



California Sportfishing Protection Alliance

“An Advocate for Fisheries, Habitat and Water Quality”

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February 16, 2010

Russ Kanz
Division of Water Rights
State Water Resources Control Board
Sacramento, CA
Via e-mail

RE: COMMENTS on the second Oroville Relicensing Draft 401 Certification, Oroville Facilities P-2100-134

Dear Mr. Kanz:

CSPA has reviewed the January 21, 2010 draft of the 401 Certification for the Oroville Facilities issued for the relicensing of those facilities (FERC #2100).

In July, 2009, CSPA commented on an earlier draft (June 23, 2009) of this 401. Our previous comments are attached as an appendix to this letter, and are incorporated by reference. While there are some improvements to the earlier document (e.g. measure S12n includes the possibility of requiring licensee to conduct studies relating to mercury as well as development of plan), and a few areas we consider to have been weakened (reduced certainty that licensee will be compelled to comply with water temperature requirements), our overall response is similar to our response in October, 2009.

The present Draft 401, like the previous draft, improves upon the Settlement Agreement for the Oroville relicensing in that it creates enforceable standards for various certain required measures, where the Settlement Agreement did not. However, notably in the case of Section S8c (requirements to meet water temperatures in the Low Flow section of the lower Feather River), the January Draft backslides from the earlier version in that it does not definitively require facilities modifications to comply with temperature requirements. Rather, the present Draft 1) allows the Deputy Director, Division of Water Rights added discretion to approve facility modification or modifications, thus offering the possibility that the most effective measures may not be implemented, for reasons such as cost; 2) assures Deputy Director approval of a plan if he or she does not act within 90 days; 3) allows the Deputy Director discretion to determine that it is not feasible to meet the temperature requirements; and 4) allows the Deputy Director discretion to set new

temperature requirements based on a proposal from licensee. In effect, the present draft places much greater emphasis on the decision of the Deputy Director than the earlier draft, which simply and objectively required compliance within ten years. This revision runs counter to the overall effort to create enforceability in the 401, and should be revised to create objective, enforceable standards. Considering the worst ever overall escapement of Central Valley salmon in 2009, the timeline should also be shortened to six years.

Similar construction of the requirements in Section S8f (requirements to meet water temperatures in the High Flow section of the lower Feather River) gives the Deputy Director equally excessive discretion, and again places excessive burdens on the Deputy Director to approve a plan or else allow the possibility of a critical change for the worse. Given the history of the administrative and political pressure placed on the State Water Resources Control Board by the Department of Water Resources, the State Water Contractors, and a series of state Governors, an objective requirement would be create more certainty of resource protection.

The present Draft 401, like the previous draft, separates the operation of the Oroville Facilities from the operation of the State Water Project for which Oroville Reservoir is the largest storage facility. In so doing, the Draft fails to protect beneficial uses, particularly relating to water quality, in the lower Feather River and in river and Delta waters downstream. Section S8e retains the flawed approach that we criticized in the earlier draft, that a “normal operation of the Project” could be assumed as given without conditions placed upon it by the 401. If a requirement is not made in the 401 to protect the cold water pool in Lake Oroville, there is little likelihood that such a requirement ever be made. The apparent plan of the National Marine Fisheries Service (whose Draft Biological Opinion circulated last July we have also criticized) is to issue a No Jeopardy Biological Opinion for the project separate from its Biological Opinion for the Operations and Criteria Plan of the State Water Project and Central Valley Project, where it appropriately found jeopardy. We can therefore not expect a cold water pool management prescription from NMFS.

Over the last three years, the “normal operation of the Project” appears to have been to supply as much demand as possible and export as much water through the Delta pumps as physical and regulatory constraints allowed. This has left the storage in Oroville Reservoir at just over 1 million acre-feet in the winter of 2008 and 2009; a repeat of 2007 water conditions in 2010 would likely have led to a “conference year” under the settlement and under the Draft 401.

It is well known that there is permanent systemic pressure on Oroville Reservoir to provide more water than the Feather River system is capable of producing. While over 4 million acre-feet per year are contracted by the State Water Project, the average delivery is approximately 2.1 million AF. The lawsuit over the Monterey Amendments that was successfully pursued by the Planning and Conservation League and others went directly to the issue of “paper water” promised but not delivered. The threat to the cold water pool in Oroville Reservoir is in black and white.

