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March 6, 2008

Cay C. Goude
Assistant Field Supervisor
Fish and Wildlife Service
2800 Cottage Way, Room W-2605
Sacramento, CA 95825

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: Response of Sacramento Municipal Utility District to
Fish and Wildlife Service Clarification of Request for Additional
Information on the Relicensing of the Upper American River Project,
FERC Project No. 2101-084;
Fish and Wildlife Service Reference No. 81420-2008-F-0014-3**

Dear Assistant Field Supervisor Goude and Secretary Bose:

The purpose of this letter is to respond to the letter from Cay C. Goude, Assistant Field Supervisor, U.S. Fish and Wildlife Service (FWS), to the Federal Energy Regulatory Commission (Commission), dated February 7, 2008, regarding FWS's request for additional information on the relicensing of the Sacramento Municipal Utility District's (SMUD) Upper American River Project (UARP). By letter dated December 12, 2007, Timothy J. Welch, Chief of the Hydro West Branch 2 at the Commission, addressed FWS's request for additional information before engaging in formal consultation required by Section 7 of the Endangered Species Act (ESA). The Commission's letter indicated that SMUD's Cooperation Agreement (Agreement) with El Dorado County (EDC) is "not part of the relicensing action and thus is not relevant to" ESA consultation for the UARP relicensing, that diversion of flows in the future is speculative, that implementation of the Agreement would require Commission approval,

and that the Commission would comply with its responsibility under Section 7 of the ESA at that time.¹

FWS's February 7 response asserted that the anticipated effects from the Agreement must be considered in the ESA consultation for the relicensing of the UARP. In addition, despite the Commission's statement that future implementation of the Agreement would require it to comply with its consultation requirements under the ESA at the time SMUD seeks authorization for implementation of the Agreement, FWS mistakenly believes that providing for water storage and delivery by SMUD to EDC would not require Commission approval. Because of these misconceptions, FWS stated that it will not begin the consultation process required for relicensing the UARP until the Commission either agrees to consult on potential indirect and cumulative effects of the Agreement on listed species, or address FWS's concerns by clarifying that additional consultation is required prior to future implementation of the Agreement.²

SMUD submits this response to FWS's letter to clarify the Agreement in order to allow FWS to begin Section 7 ESA consultation on relicensing the UARP.

First, SMUD agrees with the Commission that whether EDC will seek and obtain additional water rights that would utilize the UARP is speculative. To obtain water rights, EDC must apply to the California State Water Resources Control Board (SWRCB), which will initiate a lengthy, potentially contentious hearing process to determine whether to award EDC such rights. Whether EDC will actively pursue this process—and whether the SWRCB will issue water rights that would utilize the UARP—is not currently known. Therefore, the Agreement is not a “prospective activity” that is “caused by” relicensing and “reasonably certain to occur,” as FWS claims.

Second, EDC has multiple options for pursuing water rights, and some of those options would not even involve the use of the UARP. The Agreement expressly provides its execution is “not a decision that commits, and does not commit, any of the Parties to a definite course of action” and that “any such activity is speculative, not currently capable of precise definition, and may never occur.”³ Pursuing water rights that would utilize the UARP is just one of several possible avenues EDC may explore. In fact, the Agreement itself envisions other sources of water EDC may pursue if it is not successful in obtaining a transfer or assignment from the City of Sacramento.⁴ In addition, EDC could seek water upstream of El Dorado Irrigation District's El Dorado Project on the Silver Fork or South Fork American River, or other alternatives which would not even utilize water at the UARP. As such, the Agreement is not an independent action with “no independent utility apart from” relicensing.

¹ Letter from Timothy J. Welch, Federal Energy Regulatory Commission, to Chris Nagano, Fish and Wildlife Service, at 2, Project No. 2101-084 (issued Dec. 12, 2007).

² Letter from Cay C. Goude, Fish and Wildlife Service, to Kimberly D. Bose, Federal Energy Regulatory Commission, at 4, Project No. 2101-084 (filed Feb. 7, 2008).

³ El Dorado – SMUD Cooperation Agreement at 3, Project No. 2101-000 (filed Dec. 2, 2005) (Agreement).

