



# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
Ventura Fish and Wildlife Office  
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IN REPLY REFER TO:  
2009-FA-0056

February 17, 2009

Camilla Williams  
California State Water Resources Control Board  
1001 I Street  
Post Office Box 2000  
Sacramento, California 95812-2000

Subject: Response to Petition for Reconsideration of Water Quality Certification for the California Aqueduct Hydroelectric Project, Federal Energy Regulatory Commission, Project No. 2426, Ventura and Los Angeles Counties, California

Dear Ms. Williams:

We are responding to your notice, dated January 30, 2009, and received in our office on February 2, 2009, informing us that Caltrout, Inc., and Friends of the River (Petitioners) have requested that you reconsider the water quality certification issued on December 10, 2008, pursuant to section 401 of the Clean Water Act, to the California Department of Water Resources (DWR) and the City of Los Angeles for re-operation of Pyramid Dam for the California Aqueduct Hydroelectric Project (Federal Energy Regulatory Commission Project No. 2426).

The Petitioners are requesting that the State Water Resources Control Board (Board) reconsider the certification because they believe it failed to include conditions necessary to protect the beneficial uses of Piru Creek as required by the Clean Water Act and because the Board violated the California Environmental Quality Act, Public Resources code 21000 et seq., and its implementing regulations by approving the certification without first analyzing significant new information and changed circumstances in a subsequent or supplemental environmental impact report. Additionally, the Petitioners assert that the Board failed to adopt findings showing how the project's significant environmental impacts will be mitigated.

Specifically, the Petitioners claim that the Board failed to require DWR to maintain minimum instream summer lows for spawning habitat, cold freshwater habitat, and recreational uses. The Petitioners cite a report prepared by Land Protection Partners, which states that the elimination of minimum summer instream flows will adversely impact the "RARE" beneficial use of middle Piru Creek by eliminating breeding habitat for the federally endangered arroyo toad (*Bufo californicus*) and the threatened California red-legged frog (*Rana aurora draytonii*). The report also recommends an alternative flow regime with the following parameters:

- 1) From the period of the first winter storm to March 15, a volume of water equivalent to that which flows into Lake Pyramid shall be released from it, within the operational constraints of Pyramid Dam.
- 2) At a period of at least once every 5 to 7 years, a release event of significant volume adequate to produce scouring flows must be implemented if such flows do not occur naturally from rainfall events.
- 3) Any water deliveries shall take place during the winter period (November to February) and be released to emulate the flows of a winter storm in volume and timing.
- 4) From March 15 through August 31, water shall be released at a minimum of 15 cubic feet per second (cfs) (or natural inflows, whichever is greater), then decreased by 1 cfs every 2 days between September 1 and September 20 to achieve and maintain a 5 cfs minimum flow from September 20 until the first winter storm.
- 5) Flows shall be increased gradually to meet the 15 cfs flows in March during years when flows are less than 15 cfs leading up to March 15.
- 6) Licensee shall adopt an adaptive management program to monitor and mitigate the adverse effects of the license amendment, especially the effects of California red-legged frog.
- 7) Licensee shall commit to sediment replenishment program, placing fine sand and gravel below Pyramid Dam in amounts commensurate with winter rainfall and allowing the sediment to be incorporated into the morphology of Piru Creek to restore and maintain habitat for native amphibians and fishes.
- 8) Licensee shall selectively remove adult bullfrogs in arroyo toad breeding habitat during breeding season.

The U.S. Fish and Wildlife Service's (Service) responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act prohibits the taking of any federally listed endangered or threatened species. Section 3(18) of the Act defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harassment is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. The Act provides for civil and criminal penalties for the unlawful taking of listed species. Exemptions to the prohibitions against take may be obtained

through the Service in two ways: through interagency consultation for projects with Federal involvement pursuant to section 7, or through the issuance of an incidental take permit under section 10(a)(1)(B) of the Act.

