

**American Rivers – American Whitewater – California Sportfishing Protection Alliance –
California Trout – Central Sierra Environmental Resource Center – Friends of the River –
Golden West Women Flyfishers – Merced Fly Fishing Club – Trout Unlimited –
Tuolumne River Trust**

October 8, 2014

Via electronic mail

State Water Resources Control Board
Division of Water Rights
Attn: Mark Gowdy
P.O. Box 2000
Sacramento, CA 95812
mgowdy@waterboards.ca.gov

**Re: Phase I SED Analysis of Potential Economic Impacts to CCSF resulting from
Tuolumne Flow Alternatives**

Dear Mr. Gowdy:

American Rivers, American Whitewater, California Sportfishing Protection Alliance, California Trout, Central Sierra Environmental Resource Center, Friends of the River, Golden West Women Flyfishers, Merced Fly Fishing Club, Trout Unlimited, and the Tuolumne River Trust (“Conservation Groups”) hereby reply to the City and County of San Francisco’s (CCSF) letter dated July 29, 2014. CCSF’s letter responds to the key assumptions Division Staff proposes to use in evaluating the potential impacts to CCSF in the *Draft Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the Bay-Delta: San Joaquin River Flows and Southern Delta Water Quality* (Phase 1 SED). Division Staff’s key assumptions were described in a letter dated May 6, 2014 from Barbara Evoy, Division of Water Rights, to Ellen Levin, San Francisco Public Utilities Commission.

The Division’s proposed assumptions differ from those used by the CCSF in analyses to date.¹ We summarize the assumptions below:

- (1) The CCSF will purchase from Modesto and Turlock Irrigation Districts (Districts) the water necessary to satisfy its Fourth Agreement and Raker Act responsibilities in the event CCSF storage credits in the Don Pedro reservoir are reduced to zero. “The Phase 1 SED, therefore, will evaluate economic impacts by assuming a purchase price for this water from the Districts and then estimate the

¹ Letter from Barbara Evoy to Ellen Levin (May 6, 2014), p. 2.

corresponding increase in water rates in the SFPUC service area and the associated indirect and induced impacts in the regional economy.²

- (2) CCSF's obligation under Article 8(b) of the Fourth Agreement to contribute to water release conditions required by the Federal Energy Regulatory Commission (FERC) license for the Don Pedro Project will continue even after it exhausts its storage credits in the Don Pedro Reservoir.³
- (3) In the alternative to (2), CCSF will have "no responsibility to contribute water" under the Fourth Agreement after it exhausts its storage credits in the Don Pedro Reservoir and instead will be responsible for complying with the Districts' Raker Act requirements only.⁴

The CCSF objects to these assumptions, particularly the assumption that CCSF could purchase water from the Districts to satisfy its Fourth Agreement and Raker Act obligations.⁵ It insists:

The Phase 1 SED must analyze the impacts of reduction in deliveries throughout the [Hetch Hetchy Regional Water System] service territory that may result from implementation of the proposed Tuolumne River flow alternatives because reduction in deliveries is the only method of compliance that is within the SFPUC's control, and thus, it is the reasonably foreseeable consequence of the State Water Board's contemplated action.⁶

It further argues that it is inappropriate to assume CCSF could purchase sufficient water because there is no existing agreement for the Districts to sell water to CCSF for this purpose and no precedent for such an agreement.⁷ CCSF does not propose any alternative responses to increased flow requirements pursuant to the Water Quality Control Plan during a severe and prolonged drought that exhausts its storage credits.

Conservation Groups respectfully offer these comments and recommendations for further environmental analyses in the SED. Our comments are organized as follows: Section I provides background relevant to SWRCB's proposed assumptions for how CCSF may respond to shortages as a result of amendments to the Basin Plan. Section II provides discussion of reasonable alternative methods of compliance and reasonable measures to mitigate the impacts of

² *Id.* at 1.

³ *Id.* at 2.