Little evident regard has been paid to fishery resources in the lower Feather River in the actual operation over the last three years, particularly in consideration of carryover storage. Protection of these resources, and especially compliance with the water temperature component and other water quality parameters of the Central Valley Basin Plan and with the Settlement Agreement temperature targets, is part of the responsibility inherent in the issuance of a 401 Certification under the Clean Water Act. To simply punt this issue now would leave a regulatory gap that shows every symptom of becoming permanent.

Thank you once again for considering our comments on the Draft 401 Certification for the relicensing of the Oroville Facilities.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Chris Shutes", with a long horizontal flourish extending to the right.

Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance

Certificate of Service

I, Chris Shutes, hereby certify that I have on this day in Berkeley, California served on each party on the official service list for the Oroville Facilities, P-2100-134, a copy of these comments on the draft 401 Certification for the Oroville relicensing, addressed to Mr. Russ Kanz of the State Water Resources Control Board.

February 16, 2010

A handwritten signature in cursive script, appearing to read "Chris R. Shutes", with a long horizontal flourish extending to the right.

Christopher R. Shutes

Appendix:

CSPA letter to Russ Kanz, SWRCB

on the first public draft of the

401 Certification for the Oroville Facilities,

July 29, 2009



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"An Advocate for Fisheries, Habitat and Water Quality"

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July 29, 2009

Russ Kanz
State Water Resources Control Board
Via e-mail

RE: COMMENTS on the Oroville Relicensing Draft 401 Certification, Oroville Facilities P-2100-134

Dear Mr. Kanz:

Thank you for the opportunity to comment on the Oroville Relicensing Draft 401 Certification (Draft 401), a document that has been distributed informally over the last two weeks.

In considering the Draft 401, CSPA has reviewed the following additional documents: National Marine Fisheries Service's Biological and Conference Opinion for the Central Valley Project and State Water Project Operations and Criteria Plan for salmon, steelhead and green sturgeon (OCAP BO); NMFS's Oroville Dam Draft Biological and Conference Opinion (Draft BO for Oroville); the Department of Water Resources' draft and final EIR's for relicensing the Oroville Facilities (DEIR and FEIR); the Federal Energy Regulatory Commission's draft and final EIS's for relicensing the Oroville Facilities (DEIS and FEIS); and the Oroville Settlement Agreement. CSPA has commented previously on the DEIS, the DEIR, and the Draft BO for Oroville.

The great strength in this Draft 401 is summarized in the following paragraph from page 4:

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. Beneficial uses currently impacted by the Project may not be reasonably protected if the proposed measure has a management plan with unclear or unenforceable standards, an excessively long period prior to implementation, or unspecified implementation dates. State Water Board staff modified each measure to provide assurance that the beneficial uses will be reasonably protected.

The standards of enforceability, protection of beneficial uses, and timeliness are critical standards that are lacking in some measure in all of the additional documents cited above. While CSPA may disagree with Board Staff on whether it has applied these standards appropriately in particular aspects of the Draft 401, CSPA commends Staff for having raised these standards explicitly and having made them determinative.

Timeliness and protection of beneficial uses has been substantially improved in the Draft 401, when compared to the DEIR and the Settlement Agreement, on the following measures:

A102 Gravel Augmentation: The Draft 401 recognizes the need for defined study in the High Flow Channel (HFC) on a defined timeline, and the need for rapid implementation of gravel augmentation should that study determine that augmentation in the HFC would be beneficial to anadromous fish.

A105: Fish Weir Program: The Draft 401 appropriately shortens the timeline for implementation of this measure.

A106: Riparian and floodplain improvements: time for completion is cut in half when compared to the Settlement.

A107: Hatchery Water Temperatures: Targets become requirements.

A108 and B108: Flow and Water Temperatures for Anadromous Fish: Table 1, which gives temperature requirements in the Low Flow Channel, becomes mandatory immediately, without a phase-in period. Table 2, which gives the requirements for the High Flow Channel, becomes mandatory within 10 years, and makes submittal of a plan for achieving these temperatures, evidence that these temperatures are not presently achievable, and interim measures all subject to a one year deadline.

CSPA would like to see the requirements for temperatures in the High Flow Channel become mandatory within six years rather than ten. That should give DWR sufficient time to plan and carry out any facility modifications needed to achieve these temperature requirements.

