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ENVIRONMENTAL PROTECTION

State Water Resources Control Board

JUN 24 2013

Catherine Hack, Environmental Coordinator
Department of Community Development
Planning and Environmental Review Division
827 7th Street, Room 220
Sacramento, CA 95814

Dear Ms. Hack:

COMMENTS ON THE NOTICE OF PREPARATION OF A DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LOWER AMERICAN RIVER FLOW MANAGEMENT STANDARD UPDATE (COUNTY CONTROL NO. 09-70070)

State Water Resources Control Board (State Water Board), Division of Water Rights (Division) staff has received the Notice of Preparation (NOP) prepared and circulated by Sacramento County and the City of Sacramento on behalf of the Water Forum (collectively referred to as Water Forum), for preparation of an Environmental Impact Report (EIR) for a project to amend the Water Forum Agreement to include the Lower American River (LAR) Flow Management Standard (FMS) Update. State Water Board staff appreciates the opportunity to review and provide comments. State Water Board staff's comments are focused on the overall scope of the FMS Update as well as on specific components of the LAR flow requirement and annual water temperature plan.

As you may know, the State Water Board is working on an effort to improve flow conditions in the Sacramento-San Joaquin Delta (Bay-Delta) and its tributaries. This effort involves evaluating a range of flows and implementation approaches to improve flow conditions. Phase 4 of this effort focuses on the development and implementation of flow objectives for priority tributaries to the Bay-Delta. The American River was identified as a high priority tributary (Schedule 1, Priority 1) to the Sacramento River and Bay-Delta in the State Water Board's December 2010 report to the Legislature, titled *Instream Flow Studies for the Protection of Public Trust Resources: A Prioritized Schedule and Estimate of Costs* (\$85087). Accordingly, the State Water Board is interested in the Water Forum's efforts and its ability to complement the Phase 4 effort.

The State Water Board supports and encourages local watershed stakeholder efforts to develop water use programs and agreements that meet the coequal goals of protecting and enhancing public trust resources and providing a reliable water supply. The development of local water use programs and agreements requires extensive stakeholder participation and negotiation. The State Water Board recognizes the Water Forum's past and current efforts and believes the FMS Update is a positive step towards successfully meeting the coequal goals in the LAR.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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The State Water Board understands that the objective of the FMS Update is to help achieve the co-equal objectives of the Water Forum Agreement which are to: 1) provide reliable and safe water supply for the region's economic health and planned development to the year 2030; and 2) preserve the fishery, wildlife, recreation, and aesthetic values of the LAR. The State Water Board also understands that at this time and as currently proposed, the implementation of the project, to amend the Water Forum Agreement to include the LAR FMS Update, depends entirely on a new proposed State Water Board order to amend the Bureau of Reclamation's (Reclamation) water right permits (Nos. 11315 and 11316). The State Water Board understands that Reclamation is not currently an active participant in the Water Forum and does not fully support the proposed FMS Update. If Reclamation or others do not support amendment of Reclamation's permits, the State Water Board would be required to conduct a hearing. The State Water Board would then have to make a determination on an amended permit based on information and testimony from that hearing. The State Water Board may or may not support such a proposal.

State Water Board staff understands that the purpose of the proposed FMS Update is to improve the release of available water from Folsom Reservoir for LAR fisheries, regulate temperature of LAR through specific releases, and implement mitigation monitoring. State Water Board staff appreciates the Water Forum's effort to prepare an EIR and amend its Agreement to include the FMS Update, and thereby improve water temperature and flow patterns in the LAR to benefit fisheries. State Water Board staff would be interested in an evaluation of a wider range of flows and implementation measures to ensure that the optimal balance between public trust resources and other beneficial uses of water in the American River watershed is achieved. Additional comments are provided in Attachment 1.

