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COMMISSION



UNITED STATES DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

NATIONAL MARINE FISHERIES SERVICE

Southwest Region

650 Capitol Mall, Suite 5-100

Sacramento, CA 95814-4700

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FEDERAL ENERGY
REGULATORY COMMISSION

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

Re: NOAA's National Marine Fisheries Service's Reply To a Request From Mr. Noah Hume of Stillwater Sciences, Inc., For Concurrence With a Plan to Deviate From License-required Flow Releases, Don Pedro Hydroelectric Project, P-2299.

Dear Secretary Bose:

This letter addresses Stillwater Sciences' letter of June 17, 2011, informing NOAA's National Marine Fisheries Service (NMFS) that the Turlock Irrigation District and Modesto Irrigation District (Districts) intend to request a flow variance from the Federal Energy Regulatory Commission (the FERC) for the operating license for the Don Pedro Project (FERC No. 2299). NMFS is concerned that the proposed flow variance is an action that may affect threatened California Central Valley (CV) steelhead distinct population segment (DPS) (*Oncorhynchus mykiss*) and their designated critical habitat. Stillwater Sciences has requested that NMFS concur with a variance from the required minimum flow releases which are designed, in part, for the protection of NMFS' trust resources.

By this letter, NMFS requests that the FERC enter into consultation under Endangered Species Act (ESA) section 7 and 50 CFR §402.14 et seq. Please be advised that only a Federal agency or its designee may initiate consultation under section 7 of the ESA and thus request concurrence for a particular action. The FERC, as a Federal agency, has responsibility under section 7 of the ESA to consult with NMFS regarding projects that may affect listed species under NMFS's jurisdiction, and to ensure that any activities the FERC authorizes are not likely to jeopardize threatened or endangered species or adversely modify designated critical habitat. NMFS has requested on several occasions that the FERC initiate consultation under Section 7(a)(2) of the ESA for the federally licensed operations of the Don Pedro Hydroelectric Project primarily concerning effects of the project on threatened California CV steelhead. To date, the FERC has not initiated consultation with NMFS, at times relying on the belief that a decision not to amend a license order is not an "action" under the ESA. In this instance, it should be clear that the FERC would be altering the terms of its license order by authorizing noncompliance with them, and the duty to consult should be similarly clear.

The California CV steelhead DPS was originally listed as threatened on March 19, 1998 (63 FR 13347). After re-evaluation, the California CV steelhead DPS was listed as threatened on




January 5, 2006 (71 FR 834). On April 15, 2004, NMFS classified the CV fall and late-fall run Chinook salmon evolutionarily significant unit (ESU) as a species of concern (69 FR 19975). The Tuolumne River is included in both of the California CV steelhead DPS and the CV fall and late-fall run Chinook salmon ESU. In addition, NMFS designated critical habitat for California CV steelhead on September 2, 2005 (70 FR 52488). The Tuolumne River from La Grange Dam to the confluence with the San Joaquin River is designated as critical habitat for California CV steelhead.

Low flows in the Tuolumne River cause water temperatures to rise to sub-lethal and even lethal temperatures, which adversely impact California CV steelhead. Examples of such impacts are susceptibility to disease and predation, and reduced feeding rates, which in turn reduces growth and overall fish health. In addition, high water temperatures in the Tuolumne River are likely to force resident and anadromous forms of *O. mykiss* to rear in a condensed section of the river below La Grange Dam, where cold water releases provide suitable water temperatures. Warmer water conditions can cause avoidance behavior in California CV steelhead, such as returning adult steelhead refusing to enter the Tuolumne River or juvenile steelhead rearing in a smaller reach of the river because the water temperature below La Grange Dam more quickly exceeds their thermal tolerance. Behavioral changes in California CV steelhead may be caused by the flow variance. As a reminder, the Districts' water operations are not covered for incidental take of threatened California CV steelhead.

NMFS encourages Stillwater Sciences and the Districts to work with FERC to initiate consultation under section 7(a)(2) of the ESA for the proposed flow variance request. A completed section 7 consultation includes an incidental take statement which would protect the Districts against ESA section 9 take prohibitions and liability. This response is not intended to take the place of formal comments or consultation as required under the ESA of 1973, as amended (16 U.S.C. 1531 et seq.) and does not provide incidental take authorization pursuant to section 7(b)(4) and section 7(o)(2) of the ESA. Any incidental take of California CV steelhead that may occur during the operations of the Don Pedro project is not exempt from section 9 of the ESA. In addition, NMFS is concerned that this action may adversely affect the essential fish habitat of Pacific salmon, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act.

NMFS looks forward to working with FERC, Stillwater Sciences, and the Districts to protect and manage the Tuolumne River anadromous fish populations. If you have any questions regarding this correspondence, please contact Monica Gutierrez by telephone at (916) 930-3657, or by email at Monica.Gutierrez@noaa.gov.

Sincerely,


for Maria Rea
Supervisor, Central Valley Office

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