

SOUTH FEATHER WATER & POWER AGENCY

RATH MOSELEY, GENERAL MANAGER
RMOSELEY@SOUTHFEATHER.COM

2310 ORO-QUINCY HIGHWAY
OROVILLE, CALIFORNIA 95966
OFFICE: 530-533-4578 EXT 107
FAX: 530-533-9700



By USPS and Email meiling.colombano@waterboards.ca.gov

Ms. Meiling Colombano
State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Draft Water Quality Certification for South Feather Water & Power Agency's South Feather Power Project, FERC Project No. 2088

Dear Ms. Colombano:

South Feather Water & Power Agency (Agency) appreciates the opportunity to provide comments to the November 17, 2017 draft water quality certification issued by the State Water Resources Control Board (SWRCB) for the Agency's South Feather Power Project, FERC Project No. 2088 (Project). The Agency's comments coincide with the organization of the draft certification.

Agency Comments to Section 1.0 (Project Description)

A. Section 1.1, Sly Creek Development, pp. 6-7

There are a number of typographical, clarification and other corrections. First, correct the typographical error by deleting "(3)" from the sentence at the top of page 6 describing the South Fork Diversion Tunnel.

Second, concerning the Slate Creek Diversion Dam description, the "(~643 ac-ft)" refers to the original design capacity of the diversion pool at the time it was constructed. As the text correctly notes, today there is negligible storage in the diversion due to sediment accumulation.

Third, concerning the Slate Creek Diversion Tunnel description, the 500 cfs limitation is due to backwater influence from Sly Creek Reservoir when it is nearly full.

Fourth, concerning Sly Creek Dam and Reservoir description, the height of the dam is 299 feet and the crest elevation is 3,546 feet. The spillway is controlled by a 16 foot high and 54 foot wide bottom hinged pneumatically operated spillgate. The reservoir capacity is 63,667 ac-ft at a normal maximum water surface elevation of 3,530 feet. These alterations to the dam were completed in 2011 as part of the permitted Sly Creek Dam Crest modification project.

Fifth, concerning Lost Creek Dam and Reservoir description, the permitted Lost Creek Dam modification project, which is ongoing, has resulted in changes to the physical description of the facility. The dam has a 251 feet wide uncontrolled spillway and no longer uses flashboards. The reservoir storage at the normal maximum water surface elevation of 3,279.05 feet is 4,806 ac-ft.

B. Section 1.2, Woodleaf Development, p. 7

The Woodleaf Powerhouse switchyard contains one 48.75/65/81.25-MVA transformer. The transformer was replaced in 2008.

C. Section 1.3, Forbestown Development, p. 7

In the last sentence of the opening paragraph, the reference to "Woodleaf Development" should be stricken and insert "Forbestown Development".

Agency Comments to Section 2.1 (Kelly Ridge Powerhouse Settlement Agreement)

The description of the settlement agreement should note that the terms of the agreement whereby DWR may request that the Agency cease discharges into the Thermalito Diversion Pool for DWR to maintain cool water temperatures downstream has never occurred, including during the most recent multi-year drought.

Footnote 2 should be clarified to explain that drawdown of Miners Ranch Reservoir may be accomplished by withdrawals at the Miners Ranch Water Treatment Plant and releases to the Bangor Canal from Miners Ranch Reservoir, after the inflow to the reservoir has been stopped and flows discharged to Lake Oroville upstream at Ponderosa Dam.

Agency Comments to Section 3.0 (Regulatory Authority)

A. Section 3.1, Water Quality Certification and Related Authorities, pp. 10-11

The SWRCB should cite to its regulations at Title 23, section 3859, subdivision (a) that states that the SWRCB shall issue or deny a certification for the activity and "Conditions shall be added to any certification, if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements." The phrase "water quality standards and other appropriate requirements" is defined to mean "the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act (33 USC Sections 1311, 1312, 1313, 1316, 1317) and any other appropriate requirements of state law." (Cal. Code Regs, Tit. 23, § 3831, subd. (v).)

