI, or implementation of an off-site habitat expansion plan.

DWR adds the last sentence to clarify that it is not the Board's intent to have DWR carry out both a habitat expansion program and a fish passage program if fish passage on the Feather River is ultimately implemented. DWR is concerned that the options as currently drafted leave open the possibility that if the goals of the HEA and/or Condition S9 are not met, DWR could be in a position where the WQC requires DWR to implement a modified habitat expansion program while NMFS requires fish passage pursuant to Section 18 of the Federal Power Act; or that DWR may have requirements to implement two separate and different fish passage programs.

DWR believes that the reservation of the Board's jurisdiction to reopen the WQC will meet the Board's need to assert authority to address habitat expansion and fish passage if needed. DWR understands that it is the intent of the Board to ensure that the goal of the HEA is met. That goal is set forth in paragraph 2.2 of the HEA, which states, "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."). Paragraph 15.3 the HEA provides that the exclusive remedy for either a material breach of the HEA or withdrawal from the HEA by either Pacific Gas and Electric (PG&E) or DWR, shall be for a party to the HEA to impose or seek conditions for fish passage in the new project license. DWR believes that this requirement assures the Board that, should the HEA not be satisfied, fish passage proposals will be sought by NMFS and others before FERC, and the State Board through its reserved jurisdiction.

DWR appreciates the opportunity to comment on the above Options and will be available at the December 15 hearing to respond to any questions the Board may have on our comments.

Sincerely,



Henry M. Ramirez, Chief  
Hydropower License Planning and Compliance Office