⁴ *Id.*

⁵ Letter from Ellen Levin, SFPUC, to Mark Gowdy, Division of Water Rights (July 29, 2014), p. 2.

⁶ *Id.*

⁷ *Id.* at 4.

compliance that the Board should evaluate in the Phase I SED relative to increased flow requirements in the Tuolumne River and CCSF. Section III states our conclusions.

I. BACKGROUND

In 1964, the Federal Power Commission (predecessor to FERC) issued the existing license to the Districts for the operation of the Don Pedro Project on the Tuolumne River. License Article 37 required FERC to re-evaluate the condition of the fisheries in the lower Tuolumne River after 20 years of project operation.

In 1966, the Districts and CCSF entered into the “Fourth Agreement.” Article 8 of this Agreement, as referenced in the Division’s May 6 letter, divided the responsibility for any increased flow that might be required:

The Districts and the City recognize that Districts, as licensees under the Federal Power Commission license for the New Don Pedro Project, have certain responsibilities regarding the water release conditions contained in said license, and the such [sic] responsibilities may be changed pursuant to further proceedings before the Federal Power Commission. As to these responsibilities, as they exist under the terms of the proposed license or as they may be changed pursuant to further proceedings before the Federal Power Commission, Districts and City agree

- a) That any burden or changes in conditions imposed on account of benefits accruing to City shall be borne by City.
- b) That at any time Districts demonstrate that their water entitlements, as they are presently recognized by the parties, are being adversely affected by making water releases that are made to comply with Federal Power Commission license requirement, and that the Federal Power Commission has not relieved them of such burdens, City and Districts agree that there will be a re-allocation of storage credits so as to apportion such burdens on the following basis: 51.7121% to City and 48.2879% to Districts.

In 1995, FERC reopened the license pursuant to License Article 37 to consider modifications to flow requirements in the lower Tuolumne River and other measures to protect fishery resources. In 1995, the Districts, CCSF, several resource agencies, the Tuolumne River Trust, and Friends of the River entered into a settlement agreement that called for increased minimum instream flows in the lower Tuolumne River.⁸ In 1996, FERC approved the settlement agreement and amended the license.

On April 21, 1995, CCSF and the Districts entered into a separate agreement for dividing the responsibility for the increased flow releases required by the 1995 settlement agreement. Rather than follow Article 8 of the Fourth Agreement, the agreement obligates CCSF to pay the District an annual sum of \$3.5 million, in consideration for the Districts releasing the necessary

⁸ See eLibrary no. 19960207-0246.

flows. In 1996, the Districts and CCSF entered into a further agreement relating to additional costs associated with the 1995 settlement agreement.⁹

On July 16, 2009, FERC ordered an informational proceeding to consider interim flows for the lower Tuolumne River.¹⁰ The CCSF offered testimony that implementation of the increased flow schedule advocated by the resource agencies and Conservation Groups would have severe economic impacts in the San Francisco Bay Area in circumstances of severe and prolonged drought, as occurred in 1987-1992. CCSF's hydrologic modeling expert testified as to the potential levels of shortage in San Francisco and the greater Bay Area that might occur under the agencies' proposal.¹¹ He assumed that the responsibility for flow releases in excess of those required by the 1995 Settlement Agreement would be apportioned between the CCSF and Districts in accordance with Article 8 of the Fourth Agreement. CCSF's economic expert testified regarding the potential economic impact of the shortages predicted by CCSF's modeler. He assumed that CCSF's primary response under severe and prolonged drought would be to reduce water deliveries. He did not suggest or analyze any alternative actions CCSF could take to assure reliable replacement water supply.

On April 8, 2011, FERC issued Scoping Document 1 for the Don Pedro relicensing proceeding. On June 10, 2011, Conservation Groups requested that FERC study the effects of flow alternatives using different assumptions regarding potential responses:

We request that Commission Staff study, develop and describe an alternative whereby the Districts are paid by the City in lieu of reduced City diversions. Following the 1996 Settlement Agreement, the Districts and the City came to an economic arrangement that divides the burden of compliance. Under the terms of two contracts between the City and the Districts, the City pays specified expenses and costs related to the Settlement. In exchange, the Districts provide the water needed to meet instream flow requirements in the Tuolumne River downstream of La Grange.¹² We believe it is reasonably foreseeable that a similar contractual arrangement might be entered into in order to allocate the burden of compliance under the new license.

