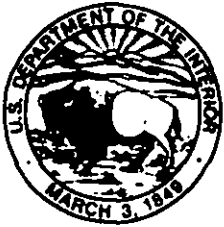


ORIGIN...



# United States Department of the Interior



**FISH AND WILDLIFE SERVICE**  
Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846

In Reply Refer To:  
81420-2008-F-0014-3

FEB 07 2008

FILED  
 OFFICE OF THE  
 SECRETARY  
 2008 FEB - 8 P 1:46  
 FEDERAL ENERGY REGULATORY COMMISSION

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

**Subject: Clarification on Our Request for Additional Information on the Relicensing of the Upper American River Hydroelectric Project, FERC Project No. 2101-084, El Dorado County, California**

Dear Ms. Bose:

This letter is in response to the Federal Energy Regulatory Commission's (FERC or Commission) letter dated December 12, 2007. From reviewing the Commission's letter and subsequent communications, we have concluded that our request for additional information (Service File # 81420-2008-F-0014-2, dated December 13, 2007) may not have clearly indicated the Service's concerns or detailed the information that is necessary for the Service to begin consultation. The Upper American River Project (UARP) is located on the Rubicon River, Silver Creek, and South Fork of the American River, near the community of Placerville, El Dorado County, California. UARP contains 11 reservoirs, eight powerhouses, and occupies approximately 6,417 acres of federal lands. UARP has the potential to affect the endangered Pine Hill ceanothus (*Ceanothus roderickii*), Pine Hill flannelbush (*Fremontodendron decumbens*), Stebbins' morning glory (*Calystegia stebbinsii*), El Dorado bedstraw (*Galium californicum* ssp. *sierrae*), and the threatened Layne's butterweed (*Packera layneae*), plants found on gabbro-derived soils; the threatened valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*) (beetle); and the threatened California red-legged frog (*Rana aurora draytonii*)(frog). This request for additional information is related to potential indirect effects of UARP to listed species. This letter is issued under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. §1531 *et. seq.*)(Act), and the regulations governing interagency consultations (50 CFR § 402).

The current biological assessment, presented as the draft Environmental Impact Statement (DEIS), does not adequately address potential indirect effects of the proposed project and interdependent actions that could result from this project. Indirect effects are defined as those effects "that are caused by the proposed action and are later in time, but still are reasonably



Ms. Kimberly D. Bosc, Secretary

2

certain to occur” (50 CFR § 402.02). Interdependent actions are defined as “those that have no independent utility apart from the action under consideration” (50 CFR § 402.02). The DEIS addresses direct effects of the proposed project to listed species but fails to address the indirect and cumulative effects of the licensed action. The Service has reviewed an agreement between the Sacramento Municipal Utility District (SMUD) and El Dorado County (Agreement) in which SMUD has agreed to use the UARP facilities to store and possibly supply water for consumptive-use by El Dorado County (EDC). Using this FERC-licensed facility for water storage and supply could allow EDC to fully implement its General Plan, by ensuring sufficient water is available for future development. This prospective activity should be considered an interdependent action to the proposed action and impacts to Federally-listed species that may result from this development should be considered as indirect effects of relicensing UARP. Section 7 of the Act requires action agencies to address all potential effects of the project on listed species, including indirect and cumulative effects. Therefore, to meet these requirements, the Service requested that the Commission incorporate a more thorough analysis of the potential consumptive water use. The Commission thus far has not complied with this request.

As reflected in its December 12, 2007 letter, the Commission appears to have determined that the information already provided is sufficient because:

1. The consumptive water use is not relevant because it is not part of the new license action.
2. Future diversion of flows is speculative.
3. Implementation of the Agreement would require Commission approval and additional consultation pursuant to Section 7 of the Act at that point in time.

The Service disagrees with these three points. The following discussion will clarify why, in the Service’s opinion, the anticipated effects from the Agreement must be considered in the current consultation for the proposed action of issuing a new license for the UARP.

#### 1. Not Relevant, Not Part of the Relicensing Action

Section 7 of the Act states that all Federal agencies shall consult with the Service on any action authorized, funded, or carried out by the agency in order to ensure that the action is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the adverse modification or destruction of critical habitat. We acknowledge that the Agreement is not part of the licensing action and that FERC does not have authority to issue or manage water rights. However, the use of FERC-licensed facilities for water storage and supply may allow for regional growth and development. The growth in EDC is currently limited by an insufficient and undependable water supply. Through the Agreement, however, the UARP facilities could be used to provide the necessary storage for water that EDC may obtain. Once EDC acquires water rights, the anticipated development projects that may affect listed species could not happen but for the FERC-issued license that allows SMUD to use UARP project facilities for the storage and delivery of water to EDC. Therefore, the potential effects of these actions are indirect effects of this licensing and the Commission is required to include them in this consultation

Ms. Kimberly D. Bosc, Secretary

3

## 2. Future Diversion of Flows is Speculative

The project applicant (SMUD), and FERC assert that the future diversion of water flows is speculative because EDC does not currently have rights to use this water and that the process for obtaining water rights is cumbersome and often lengthy. The Service agrees that the amount of water ultimately procured by EDC may be unknown, but the likelihood of EDC obtaining water rights during the term of this license (likely 50 years) is extremely high. The El Dorado County Water Agency (EDCWA) met with the Service to discuss actions they are taking to procure water rights. The fact that EDCWA approached SMUD and negotiated this Agreement speaks to the need for such an agreement. The EDC Board of Supervisors' meeting notes reflect discussions of the county's pursuit of water rights. EDC's General Plan and EDCWA's Water Resources Development and Management Plan the amount of water needed fully implementation the General Plan, and this is the amount EDCWA is pursuing. El Dorado County and the City of Sacramento are currently in negotiations regarding water used by the City that appears to belong to EDC. Additionally, EDC is currently pursuing additional water rights that would allow for the storage and consumptive use of water along the South Fork of the American River. As such, it is foreseeable that the County will obtain at least a portion of the water rights that would enable the implementation of the storage and diversion of water within and from the UARP facilities. Accordingly, it is foreseeable that the UARP facilities, for storage of water for growth in EDC, will be used.