B. Section 3.2, Water Quality Control Plans and Related Authorities, pp. 11-12

The draft certification erroneously applies the beneficial uses applicable to the lower Feather River from DWR's Fish Barrier Dam (part of the State Water Project) to the Sacramento River. The draft certification states, in relevant part:

The Basin plan does not specifically identify the beneficial uses for the South Fork Feather River. The Basin Plan specifies that the beneficial uses of any specifically identified water body generally apply to its tributary streams. Therefore, the beneficial uses applicable[FN] to the South Fork Feather River and its tributaries are those of the main stem Feather River, from the Fish Barrier Dam to the Sacramento River.

(pp. 11-12.) The more appropriate designation is for Lake Oroville given that the Agency's Project does not directly influence beneficial uses in the Feather River between DWR's Fish Barrier Dam and the Sacramento River. Terminal releases from the Agency's project are at Ponderosa Dam into Lake Oroville and at Kelly Ridge Powerhouse into the Thermalito Diversion Pool. Importantly, both these diversions occur upstream of DWR's Lake Oroville complex and are controlled by DWR (e.g., except during flood releases at Oroville, DWR captures and controls Agency's releases).

The Lake Oroville designation for beneficial uses to be protected has been utilized with similarly situated projects that are located upstream of the Lake Oroville complex. The SWRCB's 401 certification for Pacific Gas & Electric Company's (PG&E) DeSabra-Centerville Hydroelectric Project, FERC No. 803, provides in relevant part:

The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (SR/SJR Basin Plan) does not specifically identify the beneficial uses of the West Branch Feather River. The SR/SJR Basin Plan specifies that the beneficial uses of any specifically identified water body generally apply to its tributary streams. Therefore, the West Branch Feather River beneficial uses are listed under the Lake Oroville designation.

(DeSabra 401 Cert., April 8, 2015, p. 3. Italics in original.) The draft 401 certification for PG&E's Poe Hydroelectric Project, FERC No. 2107, is similarly located upstream of Lake Oroville and does not apply the same beneficial use designation proposed in this draft certification. Rather, it applies a beneficial use designation specific to the North Fork of the Feather River. (Poe Draft 401 Cert., July 2017, p. 3.)

The Agency requests that the SWRCB apply the Lake Oroville designation for beneficial uses to be reasonably protected. Those include: municipal and domestic supply; irrigation; power; contact recreation; other non-contact recreation; cold freshwater habitat; warm freshwater habitat; warm freshwater spawning; cold freshwater spawning; and wildlife habitat. The list of beneficial uses should not include "warm and cold migration of aquatic organisms" as currently proposed.

Agency Comments to Section 4.0 (Rationale For Water Quality Certification Conditions)

A. 1st Paragraph, p. 13

The opening paragraph of Section 4.0 lists nine items reviewed and considered by State Water Board staff. With two exceptions, the list includes commonsense documents and information that should be reviewed and considered by the SWRCB and ultimately included as part of the administrative record in this proceeding. However, two items should be elaborated upon, "(g) the Basin Plan" and "(i) Project-related controllable factors". It is unclear how the current Basin Plan and the water quality objectives contained therein apply to the Agency's Project. Additional explanation is required as to how and why the SWRCB staff considered the document and how it applies to the Agency's Project; if no such explanation can be offered, then the reference should be deleted. The phrase "Project-related controllable factors" is vague and should be expanded upon or defined.

B. 2nd Paragraph, pp. 13-14

The second paragraph of Section 4.0 states:

Any conditions that require development of a plan will require review, modification (if necessary), and approval by the Deputy Director. In addition, other regulatory agencies have specific authorities to approve plans and reports.