⁹ The Tuolumne River Trust filed these agreements in the FERC docket for the Don Pedro relicensing on June 10, 2011. See eLibrary no. 20110610-5107.

¹⁰ See *Turlock Irrigation Dist. & Modesto Irrigation Dist.*, 128 FERC ¶ 61,035 (Order on Rehearing, Amending License, Denying Late Intervention, Denying Petition, and Directing Appointment of a Presiding Judge for a Proceeding on Interim Condition).

¹¹ See Steiner testimony (CSF-10), eLibrary 20090914-5175; and Steiner answering testimony (CSF-18) and Sunding answering testimony (CSF-20), both eLibrary 20090922-5093.

¹² [Footnote in original text]. See Agreement between the City and County of San Francisco, Turlock Irrigation District and Modesto Irrigation District (April 21, 1995). See also "Agreement on Allocation of Certain FERC Costs Between City and County of San Francisco and Modesto Irrigation District and Turlock Irrigation District," 1996. MID resolution number 96-14; TID resolution number 96-12; SFPUC resolution number 95-0201; S.F. Board of Supervisors resolution number 35-96. These documents, or a description of these documents, should have been included in the PAD, but were not. Conservation Groups filed them with the Commission on June 10, 2011. See eLibrary no. 20110610-5107. See Conservation Group's Comments Regarding Pre-Application Document and Scoping Document 1, and Study Requests for the Don Pedro Project, eLibrary 20110610-5198, pp. 16-17.

Conservation Groups recommended consideration of West of Delta storage and water delivery to the City:

We request that Commission Staff study, develop and describe an alternative whereby [CCSF] reduces its diversions from the Tuolumne River, replacing part of San Francisco's supplies with water diverted through the Contra Costa Canal for storage at an expanded Los Vaqueros Reservoir, or through new facilities to a new, alternative west-of-Delta storage reservoir. In either case, conveyance from west-of-Delta storage would be made through interties to the South Bay Aqueduct and/or San Francisco's existing water delivery system. This alternative likely would have beneficial impacts to Tuolumne River and Delta fish, wildlife, and agricultural beneficial uses. The potential use of a west-of-Delta storage facility as a drought reserve by the City should be evaluated as part of this alternative. Any socioeconomic study conducted for the relicensing should also analyze this alternative for its opportunities to reduce economic impacts to the San Francisco Bay Area of increased Tuolumne River instream flows.¹³

In 2013, in its comments on the SED, CCSF continued the same line of argument it made in 2009.¹⁴ The only potential response it evaluated under a 35% of unimpaired flow requirement for February through June was water shortage in a drought scenario. However, CCSF reserved its right to challenge interpretation of its obligations under the Raker Act and Fourth Agreement in future proceedings:

In presenting potential water supply and socioeconomic effects from certain interpretations of the Raker Act and the Fourth Agreement San Francisco does not thereby waive arguments it may have about how the Raker Act or Fourth Agreement should or will be interpreted in future proceedings.¹⁵

On May 6, 2014, the Division sent the letter regarding its economic assumptions as described above.

On January 22, 2014, the CCSF Board of Supervisors passed Resolution 288-14, resolving:

That the San Francisco Board of Supervisors hereby expresses its interest in the on-going Bay-Delta planning processes of the Delta Stewardship Council, the Bay Delta

¹³ *Id.* at 17.

¹⁴

http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/baydelta_pdsed/docs/comments032913/dennis_herrera.pdf

(last checked Oct. 8, 2014). Mr. Steiner's PowerPoint from his March 21, 2014 oral comments is included as an appendix to the City's written comments.