CSPA is also concerned with the acceptance by the Board of the Conference Year allowance. We discuss this issue below.

Habitat Expansion Agreement: The Draft 401 wisely reserves to the Deputy Director for Water Rights the ability to exercise jurisdiction should the HEA fail to achieve stated goals in a timely manner. However, the Draft 401 does not question the HEA's goal of restoring 2000-3000 spring-run Chinook salmon somewhere in the Sacramento Valley. This target number is the artifact of both modeling and negotiation; CSPA finds it completely implausible that the historic number of spring-run and steelhead combined in the Feather River system was limited to escapement of 2000-3000 adult fish. In order to

“protect beneficial uses,” the Board, if it is to accept the HEA at all, should establish distinct goals for spring-run and for steelhead that are commensurate with the impact of the blockage of fish passage by both Oroville Dam and the PG&E hydropower dams on the NF Feather River. Moreover, the Board should make those revised goals obligatory, regardless of cost.

The Settlement Agreement requires the marking of Spring-run salmon that are produced in the Feather River Fish Hatchery. The Board should take the opportunity to require a separate marking system for all salmon and steelhead produced at the hatchery, in anticipation of a measure that needs to be implemented at hatcheries statewide. As it becomes abundantly clear that hatcheries have impacts on native fish populations that are not entirely beneficial, it is necessary to mitigate the mitigation. The only consistent argument against this measure is cost. The funding source (DWR) is identifiable and available; this should be part of the mitigation package for this relicensing.

In our comments on the DEIR, CSPA described the inadequacy of the CEQA document produced by DWR, notably in its consideration of the Project separate from the operation of the State Water Project. This flaw in the CEQA document for this project becomes critical in consideration of “Conference Years,” years in which water is ostensibly not available to meet temperature requirements in the Lower Feather River. Requirement S8(d) of the Draft 401 states in part:

If the April 1 runoff forecast in a given water year indicates that, *under normal operation of Project 2100*, Oroville Reservoir will be drawn to elevation 733 feet (approximately 1,500,000 acre-feet), minimum flows in the HFC may be diminished on a monthly average basis, in the same proportion as the respective monthly deficiencies imposed upon deliveries for agricultural use from the Project; however, in no case shall the minimum flow releases be reduced by more than 25 percent. [emphasis added]

The problem is that the CEQA document for this relicensing has not set out the “normal operation of Project 2100.” Project operation has changed since 2000, and is likely to change again considering changes in the Delta, the effects of Biological Opinions and other regulatory actions taken in the Delta, and climate change (non-exclusive list).

The disconnect in the FEIR that exists between, on the one hand, the Operations and Criteria Plan for the combined operation of the State Water Project and the Central Valley Project, and, on the other hand, the operation of Oroville becomes particularly problematic in light of the Settlement Agreement’s allowance for DWR to ease the flow requirements from the Oroville facilities should Oroville drop below 1.5 million acre-feet of storage. The storage in Lake Oroville is a combined function of meteorological conditions and human action. However, the Draft 401 makes no defined standard or restriction on human action to avoid operation of Lake Oroville through OCAP that would reduce the likelihood of operation of Oroville at low pool, either episodically or chronically. CSPA believes that this flaw is inherent in disconnecting OCAP and Oroville, and that this flaw is exacerbated by the lack of defined standards for operation

of Oroville. This flaw leaves a regulatory gap that is backstopped only by a discussion process among DWR and the resource agencies.

Assuming for the sake of argument that the Board and DWR were to successfully negotiate problems with CEQA and continue to separate the Oroville Project from the operation of the State Water Project through OCAP, the appropriate measure to protect beneficial uses in the Lower Feather River, including protection of listed species and anadromous fish in general, would be to simply specify carryover storage and coldwater pool management requirements for Oroville Reservoir independent from and without regard to downstream demands for water, or at least demands for water downstream of the Feather River.

CSPA has publicly maintained that carryover storage requirements should be mandated in the context of Delta operations in any case, and has so advocated in comments on the Bay Delta Water Quality Control Plan, and in other venues. The Board has chosen, however, not to consider carryover storage in the context of Delta operations in the Bay Delta Plan (see Draft Staff Report, Response to CSPA and C-WIN comments, May 2009).