Other agencies, such as FERC, have authority to approve plans and reports. However, the draft conditions fail to recognize the possibility that Agency may not be able to implement plans and reports approved by the SWRCB Deputy Director unless and until FERC (and possibly other agencies) has approved them. When FERC issues licenses containing mandatory conditions from water quality certifications, FERC includes an article in the license requiring any plans/reports required by those certification conditions to also be submitted to FERC for its review, possible amendment, and approval, with the expectation that such plans/reports not be implemented until that FERC process is complete. To avoid any confusion, and to avoid the possibility that the Agency is found in violation of any condition while waiting for FERC or other necessary regulatory approvals, Agency requests that language be added either in this preamble or as a separate condition a statement stating that Agency will not be required to implement plans/reports required by any condition unless and until it has received necessary approvals from FERC or other regulatory authorities.

C. Section 4.1, Rationale For Condition 1: Minimum Instream Flow Requirements (MIFs), p. 14

The section should be modified to state that the MIFs are the *same* as those established by USFS in 4(e) Condition 18, not merely “consistent”.

The “mechanism” to propose adjustments in the MIFs is not supported by applicable law or sound policy as described hereafter in comments specific to Condition 1.

D. Section 4.4, Rationale For Condition 4: Water Quality, p. 15-16

The parentheses in the first paragraph on page 15 refer to where Kelly Ridge Powerhouse “discharges into the Feather River”. Kelly Ridge Powerhouse does not discharge into the Feather River; it discharges into Thermalito Diversion Pool, part of the State Water Project and Oroville Complex.

The subsection on Kelly Ridge Powerhouse, final sentence, refers to the provisions for actions to address Basin Plan water quality objectives for temperature. The Kelly Ridge Powerhouse Settlement Agreement was established to address the actions “that can be feasibly implemented in the event” the water quality objectives exceed the objectives of the Basin Plan. It should be noted, again, that the terms of the settlement agreement whereby DWR requests that Agency cease discharges from Kelly Ridge Powerhouse has never been invoked, including during the most recent multi-year drought.

Agency Comments to Section 6.0 (Water Quality Certification Conditions), pp. 20-42

A. Condition 1: Minimum Instream Flow (MIF) Requirements, pp. 20-25

Timing of MIF Implementation

The draft certification states “Unless facility modifications are required, the Licensee shall, beginning as early as reasonably practicable and not later than 60 days after license issuances, maintain MIF as specified in this condition.” (p. 20.) As described hereafter, the Agency must modify facilities to fully comply with the MIFs. Additionally, the phrase “as early as reasonably practicable” is vague. To the extent the Agency can implement MIFs, or some portion of them, at the time of license issuance, the Agency should be given 60 days.

Facility Modifications

The Agency requests three years after license issuance to complete the facility modifications necessary to implement the specified MIFs. This is consistent with other conditions in the draft certification requiring facility modifications, specifically Conditions 6 and 12, each of which provide for three years in which to make facility modifications. To fully implement the MIFs will require engineering, permitting and construction of modifications at the South Fork Diversion and Forbestown Diversion Dams and may also include rebuilding of the tail water depression system and Woodleaf Powerhouse to allow simultaneous operation and spill, switching of the 60 inch sliding gate vavles to regulating valves capable of passing the MIFs, related construction to incorporate the new valves and outlet works, and potentially other facility modifications. The scope and expense of facility modifications necessitate a minimum implementation period of 3 years after license issuance.

Water Year Types

The Agency requests that the water year type definitions be consistent with proposed in the USFS 4(e) Condition 18, Part 2.

Modified MIFs Given Emergencies, Drought & Climate Change

Agency operations and the applicable MIFs are required to fluctuate each February through May based on each month’s Bulletin 120 water year forecast. Additionally, the water year type for October through January shall be based on DWR’s full natural flow record for the Feather River at Oroville for the preceding water year. In concept, the Agency agrees with these requirements. However, given the uncertainties associated with climate change and the potential for greater variability in the weather, these requirements may prove too inflexible and could cause other impacts if the Agency were required to adhere to these conditions in certain unique weather years. For example, a wet year followed by a critically dry period could require the Agency to operate according to wet year requirements from October through January. Dealing with these and other potential uncertainties of climate change can be addressed through the water year modification process (p. 22) set forth in the draft certification.