¹⁵ Presentation of CCSF to State Water Board on Phase I SED (Mar. 21, 2013) (emphasis in original). The caveat is repeated in footnote 7 (p. 6) of CCSF's March 29, 2013 letter, with the added words "before the SWRCB or other bodies."

Conservation Plan, and the State Water Resources Control Board, and urges applying the above principles as part of any solution or conclusions reached in critical planning and regulatory processes.

On May 27, 2014, the San Francisco Public Utilities Commission passed Resolution 14-0085 in support of the principles of a “Bay Area Regional Water Supply Reliability Partnership,” which announced:

Parties will participate in the evaluation of near- and long-term joint water supply reliability projects including, but not limited to, use of capacity of existing facilities, changes to infrastructure including new interconnections, recycled water, water conservation, expanded treatment, regional desalination, water transfers and exchanges, and other projects or institutional arrangements that encourage a regional approach to achieving water supply reliability in the Bay Area.¹⁶

Among the “above principles” cited by the Board were:

Delta Outflows. Recognize that the Bay-Delta ecosystem has been in a state of “chronic drought” due to current water management practices, and ensure adequate Delta outflows to San Francisco Bay to support fisheries, wildlife, habitat, drinking water quality and other beneficial uses.¹⁷

On July 29, 2014, CCSF responded to the Division as described above. Footnote 2 of this letter reaffirms: “CCSF reserves the right to argue how the Raker Act or the Fourth Agreement should be interpreted in future proceedings before the State Water Board or other bodies.”¹⁸

II. **DISCUSSION**

A. The Division is Entitled to Make Reasonable Assumptions Supported by Substantial Evidence.

CCSF argues in its July 29 letter that “*the* reasonably foreseeable method of compliance” with the State Board’s “proposed Tuolumne River flow alternatives” is “reduction in deliveries” to CCSF and other entities that the CCSF supplies with water.¹⁹ It argues this is the only reasonable assumption. We disagree.

¹⁶ <http://www.sfwater.org/modules/showdocument.aspx?documentid=5950> (last checked Oct. 8, 2014).

¹⁷ Available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions14/r0288-14.pdf> (last checked Oct. 8, 2014).

¹⁸ Letter from Ellen Levin to Mark Gowdy, p. 1.

¹⁹ Letter from Ellen Levin to Mark Gowdy, p. 2 (emphasis added).

Under the California Environmental Quality Act (CEQA), “[a] public agency can make reasonable assumptions based on substantial evidence^[20] about future conditions without guaranteeing that those assumptions will remain true.”²¹

The Division will provide “[a] detailed presentation of the assumptions, including their bases, and the corresponding economic and other analyses will be presented in the next draft of the Phase 1 SED,” later this year.²² It is premature for CCSF to conclude that the Division’s proposed assumptions are unreasonable prior to seeing the Division’s supporting evidence.²³

B. The Board and other stakeholders are not bound by the Fourth Agreement or constrained in proposing outcomes that conflict with it.

Despite reserving its right to challenge the Fourth Agreement, CCSF’s advocacy before the State Water Board until now has been driven by the assumption that CCSF’s burden of compliance to meet higher instream flows will be determined by the Fourth Agreement. For this reason, it has opposed any further increases in instream flow requirements for the Tuolumne River. However, as stated above, the fact that the Division does not presume the Fourth Agreement governs CCSF’s methods for compliance here does not automatically render its assumptions unreasonable.

The Division should not constrain its analysis based on the Fourth Agreement for a number of reasons. The State Water Board is not a party to the Fourth Agreement, and otherwise has no authority to enforce it. The Fourth Agreement explicitly addresses flow increases pursuant to a “Federal Power Commission license requirement”²⁴ and is silent on flow increases that may be required by the State Water Board. Further, CCSF has clearly reserved its right to challenge the interpretation of the Fourth Agreement in future proceedings, leaving its future uncertain.

In making its decision as to what instream flows are necessary to protect water quality standards in the Tuolumne River, the Board must evaluate the public interest in differing levels of responsibility for providing water to meet flow increases, pursuant both to the Board’s

²⁰ Substantial evidence “includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.” Cal. Pub. Res. Code § 21080(e)(1).