## 3. Implementation of the Agreement Would Require Commission Approval

The Commission states that the implementation of the Agreement would require Commission approval and additional consultation pursuant to Section 7 of the Act. While the Service agrees with the Commission that such an action would constitute the Federal activity triggering the need for further consultation, this does not eliminate the responsibility for FERC to fully meet its requirements to analyze indirect and cumulative effects of the proposed action at this time. However, this conclusion is based on these four items.

1. The terms of the new UARP license may contain requirements that regulate reservoir levels and water flows, based on the water-year type. From our reading of the licensing requirements, there appears to be enough flexibility in the range of flows that SMUD would be able to store and deliver water to the county **and** still maintain the minimum and maximum levels set forth in the FERC license. In a meeting between EDWCA and the Service, EDCWA conveyed that SMUD would not need operational changes for the water consumptive use planned by EDCWA once water rights were acquired. Therefore FERC would not require an amendment to the license and additional consultation with the Service would not occur.
2. The Agreement states that "Nothing in this Agreement will be construed to require SMUD to deliver El Dorado Water to, or store El Dorado Water for, the El Dorado parties in a manner that violates or that SMUD reasonable determines may violate the FERC license then in effect for the UARP." Based on this statement, it is our understanding that for the storage and delivery of water by from FERC-licensed facility FERC would not require an amendment to the license for water storage and flows, and therefore not conduct future consultation as per Section 7 of the Act.

Ms. Kimberly D. Bose, Secretary

4

3. The Agreement indicates that SMUD will store up to 30,000 acre feet of water (40,000 acre feet after 2025) for El Dorado County and provide water deliveries at either the White Rock Penstock or South Fork American River delivery Point. Any alterations made to the White Rock Penstock that allow for water delivery would require an amendment to the project license, and thus result in FERC consulting with the Service as required by Section 7 of the Act. However, the Agreement does not require water delivery through White Rock Penstock. There are existing facilities to withdraw water downstream of UARP. If the existing South Fork American River Delivery Point is used, there would be no change in facilities and therefore water delivery through this facility would not require future consultation between FERC and the Service.
4. We have been assured by FERC, and the Agreement itself, that if SMUD and EDCWA were to implement the terms of the Agreement, the parties may be required to comply with additional environmental review and this would meet the requirements of the Act. In this case, environmental review would mean the California Environmental Quality Act (CEQA). Review under CEQA does not necessitate consultation with the Service under the Act. Review under CEQA gives the Service an opportunity to provide comments, but these comments do not have to be incorporated. This proposed CEQA review does not guarantee that the Services avoidance and minimization measures for listed species would be followed and it would not include an analysis of the impacts of the project related to the recovery of the listed species.

Based upon these four points, it appears that there are avenues of providing for water storage and delivery by SMUD to EDC that would not need Commission approval for use of licensed facilities. Without an amendment to the license, there would be nothing for the Commission to approve; there would be no federal nexus; and consultation would not be reinitiated. In this scenario, potentially adverse effects to listed species could occur because of this current relicensing project that would not have been addressed. If the Agreement could be implemented in the future without further consultation, the potential effects of this Agreement must be addressed at this time or some mechanism(s) must be put in place that close all avenues of implementing this Agreement that do not require reinitiation so appropriate consultation is guaranteed to occur in the future.


Since the UARP facilities may be licensed and thus operated for at least 50 years, the use of such facilities for water storage and delivery has the potential to have serious and compounding effects to the listed plants in western El Dorado County. Therefore, the Service requests that either 1) the Commission addresses the Service's concerns listed above by establishing in writing the mechanisms needed to ensure reinitiation of consultation prior to FERC licensed facilities being used for water storage or delivery, or 2) the Commission should consult on the potential indirect and cumulative effects of the project on listed species. Until this issue is resolved, the consultation process cannot begin for the proposed Upper American River Hydroelectric Project.

Ms. Kimberly D. Bose, Secretary

5

Please address any questions or concerns regarding this response on the proposed Relicensing of the Upper American River Hydroelectric Project to Amy Fesnock, Acting Forest and Foothills Branch Chief, at (916) 414-6600.

Sincerely,

  
for Cay C. Goude  
Assistant Field Supervisor

cc:  
Upper American River Project Service List

**PROOF OF SERVICE**

Federal Energy Regulatory Commission

Project No.: FERC #2101, Upper American River Hydroelectric Project

I hereby certify that I have this day served by regular mail, the foregoing letter, Subject: Endangered Species Consultation on the Relicensing of the Upper American River Hydroelectric Project, FERC Project No. 2101-084, El Dorado County, California to each person designated on the official FERC Service list.

Dated at Sacramento Fish and Wildlife Office, Sacramento, California this 7<sup>th</sup> of February, 2007.

Eileen, Lopez  
Office Assistant  
US Fish and Wildlife Service  
2800 Cottage Way, Rm.W-2605  
Sacramento, CA 95825  
(916) 414-6600