However, the modification process as proposed in the draft certification can be too cumbersome to address a potential need for quick changes because it requires a pre-consultation process and written documentation submitted to the Deputy Director. To address the potential need

for quick changes in operations due to unique weather phenomenon, the Agency recommends modifying the definition of “emergency” in the Temporary MIF Modifications section (p. 20) to include drought conditions. (Cf. The Emergency Services Act, Gov. Code § 8558 [defining “State of Emergency” and “Local Emergency” as including drought].)

The Agency also recommends that the water year modification process (p. 22) include a timeline by which participating agencies must promptly submit feedback on proposed operational changes and by which the Deputy Director must issue a decision. The draft certification notes that the Deputy Director “may require modifications as part of the approval”¹, but provides no bookends on what those modifications may be or a process by which the Agency could seek reconsideration or challenge the Deputy Director’s conditions of approval. The Agency recommends adopting a process analogous to the temporary urgency change petition procedure (Water Code §§1435 et seq.) where certain findings must be made (e.g., no injury to other legal users and no unreasonable environmental effects associated with the proposed change) and the SWRCB’s ultimate determination can be challenged first by seeking reconsideration and then possibly by writ of mandate.

Six Year Evaluation of MIFs

Page 25 of the draft certification requires a six-year evaluation of MIFs “to determine if adjustments are needed.” Any changes to MIFs must have the prior consent of both the Agency and FERC. The U.S. Supreme Court in *California v. FERC* (1990) 497 U.S. 1040 established the principle that the certifying state – here California – cannot unilaterally modify minimum stream flows contained in a FERC license. Changes to the MIFs could materially alter the feasibility of the Agency’s Project and implicate its due process rights. A preferred approach would be to clearly state that any changes to MIFs require the advance consent of both FERC and the Agency.

As part of any requested modification to MIFs, “the Deputy Director may require modifications as part of the approval.” Any additional conditions imposed by the Deputy Director to a request for modifications must similarly secure the advance consent of both FERC and the Agency. The SWRCB lacks the legal authority to unilaterally modify MIFs. In the event either FERC or Agency consent is not obtained, the certification should clearly state that the existing MIFs shall continue to apply for the duration of the license.

B. Condition 2: Gaging, pp. 25-27

Gaging Plan

The Agency has a global comment, below, concerning development of a plan in consultation with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.” (P. 25.)

¹ The Agency has a global comment, below, concerning the deputy director’s ability to modify plans or requests of the Agency.

Installation of Gages

The Agency's existing gaging facilities are largely compliant with the draft certification's requirements. However, some new facilities will be required and "shall be completed within 18 months of license issuance." If applicable, the Agency may need to acquire permits or approvals from other agencies to complete the installation. Language should be added that an alternate schedule may be approved if the Agency is unable, despite reasonable efforts, to secure or is delayed in securing applicable permits or approvals.

C. Condition 3: Ramping Rates, pp. 26-27

Interim Ramping Rates

The Agency has a global comment, below, concerning submitting proposed interim ramping rates to the Deputy Director for review and approval and potential additional modifications that the Deputy Director may impose as a condition of approval.

Long-Term Ramping Rate Adaptive Management Plan

The draft certification requires that the Long-Term Ramping Rate Adaptive Management Plan (RAMP) be developed within 18 months of license issuance. The Agency requests that the development of the RAMP not be required until not more than 18 months after the first sets of monitoring data required by Conditions 7, 8, and 9 have been collected and analyzed. This is necessary because the RAMP will be developed based on monitoring results and the first set of monitoring results and data collection will not occur until the fifth full year after implementation of the new MIFs.

D. Condition 4: Water Quality, pp. 27-28

Water Quality Plan

The Agency has a global comment, below, concerning development of a Water Quality Plan in coordination with participating agencies and subject to Deputy Director approval, who "may require modifications as part of the approval."