Division staff looks forward to continuing to work with the Water Forum. If you have questions regarding this letter please contact me at (916) 323-9392 or e-mail at dshultz@waterboards.ca.gov. Written correspondence should be directed to:

State Water Resources Control Board
Division of Water Rights
Attn: Daniel Schultz
P.O. Box 2000
Sacramento, CA 95812

Sincerely,



Daniel Schultz
Public Trust Unit Chief

Attachment 1: State Water Board Comments in Response to the Notice of Preparation for the Lower American River Flow Management Standard Update

ec: Tom Gohring
Water Forum Executive Director
tgohring@waterforum.org

Attachment 1
**State Water Board Comments in Response to the Notice of Preparation for the
Lower American River Flow Management Standards Update**

GENERAL COMMENTS

The State Water Resource Control Board (State Water Board) requests that the information developed as part of the Flow Management Standard (FMS) Update by Sacramento County and the City of Sacramento, on behalf of the Water Forum (collectively referred to as Water Forum), be expansive and scientifically defensible. The State Water Board is generally supportive of the FMS Update, but requests that any proposed flow recommendations fully evaluate the range of flows necessary to protect public trust resources and beneficial uses. The State Water Board plans to develop and implement tributary specific policies for water quality control for priority tributaries to the Bay-Delta watershed, with a focus on the Sacramento River watershed (Phase 4 Bay-Delta effort). This effort includes, among other things, the development of non-binding flow criteria followed by the development of binding flow objectives and implementation plans. The State Water Board's goal is to develop flow criteria and flow objectives for a minimum of five priority tributaries to the Bay-Delta watershed by June 2018, with development of flow criteria and objectives for the remaining priority tributaries thereafter. The American River has been identified as a high priority tributary.

The ability for the State Water Board to use flow recommendations from the Water Forum is reliant on the scope of analysis. The proposed project to amend the Water Forum Agreement (Agreement) to include the Lower American River (LAR) FMS Update (FMS Update Project), as proposed in the Notice of Preparation (NOP), maintains the Water Forum's surface water diversions through 2030 and only analyzes the dry year cutbacks established in the Agreement. The water rights of other users in the American River or alternate curtailment scenarios are not proposed for analysis in the Water Forum's NOP. Staff suggests the evaluation be expanded to evaluate a broader range of flows, including higher flows to better protect public trust resources (one of the Water Forum's co-equal goals). Additional analyses would ensure that a range of flows that are protective of public trust resources in both wet and dry years can be accurately determined. For example, under the baseline NOP conditions Reclamation rarely meets the FMS Update temperature requirements for salmonids, and during dry years has a difficult time maintaining temperatures that are not stressful or sub-lethal to salmonids. Evaluation of a broader range of flows can help to determine if the temperature stresses could be prevented or reduced during dry years to meet the Water Forum's co-equal objective of preserving the fishery, wildlife, recreational, and aesthetic values of the LAR.

The FMS Update flow alternatives include Water Forum dry year cutbacks to surface water diversions, which are listed in the Agreement. The 1995 and Proposed Year 2030 Surface Water Diversions table in the Agreement (2000) includes each signatory water supplier/organization; their proposed 2030 surface water diversions, including demand from proposed development projects; and dry year cutbacks. The FMS Update Project considers these dry year cutbacks as part of the existing conditions as well as future conditions. However, the list of water supplier/organizations does not include all water right holders within the American River watershed or even in the LAR. State Water Board staff recommends including these additional surface water demands in the CEQA analysis.

Many of the water suppliers/organizations who have agreed to dry year cutbacks are not the primary owner of water rights but rather receive water through water transfers or contracts. It is unclear to State Water Board staff where or how dry year cutbacks will influence flows (i.e., where points of diversion are located, how cutbacks in Folsom Reservoir could help with coldwater pool storage, etc.). The Agreement's 2030 water demand includes increased surface water diversions by Water Forum members. In many cases the amount of water available to a Water Forum member under the 2030 dry year cutbacks is greater than the 1995 baseline diversion volume. Analysis should show the degree to which the flow recommendations provided as a result of the FMS Update benefit public trust resources. Finally, the Water Forum Memorandum of Understanding states that it and the Agreement are not intended to, and do not, create contractual relationships, rights, obligations, duties or remedies enforceable in a court of law by, between, or among the signatories or any third parties. Accordingly, it is not certain that signatory agencies will always adhere to their dry year cut back agreements. State Water Board staff suggests that each flow regime scenario also be analyzed without inclusion of the Water Forum dry year cutbacks in the FMS Update Project EIR.