²¹ *Envtl. Council of Sacramento v. City of Sacramento*, 142 Cal.App.4th 1018, 1036 (Cal. Ct. App. 2006) (citing Cal. Pub. Res. Code § 21080(e); *City of Del Mar v. City of San Diego*, 133 Cal.App.3d 401, 412 (Cal. Ct. App. 1982)).

²² Letter from Barbara Evoy to Ellen Levin, p. 2.

²³ We note that, under CEQA challenges, “plaintiffs bear the burden of proving a prejudicial abuse of discretion by establishing that the agencies’ decisions are not supported by substantial evidence” *Id.* (citing *Neighbors of Cavitt Ranch v. County of Placer* 106 Cal.App.4th 1092, 1099 (Cal Ct. App.2003); *Barthelemy v. Chino Basin Mun. Water Dist.* 38 Cal.App.4th 1609, 1617 (Cal Ct. App. 2003)).

²⁴ There does not appear to be a dispute regarding that the agreement applies to orders issued by the Federal Energy Regulatory Commission, successor to the Federal Power Commission.

authority under the California Water Code²⁵ and federal Clean Water Act.²⁶ It should not constrain its consideration of the public interest based on an agreement between private parties, as CCSF argues.

C. The Division must consider reasonably foreseeable alternative methods of compliance and also measures that would mitigate the effects of compliance.

CCSF argues that the Division must consider reasonably foreseeable methods of compliance with any requirements for additional flow in the lower Tuolumne River. We agree. However, the Draft SED must also include

- An analysis of reasonably foreseeable alternative methods of compliance that would have less significant adverse environmental impacts; and
- An analysis of reasonably foreseeable mitigation measures that would minimize any unavoidable significant adverse environmental impacts of the reasonably foreseeable methods of compliance.²⁷

To this end, Conservation Groups respectfully request that the SED include analysis of (1) foreseeable alternative methods of compliance with potential reductions in the amount of Tuolumne River water available to CCSF and (2) reasonably foreseeable mitigation measures that would minimize the impacts of compliance measures, as described below.

D. The Division should consider alternative methods of compliance.

1. The Board modifies flow requirements for multiple dry year sequences to mitigate the potential adverse impacts of reduced deliveries.

Many of the present Conservation Groups recently submitted a flow proposal for the lower Merced River pursuant to the relicensing proceeding of the Merced River Hydroelectric Project.²⁸ This flow proposal combines reduced irrigation deliveries with a 60% of unimpaired flow requirement. The application of a percent-of-unimpaired requirement adopts the State Board’s approach in Phase I, but in Below Normal and Dry years reduces the number of months in which the percent-of-unimpaired requirement would apply, and in Critically Dry years eliminates the percent-of-unimpaired requirement in favor of a combination of numeric flow values and a “block of water” that would be deployed in the February – June period by an implementation committee. Conservation Groups used the water balance model developed for the Merced relicensing to evaluate options and outcomes of modifying the frequency of the application of the percent-of-unimpaired and to triage dry year sequences.

²⁵ California Water Code §§ 174, 179, 275.

²⁶ 33 U.S.C. § 1341.

²⁷ 23 Cal. Code Regs. § 3777(b)(4).

²⁸ Conservation Groups plan to develop a similar proposal for the Tuolumne River, using the water balance model developed for the relicensing of the Don Pedro Project.

One of the advantages of a variable duration for deployment of a percent-of-unimpaired flow requirement is that it also allows a greater aquatic benefit in Wet and Above Normal years. However, this is less essential to the present discussion than the development of defined and specific changes in flow requirements to reduce water supply impacts in dry year sequences. Rather than simply announce the principle of “off-ramps,” or rely on emergency actions to avoid short-term calamities, the Board should evaluate specific options for limiting or mitigating water supply impacts to urban water users in particular during multiple dry year scenarios.