Concerning the location of proposed water quality measuring stations at the "Feather River, immediately below the Kelly Ridge Powerhouse discharge point" (p. 28), that is the Thermalito Diversion Pool, not the Feather River, and is predominantly influenced by releases from DWR's Hyatt Powerhouse. The Agency currently monitors temperatures within the Kelly Ridge Powerhouse immediately before it is discharged to the Thermalito Diversion Pool, pursuant to the terms of the 2012 Kelly Ridge Powerhouse Settlement Agreement. The Agency requests that the point of temperature monitoring at this location be changed to "at Kelly Ridge Powerhouse".

The Water Quality Plan must also include "Feasible actions that will be implemented in the event that the water discharged from Kelly Ridge Powerhouse exceeds Basin Plan water quality objectives for temperature". (P. 28.) The Agency is not aware of any existing water quality objectives for

temperature in the Thermalito Diversion Pool or in any downstream reach that the Agency controls or significantly influences. SWRCB should specifically identify the applicable water quality objective proposed. Regardless, the Agency is a party to the 2012 Kelly Ridge Powerhouse Settlement Agreement, which should be considered as the “feasible action[] that will be implemented” since it was designed to address water temperature in coordination with DWR’s Lake Oroville operations.

Slate Creek Diversion Dam Operations

The Agency proposed that it cease diversions at the Slate Creek Diversion Dam June 1st through September 15th if temperature exceeded 20°C *for three consecutive days*. The draft condition removed from the Agency’s proposal the three consecutive days requirement. The additional requirement should be incorporated or additional explanation should be provided for why this additional requirement was removed.

E. Condition 5: Slate Creek Diversion Dam Sediment Management, p. 29

The Agency has a global comment, below, concerning development of a Slate Creek Sediment Management Plan in coordination with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.”

F. Condition 6: Geomorphic Flows in Lost Creek, pp. 29-30

The timing of implementation of geomorphic flows is between March 1 through May 31 and “no later than the day when mean daily water temperatures... reaches 13°C.” (P. 29.) There is no rationale for the added temperature requirement provided either in this section or in the preceding “Rationale for Condition 6” at page 16. The rationale stated is “to provide sufficient supplemental stream flows to adequately flush fine sediments from this reach” (*id.*); it is therefore unclear why or how water temperature plays a role in sediment flushing. The Agency requests that the SWRCB either incorporate rationale for why temperature must be considered during sediment flushing or strike the temperature requirement from Condition 6.

G. Condition 7: Fish Monitoring, pp. 30-31

The Agency has a global comment, below, concerning development of a Fish Monitoring Plan in coordination with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.”

E. Condition 8: Amphibian Monitoring, pp. 31-32

The Agency has a global comment, below, concerning development of an Amphibian Monitoring Plan in coordination with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.”

F. Condition 9: Benthic Macroinvertebrate Monitoring, pp. 32-33

The Agency has a global comment, below, concerning development of a Benthic Macroinvertebrate Monitoring Plan in coordination with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.”

G. Condition 10: Riparian Vegetation Monitoring and Management, p. 33

The Agency has a global comment, below, concerning development of a Riparian Vegetation Monitoring and Management Plan in coordination with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.”

The Vegetation Plan is partially inconsistent with the USFS 4(e) condition to prepare an invasive vegetation management plan (not a riparian vegetation management plan). The rationale for including riparian vegetation in the monitoring and management plan is not explained and there is no demonstrated environmental effect to riparian vegetation resulting from the Agency’s Project or its operations. The Agency requests that the certification align with the USFS 4(e) condition.

H. Condition 11: Construction General Permit and Water Quality Monitoring and Protection, pp. 33-34

The Agency has a global comment, below, concerning submittal of a water quality monitoring and protection plan to Deputy Director approval, who “may require modifications as part of the approval.”