SPECIFIC COMMENTS

Below are comments on specific components of the proposed FMS Update. Staff has specific comments relating to the following components of the FMS Update: A) Flow Requirements, and B) Annual Water Temperature Plan. A general summary of the FMS Update Project component, as understood by State Water Board staff, is followed by specific questions and comments directly relating to the component. A brief discussion of each comment and question are provided when appropriate.

A. Flow Requirements

The FMS Update as outlined in the NOP requires: 1) a minimum release requirement at Nimbus Dam ranging from 800 to 2,000 cubic feet per second (cfs); and 2) a downstream compliance flow at the H Street Bridge of 250 cfs January 1 through September 15, and 500 cfs September 16 through December 31 of each year. These requirements provide allowances for the minimum release requirement to be suspended if: (a) runoff to Folsom Reservoir is projected to be less than 100,000 total acre-feet; or (b) Folsom Reservoir is projected to fall below 200,000 acre-feet in storage at any time within a 12-month period.

- I. Staff is aware of a river stage gauge but not a flow gauge at the H Street Bridge. Will installation of a flow gauge be part of the FMS Update Project? Who will be in charge of ongoing maintenance and operation of this flow gauge? Will information from the flow gauge be made public?
- II. The NOP states that in determining the minimum release requirement at Nimbus Dam (which can range from 800 to 2,000 cfs), basic flow data are calculated based on water availability and storage supplies. The flow data are then adjusted to reflect current water conservation efforts, available stored water supplies, and other considerations intended to aid spawning, generally protect fish, and conserve reservoir storage (p. NOP-5). If basic flow data are calculated based on water availability and storage supplies then why is it also adjusted for available stored water supplies? What is the purpose of factoring in water conservation (e.g., is conserved water used for fisheries flows or to allow for increased surface water diversions)?

- III. The NOP states that the purpose of the FMS Update is to improve the release of available water from Folsom Reservoir for LAR fisheries, regulate temperature of LAR through specific releases, and implement mitigation monitoring (p. NOP-5). State Water Board staff interprets the flows specified in the FMS Update as being the preferred alternative of the Water Forum for achieving optimal fisheries benefits with available water (i.e., the water available through amendment of Reclamation's permits Nos. 11315 and 11316). Analysis of a broader range of flows is recommended in order to evaluate the best flow regime for fisheries in the LAR and associated impacts.

B. Annual Water Temperature Plan

The preparation and implementation of an annual water temperature plan is an additional component of the FMS Update. The water temperature plan would be prepared by Reclamation and contain forecasts of hydrology and storage, evidence that the flow release schedule selected by Reclamation was the optimal schedule for instream temperature management through circulation of model runs, and a plan for operations based on the selected model run. In addition, the FMS Update requires Reclamation to maintain: (1) a water temperature of 65°F or less at Watt Avenue Bridge from May 15 through October 31 for steelhead, and (2) an average daily water temp of 60°F or less at Watt Avenue Bridge in October and 56°F or less at Hazel Avenue in November for Chinook salmon.

- I. Temperature requirements for Steelhead (65°F May 15-October 31) overlap with those required for Chinook salmon (60°F October). Based on the above, it is unclear whether the LAR will be managed to meet temperature requirements of 60°F or 65°F in October.
- II. State Water Board staff support the use of a model for analysis and selection of the best flow release schedule and believe it can help LAR instream temperatures and better protect public trust resources. However, State Water Board staff question Reclamation's ability to meet the minimum temperature requirements listed in the NOP.

The Water Forum's 2004 FMS specifies similar water temperature standards as those proposed in the FMS Update.

