



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

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July 21, 2009

Rod McInnes, Regional Administrator  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
501 West Ocean Blvd, Suite 4200  
Long Beach, CA 90802-4312

RE: COMMENTS on the Oroville Dam Draft Biological Opinion, Oroville Facilities P-2100-134, TN 2009/02370

Dear Mr. McInnes:

Thank you for the opportunity to comment on the Oroville Dam Draft Biological and Conference Opinion (Draft BO for Oroville), filed with the Federal Energy Regulatory Commission on July 6, 2009 (accession number 20090708-0149).

In preface to these comments, CSPA points out that it has reviewed NMFS'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). CSPA supports the OCAP BO as providing minimum requirements needed to avoid extirpation of the listed species it considers, and begin their recovery.

CSPA does not understand, however, how NMFS can issue a jeopardy finding in the OCAP BO on the combined operations of the CVP and SWP, but then issue a no jeopardy finding in the Draft BO for Oroville that addresses a central feature of combined CVP and SWP operations, and the major storage reservoir for the SWP, which has over 3 million acre-feet of storage and additional storage upstream.

Moreover, the analysis in the OCAP BO and that in the Draft BO for Oroville appear fundamentally disconnected. While the OCAP BO sets a number of actions with specific requirements, performance measures and timelines, the Draft BO for Oroville, in conformance with the Oroville Settlement Agreement, includes reconnaissance studies and processes for improvements in lieu of potential defined measures. This is most notable in the respective conditions for measures to protect water temperatures.

The OCAP BO recognizes a fundamental reality: recovery of Central Valley salmonids depends on restoring salmonids to the habitat upstream of Central Valley rim dams.

Reliance on habitat below rim dams is unsustainable in the face of climate change. Yet while the OCAP BO requires pilot projects for re-introductions of salmon and steelhead upstream of Shasta Reservoir, and steelhead upstream of Folsom Reservoir, to be functioning on the ground by dates certain, the Draft BO for Oroville contemplates only the Habitat Expansion Agreement with no defined timeline for implementation.

Moreover, the Draft BO for Oroville analyzes the condition of the listed species in the Feather River watershed according to the inadequate standard of the FEIS and FEIR for the relicensing of the Oroville Facilities. These documents ask not whether the ongoing operation of the project will jeopardize listed species, but merely rather whether or not the proposed action represents an improvement over existing conditions. That is not the standard.

The Draft BO for Oroville presents the Habitat Expansion Agreement as the reason for a no jeopardy finding for spring-run Chinook for the Feather River drainage. Apparently, increasing the geographic range of spring-run chinook is supposed to reach a threshold of no jeopardy because expanded range will offset the possibility of a catastrophic event such as a fire in the Mill Creek, Deer Creek , and Butte Creek region. However, there is no certainty that an HEA will achieve the desired results, or even that those results if achieved would warrant a no jeopardy finding. It appears to us that the appropriate finding would be a jeopardy finding with a Reasonable and Prudent Alternative to mitigate jeopardy, including a backstop should the HEA fail to reach a threshold needed to eliminate jeopardy.

Even assuming adequate mitigation for spring-run Chinook under the HEA, there is a broader assumption that steelhead will also benefit from the HEA. This assumption is yet another step removed, especially if a trap and haul approach is used under the HEA for spring-run. Under such circumstances, will NMFS also require trap and haul for steelhead, or will it be satisfied with unproven channel modifications and unspecified flows to enable the benefits of those modifications, in the area downstream of the project? A requirement for a defined amount of spawning escapement for spring-run does not appear to mitigate the effects of the proposed action on Central Valley steelhead.

The facility modifications contemplated in the Oroville Settlement Agreement do not appear to provide room for a temperature control device should the finding of investigation during the first few years of the new license term be that such a device is needed. The estimated total cost to DWR of temperature modifications at Oroville is not to exceed \$60 Million (Section 108.4f). However, the Lake Shasta temperature control device completed in 1994 cost \$100 Million. A Final BO for Oroville should specify that the measures needed to meet the required temperatures in the Feather River downstream of Oroville, using whatever means are necessary, without reference to a cost cap.

Over the last week, a Draft 401 Certification dated June 23, 2009 has been made available by State Water Resources Control Board. This Draft 401 Certification includes specific timelines and standards required to protect beneficial uses, including many that are pertinent to listed species. At minimum the Final BO for Oroville should line up with

the requirements set forth in the Draft 401 insofar as these requirements affect listed species.

The disconnect between the BO for OCAP and the Draft BO for 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 BO for Oroville 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 the Biological Opinions for OCAP and Oroville, and that this flaw is exacerbated by the lack of defined standards for operation of Oroville in either document. This flaw leaves a regulatory gap that is backstopped only by a discussion process among DWR, NMFS and resource agencies other than NMFS. While NMFS contemplates a re-initiation of consultation is the event that temperature requirements in the Lower Feather River fail to be met on a repeated basis, the threshold for that re-initiation, and the possible remedies, are completely open to debate and even to legal argument.

The Feather River Technical Team and the Green Sturgeon Technical Subcommittee have no apparent ability to address the overall operation of the SWP under OCAP. There does not even appear to be a defined relationship between these entities and the OCAP Water Operations Management Team (WOMT), as there is for the other technical teams for other watersheds that are defined in the OCAP BO. Again, this situation amounts to a regulatory gap that gives unwarranted latitude to DWR and its operation of Lake Oroville. Given the severe drawdown of Oroville in 2008-2009, and the current operation of the reservoir out of which water is flowing at 18,000 af per day and appears headed to drop below 1.5 million acre-feet of storage on about August 1 of this year, the issue appears to CSPA to be chronic.

The Final BO for Oroville should set numeric standards for operation to preserve the cold water pool, not simply a process for how to carry out damage control once threshold numbers are passed.

The two week comment period for review of the Draft Biological Opinion for Oroville is inadequate to provide time for comments. This is one of the few issues on which we agree with DWR. Our comments at this time have therefore been limited to high level issues. Given an appropriate comment period for a 300 page document, which must be considered in the context of the OCAP BO of well over 1000 pages with appendices, our comments would surely be more extensive.

Thank you for the opportunity to comment on the Oroville Dam Draft Biological and Conference Opinion for the proposed action of relicensing the Oroville Facilities.

Respectfully submitted,

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

Chris Shutes  
FERC Projects Director  
California Sportfishing Protection Alliance

cc:

Kimberley Bose, Secretary  
Federal Energy Regulatory Commission  
(via e-filing)

Howard Brown, NMFS

Russell Strach, NMFS

Russ Kanz, SWRCB

Service list

CERTIFICATE OF SERVICE

I hereby certify that I have on this day provided a true copy of these comments on the National Marine Fisheries Service's Draft Biological Opinion for Oroville Dam to the Service List for the above referenced proceeding, P-2100-134.

Berkeley, California  
July 21, 2009

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

Chris Shutes