The Agency appreciates recognition that it shall file its plan with FERC the Deputy Director’s approval and that the plan may not be implemented until after “any other necessary regulatory approvals”. (P. 33.) Other agencies, such as FERC, have authority to approve plans and reports. However, the draft conditions fail to recognize the possibility that Agency may not be able to implement plans and reports approved by the SWRCB Deputy Director unless and until FERC (and possibly other agencies) has approved them. When FERC issues licenses containing mandatory conditions from water quality certifications, FERC includes an article in the license requiring any plans/reports required by those certification conditions to also be submitted to FERC for its review, possible amendment, and approval, with the expectation that such plans/reports not be implemented until that FERC process is complete. To avoid any confusion, and to avoid the possibility that the Agency is found in violation of any condition while waiting for FERC or other necessary regulatory approvals, Agency requests that language be added either in this Condition or as a separate condition a statement stating that Agency will not be required to implement plans/reports required by any condition unless and until it has received necessary approvals from FERC or other regulatory authorities.

I. Condition 12: Recreational Resources Management, pp. 34-37

The Agency has a global comment, below, concerning submittal of a Recreation Management Plan in coordination with participating agencies and subject to Deputy Director approval, who “may require modifications as part of the approval.”

The Recreation Plan must include a Little Grass Valley Reservoir Level that, in dry years, must be maintained “as high as possible through Labor Day Weekend”. (P. 34.) That is a vague standard that could if applied literally mean that hydroelectric operations, MIFs and other Condition terms must be abandoned to maintain recreational reservoir levels. Additional clarification should be included such as that the reservoir level in dry years be maintained “as high as possible given the other conditions in this certification, consumptive water and power generation needs by the Agency.”

The Recreation Plan must include recreational stream flow below Little Grass Valley Dam and includes a sentence “To the extent feasible, the Licensee shall provide the target Recreational Stream Flow at all times.” That requirement is vague as to when the requirement applies. The Agency suggests modifying the sentence to read: “To the extent feasible, the Licensee shall provide the target Recreational Stream Flow at all times from September 16 until the Little Grass Valley Reservoir water surface elevation is 5,017.00 ft.”

J. Condition 13: Large Woody Material, p. 37

If reservoir spills are not adequate to pass the large woody material, the draft condition requires consultation with participating agencies “concerning alternative means and a schedule to return the large woody material to the streams downstream of the reservoirs.” This requirement is not feasible given for a number of reasons. The project locations, particularly the downstream placement area, are not accessible. The requirement could pose a hazard to Project facilities and Agency staff if a requirement were imposed given the necessity for heavy equipment being employed in inaccessible locations. Finally, the requirement could come at a considerable expense. Given these factors, the Agency requests modification, as follows: “If spills are not adequate to pass the large woody material and, if feasible, the Licensee collects and can safely pass the material from Little Grass Valley, Sly Creek and Lost Creek reservoirs, the Licensee shall consult with State Water Board staff, USFS, CDFW, and USFWS, concerning alternative means and a schedule to return the large woody material to the streams downstream of the reservoirs.”

K. Condition 15: Potential Reintroduction of Anadromous Fish, p. 38

Condition 15 requires a reassessment of this certification if there is the “potential for reintroduction of anadromous fish” above the dams on the Lower Yuba River. The mere “potential” for reintroduction should not be the trigger for consultation and potentially revisiting the Agency’s certification. After all, it is “possible” even today that anadromous fish could be reintroduced above the dams on the Lower Yuba River. The triggering event ought to be an actual reintroduction project with adequate funding and environmental and regulatory approvals in place that is scheduled to be implemented.

L. Condition 16: Kelly Ridge Powerhouse Settlement Agreement, pp. 38-39

The draft condition requires the Agency to prepare a report following a requested shutdown of KRPH, including reporting on the drawdown of Miners Ranch Reservoir and “Within 30 days following this drawdown, the Licensee shall report the amount of water drawn down from Miners Ranch

Reservoir and then refilled from Ponderosa Reservoir.” (P. 39.) The relevance of providing this information is not explained and is not understood by the Agency. There are additional outlets for water stored in Miners Ranch Reservoir, in addition to diversions through KRPH. Additionally, such operation is consistent with historical operations and applicable water right terms. The draft certification should either be modified to explain the relevance of providing this information or this aspect of the required post-shut down reporting should be stricken.

M. Condition 17, p. 39

This condition states that the SWRCB’s authority includes the authority to withhold approval or to require modification to a proposal or plan prior to approval. As noted elsewhere, FERC’s approval is similarly needed to adopt, implement or modify a plan. Additionally, a sentence should be added stating that the State Water Board’s authority shall not be unreasonably withheld.

The Agency has a global comment, below, concerning the proposed Deputy Director authority to unilaterally modify a proposal or plan.

N. Condition 18, p. 39

Draft condition 18 includes a purported reservation of SWRCB authority to add to or modify the certification under various future circumstances. However, draft condition 18 does not reference any statute authorizing the reserved authority. The State’s effort to retain jurisdiction as stated in this draft condition would allow the SWRCB to unilaterally change the requirements of the Agency’s FERC license for the Project, in violation of the FPA. Such a sweeping reservation of authority contravenes the express purpose of the FPA that “Licenses...may be altered...only upon mutual agreement between the Licensee and the Commission...” (16 U.S.C. § 799.) Therefore, the Agency recommends that this condition be removed or substantially redrafted as set forth hereafter and in the global comment, below.

Draft condition 18(3) reserves SWRCB authority to modify the certification “to implement any new or revised water quality standards and implementation plans adopted or approved pursuant to the Porter Cologne Water Quality Control Act or section 303 of the Clean Water Act”. Coupled with draft condition 20 (discussed below), the SWRCB appears to be contending that the modification can occur with simple “notice and opportunity to be heard”. This is inadequate and violates the principle that the SWRCB’s exercises separate and distinct legislative and adjudicatory functions when undertaking and implementing basin plan amendments.

Basin plan amendments are quasi-legislative acts that are not self-implementing. To implement plan amendments requires a quasi-adjudicatory proceeding in which the affected water right holders are afforded due process, including hearing and opportunity to present and challenge evidence. This proceeding should, if practicable, adhere to the water right priority system. The SWRCB’s two-step process – a legislative determination followed by application through a judicial proceeding in accordance with water right priority – should not be short circuited through the SWRCB’s asserted reserved jurisdiction in this certification. If the SWRCB seeks to implement future amendments to the

basin plan, the Agency must be afforded adequate due process as part of the larger quasi-adjudicatory proceeding implementing the amendments in accordance with the water right priority system. Draft condition 18(3) should be qualified to state that any such modification to the certification may only be implemented if included in the SWRCB's larger quasi-adjudicatory proceeding to implement basin plan amendments.

Draft condition 18(4) and (5) set forth similar language that allows the SWRCB to modify or add to conditions of the certification if future events demonstrate a need to "protect beneficial uses of water". The appropriate legal standard is more nuanced and does not involve the blanket "protection" of beneficial uses. Rather, the SWRCB's task is to provide *reasonable* protection of beneficial uses; this is a fact-based analysis that occasionally entails balancing potentially competing beneficial uses to reasonably protect all beneficial uses. In this context, hydropower (the reason for this certification) is considered a beneficial use in California and should be afforded reasonable protection along with all other beneficial uses in the South Fork of the Feather River and Slate Creek.

O. Condition 19, p. 39

This draft condition includes a purported reservation of authority to modify the certification as a result of a change in baseline assumptions caused by future climate change. However, draft condition 19 does not reference any statutory authorizing this reserved authority. The State's effort to retain jurisdiction as stated in this draft condition would allow the SWRCB to unilaterally change the requirements of the Agency's FERC license in violation of the FPA. It is not appropriate to require the Agency to mitigate for a harm to which the Project is not contributing. There must be some nexus between the condition and a project effect that is contributing to the identified harm. The required nexus is lacking here, since it has not been demonstrated that the Project is a cause of climate change. This draft condition should be removed or substantially redrafted as set forth in the global comment, below.