"Reclamation shall operate Folsom Dam and Reservoir and Nimbus Dam to maintain daily average water temperatures that do not exceed 65°F in the lower American River at Watt Avenue from June 1 through October 15 for juvenile steelhead over-summer rearing.

Reclamation shall operate Folsom Dam and Reservoir and Nimbus Dam to meet daily average water temperatures of 60°F or less, striving to achieve 56°F or less as early in the season as possible, in the lower American River at Watt Avenue from October 16 through December 31 for fall-run Chinook salmon spawning and egg incubation." (p.13)

The FMS Update has stricter temperature requirements compared to the 2004 FMS as the proposed FMS Update Project contains water temperature objectives of 65°F at Watt Avenue from May 15 through October 31 as opposed to from June 1 through October 15 for steelhead. The Chinook requirements are also changed but to less effect from 60°F from October 16 through December 31 to 60°F in October at Watt and 56°F at Hazel in November. Additionally, the National Marine Fisheries Service (NMFS) responded to the 2004 FMS temperature standards in its Biological Opinion (2009 pp 281-282) writing:

"NMFS assumes that, even if Reclamation intends to do so, they will not achieve the water temperature standards described in the flow management standard with implementation of the proposed action because: (1) the availability of b(2) water that would allow Reclamation to 'operate to the proposed flow management standard' is uncertain; (2) operational (e.g., Folsom Reservoir operations to meet Delta water quality objectives and demands and deliveries to M&I [municipal and industrial] users in Sacramento County) and structural (e.g., limited reservoir water storage and coldwater pool) factors not associated with the flow management standard limit the availability of coldwater for water temperature management; (3) in most years since the late 1990s, Reclamation has not achieved the temperatures specified in the flow management standard; and (4) annual water demands for full build-out (year 2030) of the proposed action are expected to substantially increase from present day levels, which will likely further constrain lower American River water temperature management."

NMFS' above response towards more lenient temperature requirements makes it unclear to State Water Board staff whether the proposed temperatures are attainable if Reclamation is responsible to provide all the flows. If stricter requirements are carried forward in the EIR analysis, it would be beneficial to include an analysis of whether the required minimum temperatures are attainable by Reclamation on a consistent basis.

- III. The FMS Update states that if a water temperature of 65°F cannot be achieved May 15 through October 31, then the daily target temperature at Watt Avenue Bridge can be increased by 1°F to a maximum of 68°F. If 68°F cannot be achieved for three consecutive days or the temperature objective is exceeded by more than the 1°F target for a single day then Reclamation, at the request of the State Water Board, shall meet with American River Operations Group (ARG) to devise alternatives to improve water temperatures. Given Reclamation's inability to meet the temperature standard (see discussion in comment II above), State Water Board staff recommends the provision be revised such that Reclamation continues to meet with the ARG to evaluate and determine necessary alternatives to improve water temperatures prior to submitting the water temperature plan to the State Water Board.
- IV. Under the FMS Update, Reclamation would submit the water temperature plan to the State Water Board's Deputy Director for Water Rights (Deputy Director) and NMFS. It is specified in the NOP that the Deputy Director would then have ten days to approve the water temperature plan. The FMS Update does not have the authority to dictate how the State Water Board will respond to receipt of the water temperature plan. State Water Board staff requests that reference to State Water Board approval and the approval timeframe be removed.
- V. The NOP states that if the Deputy Director opposes the water temperature plan the State Water Board may request a hearing under California Code of Regulations, title 23, section 767, during which the Deputy Director may seek recommendations from the ARG. Section 767 of the State Water Board's regulations refers to Hearings in Response to Drought Emergency Conditions and would not necessarily apply in the event that the Deputy Director disapproves of a water temperature plan. In addition, it may not be necessary to hold a formal evidentiary hearing in order to consider whether changes to a plan should be made. The appropriate process to follow in order to consider changes to a water temperature plan should be left to the Deputy Director's discretion.