

State Water Resources Control Board

APR 01 2014

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Dear Secretary Bose:

RESPONSE TO YUBA COUNTY WATER AGENCY UPDATED STUDY REPORT RESPONSES AND COMMENTS ON YUBA RIVER DEVELOPMENT PROJECT; FEDERAL ENERGY REGULATORY COMMISSION (FERC) PROJECT NO. 2246; YUBA COUNTY

On March 3, 2014, Yuba County Water Agency (YCWA) submitted to FERC responses to comments filed by relicensing participants during the Updated Study Report comment period. In YCWA's letter, Section 2.2.7 *Fish Passage Assessment for Spring-run Chinook Salmon and Central Valley Steelhead*, YCWA discussed the State Water Resources Control Board's (State Water Board or SWRCB) Fish Passage Assessment Study Request (Study Request) made in the State Water Board's January 30, 2014, comment letter.

Section 2.2.7.3 of YCWA's response letter recommended that FERC deny the State Water Board's Study Request. State Water Board staff would like to provide clarification to FERC on three statements YCWA made in its March 3, 2014, comment letter:

1. Section 2.2.7.2.7 *Other Showings of Good Cause* states, "The SWRCB contends that there is a nexus between water quality certification and anadromous fish upstream of Englebright Dam. However, the Basin Plan does not include migratory anadromous salmonids as a Designated Beneficial Use, either existing or potential, in the Yuba River Basin upstream of Englebright Dam."

Page II-6.00 of *The Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (Basin Plan) lists "cold water spawning" for salmon and steelhead as a beneficial use in the Yuba River above Englebright Reservoir. (See *Id.* p. II-6, line 41 & Note 4.) Thus, a spawning beneficial use designation exists for salmon and steelhead in the upper Yuba River watershed above Englebright Reservoir. Additionally, the Basin Plan has postponed identification of surface waters having the potential to support rare, threatened or endangered species beneficial use¹ (*Id.* pp. II-2.00; II-5, Note.)

¹ Surface waters with the beneficial uses of Groundwater Recharge (GWR), Freshwater Replenishment (FRSH), and Preservation of Rare and Endangered Species have not been identified in this plan [Basin Plan]. Surface waters of the Sacramento and San Joaquin River Basins falling within these beneficial use categories will be identified in the future as part of the continuous planning process to be conducted by the State Water Resources Control Board. (Basin Plan 11-5, Note)

State Water Board staff would also like to note that the State Water Board's review for water quality certification is not limited to beneficial uses and water quality objectives identified in the basin planning process. Water quality certification may include conditions necessary to satisfy any appropriate requirements of state law (see 33 U.S.C. 1341 (d)), and the State Water Board considers a range of other water quality-related requirements in its water quality certification process, including the application of the public trust doctrine and the California Constitution's requirements for reasonable use and reasonable methods of use and diversion. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; Cal. Const., art. X, § 2.) Therefore, while the Basin Plan here does, in fact, identify the beneficial use of waters upstream of Englebright as spawning habitat for steelhead and salmon, this determination is not the only relevant source of the State Water Board's authority in seeking additional information.

2. Section 2.2.7.2.1 *Criterion 1 – Material Changes in Laws and Regulations* YCWA states, "The SWRCB did not base its request on material changes in applicable law and regulations, or the implementation of those laws and regulations."

The Code of Federal Regulations (CFR) Title 18, Section 5.19(e) states:

"Any proposal for new information gathering or studies pursuant to paragraphs 9(c)(1)-(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, *as appropriate to the facts of the case*, a statement explaining:

1. Any material changes in the law or regulations applicable to the information request..."

State Water Board staff's Study Request addressed CFR Title 18, Section 5.19(e) "as appropriate to the facts of the case." The CFR does not specify that a study request must be based on material changes in applicable law and regulations, or the implementation of those laws and regulations, rather, by requiring discussion of "any" such changes, it provides for inclusion of this information when appropriate. Here, the request is not based on a change in law or regulations. The request is based on a change in circumstances and available information, and on the State Water Board's information needs in complying with the California Environmental Quality Act and in evaluating the water quality certification application for the Project, once received. As noted in the State Water Board's January 30, 2014, Updated Study Report Comment Letter, documents developed as part of the Yuba Salmon Forum's effort (*Fish Passage Infrastructure Report* and *Draft Summary Habitat Analysis*) provide significant new information that became available after the Initial Study Report comment period. See the State Water Board's January 30 letter for additional information.

3. Section 2.2.7.2.3 *Criterion 3 – Why Request Was Not Made Earlier* YCWA states, "The SWRCB has not provided any additional information regarding Project nexus." The Project nexus information in the Study Request satisfies the FERC criteria listed in CFR, Title 18, Section 5.9(b). State Water Board staff refers FERC staff to the State Water Board's January 30, 2014, Updated Study Report Comment Letter, Appendix A, for additional information on staff's determination of Project nexus.

If you have questions related to this letter, please contact me at 916-341-5321 or through email at parker.thaler@waterboards.ca.gov. Written correspondence should be addressed as follows:

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Sincerely,



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