P. Condition 20, p. 39, GLOBAL COMMENT

This draft condition states that the SWRCB "shall provide notice and an opportunity to be heard in exercising its authority to add to or modify the conditions of this certification." This is inadequate to protect the due process and other legal rights of the Agency. The draft certification is littered with reservations of SWRCB authority and ability by the Deputy Director to unilaterally modify or amend the terms of plans and studies. (See, e.g., draft conditions 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, and 17.) Prior 401 certifications, such as the one for Lake Oroville, states that "The State Water Board shall provide notice and opportunity *for hearing* in exercising its authority to add or modify any of the conditions of this certification." (Lake Oroville 401 Certification, G12, p. 49, italics added.) These prior certifications have recognized and protected the licensee's due process and other legal rights by allowing for hearing to consider the evidence and to rule upon the legitimacy of the exercise of reserved SWRCB authority. That same protection is due the Agency in this certification.

Consistent with Agency comments to Condition 18 sweeping statements about the SWRCB's reserved jurisdiction should be stricken. If, however, the SWRCB refuses to strike its purported reserved

jurisdiction, then constitutional and legal rights of the Agency must be protected. Condition 20 should be redrafted to state:

“The State Water Board shall provide notice and an opportunity for hearing in exercising its authority to add to or modify the conditions of this certification or to add to or modify the results of any study or plan required herein. Any exercise of the State Water Board’s reserved jurisdiction or authority to add to or modify the terms of this certification or any plan or study required by this certification shall be subject to the procedure and opportunity for review set forth in Water Code section 13330.”

Q. Conditions 21 and 22, p. 40

These draft conditions require compliance with “all applicable requirements of the Basin Plan” and Project operations “in a manner consistent with all water quality standards and implementation plans...”. Additionally, the Agency “must take all reasonable measures to protect the beneficial uses of the South Fork Feather River and Slate Creek watersheds.” These standards are impermissibly vague and unreasonable since they do not establish any definable standards or requirements by which the Agency must comply. The Agency requests that these requirements be deleted or significantly modified to specifically and unequivocally define the Agency’s responsibilities.

R. Condition 25, p. 40

Draft condition 40 requires advance notification of “significant or material” changes in the Project. “The State Water Board shall determine significance....” This is an impermissibly vague standard. The draft condition should be modified to define what constitutes, in the State Water Board’s view, a significant or material change in the Project triggering the obligations contained in this condition. Without this definition, the Agency is left guessing as to what changes are subject to this obligation and which changes are not.

S. Suggested New Condition for Plans Required by the Certification

Agency suggests the following be added as a condition to the certification:

“This general condition applies to Conditions 2, 3, 4, 5, 7, 8, 9, 10 and 12, each of which requires the Licensee to develop a monitoring and/or implementation plan. Any plans that have been filed by the Licensee with FERC that have been agreed to by all relevant resource agencies listed in the condition during or subsequent to relicensing negotiations are considered to be “developed in consultation with relevant resource agencies” for the purposes of this certification. In this circumstance, the Licensee is not required to provide the plan to the relevant resource agencies. The Licensee shall submit the “agreed to plans” to the Deputy Director for approval with documentation that the relevant resource agencies approve the plan. Upon Deputy Director approval, the Licensee shall file the State Water Board-approved plan with FERC. When FERC approves the plan, the Licensee shall implement the plan as approved by FERC.”

Conclusion

The Agency appreciates the opportunity to provide comments on its draft certification. Agency representatives are available to meet if the State Water Board would like to discuss any of these comments.

If you have any questions regarding this matter, please contact me at (530) 533-4578.

Sincerely,
South Feather Water and Power Agency

A handwritten signature in black ink, appearing to read "Rath T. Moseley". The signature is written in a cursive style with a long horizontal stroke at the end.

Mr. Rath Moseley, GM