2. The Board requires measures to increase water use efficiency throughout the basin.

We acknowledge that CCSF is a leader in water use efficiency.²⁹ However, the Division should still consider measures CCSF and other municipal, industrial, and agricultural users³⁰ in the basin could implement to increase water use efficiency in order to comply with any increase in instream flow requirements.

The State Water Board is charged with the orderly and efficient administration of water resources of the state.³¹ It has a broad mandate to apply its adjudicatory and regulatory authority in furtherance of the general welfare of the state.³²

[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.³³

²⁹ Voluntary reductions in 2014 in water used by SFPUC and by the Bay Area Water Supply and Conservation Agency (BAWSCA) served in large part by the Hetch Hetchy system exceeded requested conservation. BAWSCA has reduced its long term projected demands based from its projections in 2008. See BAWSCA Board of Directors meeting packet, September 18, 2014 at: http://www.bawasca.org/docs/14_BAWSCA_Sept18_Agenda_FINAL_PACKET.pdf pp. 31-33 (last checked Oct. 8, 2014).

³⁰ See, e.g., CRAIG M. WILSON, CAL. ST. RES. CONTROL BD., THE REASONABLE USE DOCTRINE & AGRICULTURAL WATER USE EFFICIENCY, pp. 1-3.

³¹ California Water Code § 174(a).

³² *Id.* § 275.

³³ *Id.* § 100.

What is reasonable use may depend on the circumstances and evolve over time. As the court stated in *Light v. State Water Resources Control Board*:

“What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare Dist. v. Lindsay–Strathmore Dist.* (1935) 3 Cal.2d 489, 567, 45 P.2d 972.) In this regard, the *Joslin* court commented, “Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in [Article X, Section 2].” (*Joslin, supra*, 67 Cal.2d at p. 140, 60 Cal.Rptr. 377, 429 P.2d 889, fn. omitted³⁴

The Division should consider efficiency measures for all water rights holders. The Board has authority to curtail pre-1914 water rights pursuant to Article X of the State Constitution. “The Board’s authority to prevent unreasonable or wasteful use of water extends to all users, regardless of the basis under which the users’ water rights are held.”³⁵

Further, the Division’s evaluation of efficiency measures cannot exclusively rely on the priority system. In *El Dorado v. SWRCB*, the court held that “the rule of priority is not absolute.”³⁶ Water right priorities are still subject to the constitutional prohibition on waste and unreasonable use:

[t]he Board is obligated to protect water right priorities unless doing so will result in the unreasonable use of water, harm to values protected by the public trust doctrine, or the violation of some other equally important principle or interest.³⁷

³⁴ *Light v. State Water Resources Control Board*, 226 Cal.App.4th 1463, 1479 (Cal. Ct. App. 2014), as modified on denial of reh’g (July 11, 2014), review filed (July 28, 2014), review filed (July 29, 2014), review denied (Oct. 1, 2014).

³⁵ *Id.* at 1482 (quoting *Cal. Farm Bureau Fed’n v. State Water Resources Control Board*, 51 Cal.4th 421, 429 (Cal. 2011)).

³⁶ 142 Cal.App.4th 937, 944 (Cal. Ct. App. 2006).

³⁷ *Id.*

E. The Division should consider measures to mitigate the impacts of reasonably foreseeable methods of compliance.

1. The Districts and CCSF enter into an agreement whereby the Districts provide additional or all required water to meet increased instream flow requirements pursuant to the update of the water quality control plan.

In 1995, following conclusion of a settlement agreement that was signed by the Districts and the City, the Districts and the City reached a contractual agreement by which the City pays the Districts a sum of money every year, and in exchange the Districts meet the flow requirements in the lower Tuolumne River with District water. Since there is substantial evidence in the FERC record, and now in the record for Phase I, that this contractual agreement was the solution in the only previous case in which additional flow was required (in this case, by FERC), it is reasonably foreseeable that the City and the Districts might once again conclude a similar agreement.