There is, therefore, no definition anywhere of operational constraints to be imposed on Lake Oroville for the protection of beneficial uses in the Lower Feather River, notably for the protection of anadromous salmonids and sturgeon. There is no “normal operation of Project 2100,” in particular operation of cold water pool management, that is defined and enforceable. We are left, rather, with a Draft 401 that proposes a process for damage control whenever storage falls below a threshold of 1.5 million acre-feet.

This damage control, moreover, is based on a fallacious notion of balance that reduces minimum flows in the Lower Feather River in proportion to the reductions in water supply deliveries occasioned by low reservoir storage, until an absolute floor for flows is reached. This reduction is to be carried out, however, regardless of actual impacts on affected biota, including water temperature, the latter being subjected to a process of consultation with resource agencies. While water supply impacts largely affect a combination of groundwater pumping and economics, and are relatively easily quantifiable, the biological effects of reduced streamflows are frequently qualitative, and likely to become more so in the context of climate change.

The Draft 401’s limitation to the Feather River watershed, without considering Delta impacts of water supplied to the State Water Project from Oroville Reservoir, equally presents a truncated perspective that fails to address water quality impacts of the operation of the Oroville Facilities. The FEIR for relicensing the Oroville Facilities maintains that the Oroville Project is simply “one of many inputs to the hydrology of the Delta ecosystem” (p. 3-39). On the contrary, as stated by the U.S. Fish and Wildlife Service on page 202 of its Biological Opinion for Delta Smelt:

The Status of the Species/Environmental Baseline section of this document described the multitude of factors that affect delta smelt population dynamics

including predation, contaminants, introduced species, entrainment, habitat suitability, food supply, aquatic macrophytes, and *microcystis*. The extent to which these factors adversely affect delta smelt is related to hydrodynamic conditions in the Delta, which in turn are controlled to a large extent by CVP and SWP operations. Other sources of water diversion (NBA, CCWD, local agricultural diversions, power plants) adversely affect delta smelt largely through entrainment (see following discussion), but when taken together do not control hydrodynamic conditions throughout the Delta to any degree that approaches the influence of the Banks and Jones export facilities. So while many of the other stressors that have been identified as adversely affecting delta smelt were not caused by CVP and SWP operations, the likelihood and extent to which they adversely affect delta smelt is highly influenced by how the CVP/SWP are operated in the context of annual and seasonal hydrologic conditions. While research indicates that there is no single primary driver of delta smelt population dynamics, hydrodynamic conditions driven or influenced by CVP/SWP operations in turn influence the dynamics of delta smelt interaction with these other stressors (Bennett and Moyle 1996).

The 401 for the Oroville Facilities simply must address water quality impacts of project operation in the Delta.

Conclusion

The differences between the Draft 401 and the Oroville Settlement Agreement can be broken down into two basic categories: whether there is certainty that a measure will actually be carried out in a manner that protects beneficial uses, and, if so, when that measure will be carried out. While CSPA, a signatory to a number of FERC relicensing settlement agreements, appreciates the desire for a 401 Certification to line up as much as possible with a settlement document, CSPA believes that the Board is within its purview to require certainty, enforceability and timeliness to protection, mitigation and enhancement measures contemplated in a settlement. Settling parties do not have the discretion to allow a licensee to fail to conform to the law. The Board is the party with the authority under the Clean Water Act to interpret the requirements and assure compliance. To the degree that it has done so in this case, CSPA believes that it has done so appropriately.

There are some measures regarding which CSPA believes that Board staff has not lived up to the standards that it has appropriately set forth. We have pointed those out above, notably the need to expedite the implementation of water temperature requirements in the High Flow Channel.

Finally, there remain overarching issues which make the issuance of a 401 at this time problematic. The 401 is not supported by an adequate EIR. The EIR is currently being litigated by Plumas County and Butte County, over issues that include definition of the proposed project and its relation to OCAP. Concretely, this lack of definition plagues the Draft 401, when it references “normal operation of Project 2100” in Section S8(d). As

written, the Draft 401 fails to protect beneficial uses because it leaves the cold water management of Oroville Reservoir without definition and enforceability.

In addition, the Draft 401, inadequately supported by an EIR that disconnects the Feather River from the Delta, fails to protect Delta water quality, in spite of the fact that operation of the State Water Project is determinative in its influence on Delta hydrodynamics. A final 401 must connect the Project with the Delta and set forth appropriate measures for the protection of beneficial uses.

Respectfully submitted,

Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance