

BEFORE THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of

Water Quality Certification for the
Oroville Hydroelectric Project

FERC Project No. 2100

GOLDEN GATE SALMON ASSOCIATION
AND
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
PETITION TO REOPEN AND AMEND
THE WATER QUALITY CERTIFICATION
FOR THE OROVILLE HYDROELECTRIC PROJECT

On December 15, 2010, the State Water Resources Control Board (SWRCB or Board), acting pursuant to Section 401 of the federal Clean Water Act, U.S.C. § 1341, issued a water quality certification (Certification) to the State Department of Water Resources (applicant) for the Oroville Hydroelectric Project (Project), Federal Energy Regulatory Commission (FERC) Project No. 2100. On September 24, 2010, prior to issuance of a certification for the Project, Golden Gate Salmon Association (GGSA), California Sportfishing Protection Alliance (CSPA), and other fishing groups submitted comments on a draft certification urging the Board to issue a permit adequately protective of the beneficial uses of water, including migration, spawning habitat, and cold freshwater habitat for anadromous fisheries. GGSA and CSPA hereby request that the Board re-open and amend the certification to address operational aspects for the reasonable protection of the migration, spawning habitat, and cold freshwater habitat for anadromous fish.

Based upon new information that has come to light since late 2010, we have become concerned that the final Project certification did not include flow standards sufficiently protective of migration, spawning, and cold freshwater habitat for anadromous species, including federally listed and managed species residing in the Feather River. Specifically, we are concerned that the March to May flow requirements contained in the permit are not adequate to allow for the successful migration and spawning of green sturgeon, a federally threatened species under the Endangered Species Act. Moreover, increased flows that would benefit green sturgeon during this period would also help

improve outmigration success for listed Central Valley steelhead, listed chinook salmon, and commercially valuable fall run chinook salmon, all species vital to our communities, heritage, and businesses.

We believe the Board has an obligation to address these issues. Section G9 on page 49 of the Oroville Certification affords the State Water Board the ability “ to modify the certification if monitoring results indicate that continued operation of the Project would violate water quality objectives or impair the beneficial uses of the Feather River.” As described in more detail below, monitoring results clearly show impairment of the cold freshwater habitat and spawning and migration beneficial uses in the Feather, and the Board must resolve the ongoing impairment.

2010 - 2011 MONITORING RESULTS AND FISHERY INFORMATION

In late 2010 and early 2011, a series of wet winter and spring storms resulted in an abundance of water throughout California. Oroville Reservoir filled to its maximum storage level and was forced to pass excess runoff downstream, resulting in high spring flows within the Lower Feather River. During this period the Department of Water Resources (DWR) discovered the presence of green sturgeon within the Feather River.¹ Green sturgeon were found as high as the fish barrier dam, the uppermost barrier to anadromous fish. Until this recent discovery, green sturgeon and their use of the Feather River has been the subject of significant debate: National Marine Fisheries Service (NMFS) lists the Feather River as critical for green sturgeon survival, while DWR has claimed that green sturgeon do not spawn or consistently utilize the river, focusing on the lack of emigrating juveniles. It should be noted that other sightings and anecdotal evidence reinforce the importance of the Feather River to green sturgeon.² After DWR regained control of the Project they rapidly curtailed flows to the minimum allowed under the existing license. (These minimums are largely unchanged in the Certification/Settlement Agreement.) In response, green sturgeon moved downstream from the low flow channel and possibly ceased spawning activity during the peak of their spawning period.³ Despite this setback, some green sturgeon fertilized eggs were identified within the lower Feather River, signifying a successful mating attempt.⁴ However, this change in behavior resulting from DWR’s curtailment of river flows constitutes unlawful take of a threatened species .

While this was the first confirmed case of green sturgeon spawning in the Feather River, had sufficient flows been provided in preceding years it is likely that they could and would have regularly utilized this critical habitat.⁵ However, in all but the wettest flood conditions DWR does not pass sufficient flow for green sturgeon to ascend several upstream barriers, including Shanghai Bench, Sunset Pumps, and Steep Riffle. Some of these barriers are natural obstructions, while others include diversion dams and other man-made structures. High spring flows of sufficient duration and magnitude may also be

¹ See Attachment A, *Lower Feather River Sturgeon Information, Compiled in July 2011*, Jessica Seesholtz, DWR.

² See Attachments B, C, D, and E.

³ *Final Assessment Of Potential Sturgeon Passage Impediments, SP-F3.2 TASK 3A*, USFWS 1995, p. 3-7. Catch data indicate that most green and white sturgeon spawning in the Feather River occurs between March and May.

⁴ See Attachment C, *Summary of Egg Verification by U.C. Davis Animal Sciences Feather River Green Sturgeon Eggs Collected from Egg Mats during 2011*.

⁵ See Attachment A.

important to attract and provide homing cues for spawning adults, or to provide sufficient rearing habitat and dispersal of juveniles. To date this issue has not been resolved, and the current status quo operations will continue to impair the beneficial uses of the Feather River and result in the unlawful take of green sturgeon through a loss of their critical habitat.

We are disappointed that an opportunity to improve instream flows for sturgeon, salmonids, and other listed species in the Lower Feather River and Delta environment has not resulted in meaningful or quantifiable gains. Flows proposed by the Settlement Parties to resolve flow issues for salmonids “improved” only the low flow channel by raising its flow 100 cfs annually. We do not understand how the benefits of this improvement will be measured in practice, and are not convinced that the information used to justify such a low flow is sufficient given the long-term declines in anadromous fish species in the Feather River. Such a flow also runs counter to the Board’s own recommendations to improve and protect fishery resources in the Delta by mimicking natural flow patterns of sufficient magnitude and duration during key times of the water year.