⁴ Agreement at Exh. G § 2.

Third, if EDC seeks and obtains water rights from the SWRCB and EDC seeks to utilize such rights within the UARP boundary, SMUD would be required to seek approval from the Commission for non-project use of project lands, which could trigger the Commission's ESA consultation obligations. The Commission's standard land use article provides that a licensee may convey easements or rights-of-way across, or leases of, project lands without prior Commission approval for water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir.⁵ Withdrawals in excess of this amount, however, require the licensee to file a request for approval of non-project use of project lands. The Commission reviews proposals for non-project use of project lands under the comprehensive development standard of the Federal Power Act, and its authorization of such uses requires compliance with Section 7 of the ESA.⁶

Lastly, it is clear from FWS's letter that the effects on listed species that are of concern to FWS are *not* those resulting from use of UARP facilities for storage and conveyance of water or use of Project land to connect EDC facilities to the UARP. Rather, FWS's concern is with implementation of EDC's General Plan and the effects that construction of new housing, commercial buildings, and related infrastructure within the County might have on listed species. Those activities, of course, are fully subject to Sections 9 and 10 of the ESA.

In the context of the Commission's relicensing of the UARP, however, Section 7 is concerned only with whether the Commission's action (issuance of a new license) will have an adverse effect, either direct or indirect, on species or habitat when considered alone or together with interrelated or interdependent activities. Indirect effects of the Commission's action would be later effects *caused* by its action that are *reasonably certain* to occur. Similarly, for the Commission's action and the development of concern to be interdependent or interrelated, there must be a "but for" relationship between the two.

None of these statutory and regulatory triggers are met here. Indeed, the issues FWS raises are speculative in the extreme. It is speculative whether EDC will actually seek to take advantage of its agreement with SMUD or instead seek other water supplies. It is speculative whether the SWRCB will award the requisite water rights. If it does, it is speculative whether the additional water supplies will be used for agriculture or the additional development with which FWS is concerned. If such development does occur,

⁵ FERC Division of Hydropower Administration and Compliance, Compliance Handbook at App. H (Standard Land Use Article (c)(8)) (Mar. 2004).

⁶ See, e.g., *Virginia Elec. & Power Co.*, 72 FERC ¶ 61,075 at p. 61,390 (1995) (noting that the licensee's request to amend the license to divert project water for consumptive use required "rigorous environmental scrutiny and analysis," including the preparation of an environmental impact statement). Even in its evaluation of a request for approval for the non-project use of project lands, the Commission may condition such approval to require the protection of threatened or endangered species. See, e.g., *Duke Power Co.*, 109 FERC ¶ 61,020 at P 5 (2004) (stating that Commission staff approved the proposed non-project use of project lands and waters to allow the licensee to undertake activities relating to increased water withdrawals by a local utility district, but, based on consultation with the FWS, placed conditions on the uses to ensure protection of federally-listed species).

its location is speculative, and it is speculative whether it will have any effect whatever on listed species or critical habit. In short, there is no causation, there are no effects reasonably certain to occur, and the development of concern—if it occurs—will have independent utility and not be dependent on the Commission’s action in relicensing the UARP.

Moreover, should the circumstances relevant to the consultation change after consultation on the relicensing is complete, FWS could reinitiate consultation under Section 7 of the ESA to address any such change, as outlined in its regulations.⁷

For all of these reasons, FWS’s ability to ensure protection for listed species in the event that EDC is ever able in the future to utilize water from the UARP under the Agreement is fully protected; and thus consultation for purposes of the pending UARP relicensing need not consider the Agreement.

Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael A. Swiger". The signature is written in a cursive, flowing style.

Michael A. Swiger
Counsel to Sacramento Municipal Utility District

⁷ 50 C.F.R. § 402.16. FWS typically reserves such authority when issuing a biological opinion for a hydroelectric project. *See, e.g.*, Biological Opinion for the Makah Bay Wave Energy Project at 52, Project No. 12751-000 (filed Feb. 15, 2008) (including a “Reinitiation Notice” in the Biological Opinion).