We have the following comments and concerns regarding the parameters of the alternative flow regime proposed by the Petitioners:

- It is unclear how items 1 through 3 differ from the currently certified project (i.e., existing flow management) and we believe that these parameters would simulate a natural flow regime.
- Regarding item 4 of the Petitioners' proposed flow regime, we are concerned that by maintaining summer flows at 15 cfs scouring would increase in middle Piru Creek, thereby changing the channel morphology resulting in less suitable habitat for native species, including arroyo toads and California red-legged frogs. Maintaining summer flows at 15 cfs would channelize segments of Piru Creek that would otherwise be shallow pools and open sand and gravel flooded terraces. The steady release of water would create entrenched channels with encroaching vegetation and would give opportunities for non-native predators (e.g., largemouth bass (*Micropterus salmoides*), green sunfish (*Lepomis cyanellus*), crayfish (*Procambarus clarkii*), and bullfrogs (*Rana catesbeiana*)) to proliferate by expanding habitat for these species within Piru Creek.
- We believe item 5 of the Petitioners' proposed alternative flow regime is poorly defined and ambiguous. Specifically, it is unclear to us what is meant by "flows shall be increased gradually." Depending on the rate of increase, arroyo toad egg strands and tadpoles could be flushed from their habitat. Egg strands could be destroyed and tadpoles could be flushed into areas with predators or stranded in drying terrace pools.
- Item 7 of the Petitioners' proposed flow regime 7 is not supported scientifically. Based on field observations, sufficient sediment input occurs locally (i.e., from the middle Piru Creek tributaries). If the Petitioners have collected or obtained different data, we would welcome the opportunity to review it.
- Item 8 of the Petitioners' proposed flow regime 8 should be implemented only in the event that summer flows are enhanced (i.e., if items 4 and 5 of the proposed alternative flow regime are implemented), which would result in an expansion of habitat for bullfrogs.

The existence of Pyramid Dam on Piru Creek ensures that stream conditions can never be "natural," even under the terms of Federal Energy Regulatory Commission (FERC) Project 2426; however, we have concluded that simulating the natural flows in upper Piru Creek following the current FERC requirements is the best strategy for long-term conservation of the arroyo toad and California red-legged frog. Since the simulated natural flow regime was implemented in 2005, surveys of Piru Creek have shown increased sediment movement and

scouring from various flow velocities and natural drying out during the summer months. The result has been reduced stream-side vegetation, wider stream channels, and the formation of side channels that has created more breeding habitat for arroyo toads compared to conditions observed from 2002 to 2004 before the simulated natural flow releases began.

The alternative flow regime suggested by the Petitioners would require intensive management for the arroyo toad and California red-legged frog in perpetuity. Such long-term management is not consistent with the goal of the Act, which is ultimately recovery of listed species to the point where listing is no longer warranted. Recovery would be extremely difficult to achieve if it depended upon permanent, intensive management such as that contained within the alternative flow regime proposed by the Petitioners. Introducing further complexity into the management of upper Piru Creek would create more challenges for conservation of federally listed species.

If you decide to amend the certification and implement the alternative flow regime suggested by the Petitioners, we would support an intensive biological monitoring program to measure changes in the riparian system and impacts to arroyo toads and California red-legged frogs, migratory birds, and other wildlife. Part of the monitoring process should include opportunities to actively seek habitat enhancements. Furthermore, if the certification is amended as recommended by the Petitioners, take of arroyo toads and California red-legged frogs is likely occur and we would recommend that you work with DWR to obtain exemption to the prohibitions against take through interagency consultation pursuant to section 7, or authorization for take through the incidental take permit process under section 10(a)(1)(B) of the Act.

We appreciate the opportunity to provide comments regarding the petition. If you have any questions regarding this matter, please contact Della Snyder-Velto or Chris Dellith of my staff at (626) 574-5254 and (805) 644-1766, extension 227, respectively.

Sincerely,

  
Roger P. Root  
Assistant Field Supervisor

cc:

Kimberly D. Bose, Federal Energy Regulatory Commission  
Rodney McInnis, National Marine Fisheries Service  
Ed Pert, California Department of Fish and Game  
Dean Messer, California Department of Water Resources  
Steve Howard, United Water Conservation District  
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