We are also disappointed that the Board passively followed the Settlement Agreement in adopting a single base flow to protect the cold freshwater habitat beneficial use. We assume the Board did this based on the assumption that the fishery agencies had thoroughly reviewed or resolved flow needs before signing the Settlement. It is now clear that the fisheries agencies had not done an adequate review at the time. This indicated by the NMFS’s February 29, 2012 jeopardy biological opinion issued for green sturgeon in the Yuba River, and NMFS’s draft jeopardy Reasonable and Prudent Alternative for Feather River green sturgeon discovered through a recent GGSA Freedom of Information Act request.⁶ While the Board should be applauded for attempting to resolve outstanding water temperature issues in a more timely manner than preferred by the Settlement Parties, it erred in not thoroughly reviewing flow needs to protect the cold freshwater habitat beneficial use in the Lower Feather River. This oversight while unfortunate, can now be corrected. At the same time, the Board can take this opportunity to address other concerns with the Settlement Agreement, notably the Habitat Expansion Agreement and its questionable ability to achieve its stated goals as required by the Certification.

We understand that the Board’s Certification is an attempt to balance the needs of multiple and sometimes competing beneficial uses, such as those of endangered species, through the protection of the cold freshwater habitat beneficial use and conversely the use of hydropower or municipal water. We believe that the measures for this Project, however, have failed to adequately protect the migration, spawning habitat, and cold freshwater habitat beneficial uses.

Had the Board been provided satisfactory information regarding green sturgeon during the time it spent certifying the Project, we believe that the Board would have developed measures that more adequately protect the beneficial uses related to all anadromous species.

⁶ See Attachment F, *Draft Green Sturgeon RPA*, and NMFS February 29, 2012 *Biological Opinion for the U.S. Army Corps of Engineers’ operation and maintenance of Englebright and Daguerre Point dams and Englebright Reservoir on the Yuba River*.

Indeed, this new information raises a series of questions regarding various certification requirements which may actually end up hindering or harming green sturgeon, while providing negligible or unquantifiable benefits to other species. As an example, the requirement to install segregation and other weirs for spring-run and fall-run chinook salmon to prevent interbreeding between these species and a corresponding loss in genetic diversity (as these species no longer segregate naturally due to the lack of passage, or a requirement for passage, of spring-run to their native spawning grounds above Oroville) may result in an impediment to green sturgeon movement in the Lower Feather River. We believe such issues warrant a new review to ensure a full and balanced approach to endangered species habitat protection that avoid single species management conflicts.

We understand that it is not the Board's responsibility to uphold the Endangered Species Act, and note that we are actively trying to resolve differences with the fishery agencies to understand why adequate protections and mitigation for green sturgeon and salmonids are not currently required in their respective Biological Opinions. However, the Board does have a responsibility to protect the beneficial uses, including public trust resources, which include the habitat utilized by these endangered species. The Board frequently and consistently includes flows necessary to protect fishery resources and engendered species needs on other hydroelectric license certifications issued. We do not believe the Board knew that its current certification could have the unintended effect of harm for listed species, and the Board now is in a unique and key position to help resolve this issue.

As a legal matter the Board issues a Clean Water Act Section 401 water quality certification for the FERC license. The conditions contained in this certification are non-discretionary and binding on FERC when they issue a final license for the Project. Federal fishery agencies, such as the U.S. Fish and Wildlife Service (USFWS) and NMFS consult with FERC to ensure that FERC's issuance of a license would not jeopardize the continued existence of endangered or threatened species. Thus they write a Biological Opinion to determine the effects of the Project while providing restrictions on activities to ensure no harm to the species. There is however a catch as the fishery agencies may only consult on aspects which are discretionary by FERC.⁷ That is to say, if the Board requires actions that could put endangered species at risk, neither FERC nor the resource agencies can change or address these aspects through Biological Opinions or other means, as the Board's requirements are non-discretionary. In a perfect world we would hope that no Board actions or requirements would harm endangered species, but in balancing the needs of beneficial uses, the Board has authority and discretion to choose otherwise. For this Project we do not believe that the benefits of certifying the Project under the current Certification requirements strike the correct balance of protecting the cold freshwater habitat beneficial use. Further loss of green sturgeon and other anadromous species caused by the Project is unacceptable, and counter to the Board's Public Trust and Clean Water Act responsibilities, and will only further reduce listed species already in significant decline.

For the reasons discussed above we are requesting that the State Water Board re-open and amend the Certification to address operational aspects for the reasonable protection of the migration, spawning habitat, and cold freshwater habitat for green sturgeon, while also balancing other competing demands

⁷See National Association of Home Builders et al. v. Defenders of Wildlife et al., 420 F. 3d 946

for Project water. We believe the Board has sufficient discretion and information to warrant a re-opening of the Certification based upon general conditions G5 and G9 of the Certification.

We would recommend a workshop to address these complex issues, such that parties could submit relevant information for the Board to make more sound management decisions. We also believe DWR should be more forthright in submitting information to the Board based on recent events.

Sincerely,

A handwritten signature in blue ink, appearing to read "Victor Gonella", with a long horizontal flourish extending to the right.

Victor Gonella

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A handwritten signature in black ink, appearing to read "Bill Jennings", with a stylized, cursive script.

Bill Jennings, Chairman

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