The City suggests in its July 29 letter that the Board should not consider such a scenario because (1) Modesto Irrigation District (MID) voted down a proposal to sell water to CCSF in 2012, and (2) the CCSF was unable to effect a 2014 water transfer from Oakdale Irrigation District, due in part to a lack of needed cooperation from MID. However, in 2012-2014, MID was not facing impending large-scale mitigation requirements. Following relicensing, both MID and Turlock Irrigation District (TID) can reasonably expect to be required to complete numerous expensive mitigation projects, which may require expenditure of hundreds of millions of dollars, particularly if fish passage measures are ordered. Under the pressure of such requirements, the financial and water calculus of the Districts may be much different than in the recent past.

2. The Districts transfer water to CCSF in times of drought conditions.

Even if CCSF does not conclude a long term contractual agreement with the Districts that requires the Districts to meet all or part of the CCSF's flow obligations with the Districts' water, it is reasonably foreseeable that CCSF will increase the price offered to the Districts to the point where the Districts and their growers would agree to sell enough water to meet CCSF's needs during a drought. As noted above, this is particularly true considering the likely additional costs the Districts will face as an outcome of relicensing. As suggested by the Division in its May 6 letter to CCSF, the Division could consider different values as potential prices in order to bookend potential economic impacts.

3. CCSF arranges long-term alternative water supplies from north of the Delta or other sources.

There is no basis to assume that water supply reliability for CCSF must *exclusively* depend on the over-diverted Tuolumne River as a source for water. However, in its July 29 letter, CCSF discusses only TID and MID as potential sources of water for transfer to SFPUC.

Over the past ten years, the East Bay Municipal Utilities District (EBMUD), which like the SFPUC serves over a million customers in the San Francisco Bay Area and derives over 80%

of its water from one watershed (for EBMUD, the Mokelumne), has steadily and systematically pursued water supply reliability for its customers during dry years and multiple dry years. EBMUD has looked to diverse sources. In 2013, EBMUD completed the Freeport Project, allowing water acquired through a Central Valley Project contract to be moved from the Sacramento River to EBMUD's Mokelumne Aqueduct; this facility was first used in 2014. EBMUD is currently negotiating and preparing environmental documentation for a long term dry year water purchase agreement with Placer County Water Agency and is negotiating a similar agreement with Yuba County Water Agency.

In 2009, EBMUD adopted a Water Supply Master Plan to take the District through the year 2040. In developing this Plan, EBMUD considered potential measures to meet demand through the year 2040 and selected from them a suite of actions that it advanced as its preferred project. Several conservation groups, including two signatories to the present letter, sought to persuade the EBMUD Board of Directors that it should include in its preferred project an option to cooperate with Contra Costa Water District (CCWD) and purchase storage rights from CCWD in an expanded Los Vaqueros Reservoir, located west of the Delta near Byron. EBMUD declined to include this alternative, in part because water from Los Vaqueros would require more treatment than water from EBMUD's major storage facility, Pardee Reservoir, located near Jackson. Three conservation groups subsequently sued EBMUD over its inadequate CEQA document for the proposed Plan, in significant part on grounds that EBMUD's Environmental Impact Report (EIR) did not include a reasonable range of alternatives.

In April of 2011, the Sacramento Superior Court found in favor of plaintiffs, in part on grounds of inadequate analysis of alternatives under CEQA. The judgment read in part:

The evidence in the record supports the assertion that the Los Vaqueros Reservoir project was sufficiently defined to be included as a "potentially feasible" alternative. The District abused its discretion in arbitrarily excluding the Los Vaqueros project for being "undefined" and "uncertain" while retaining other water supply components that are equally undefined and uncertain. The District's determination that the Los Vaqueros project is "infeasible" is not supported by substantial evidence in the administrative record as a whole. The District should have included the Los Vaqueros project as a potentially feasible alternative water supply component.³⁸

The court invalidated the EIR, finding:

While the Court has no objection to the conceptual range of portfolios described in the EIR, the Court finds there is insufficient variation in the composition of those portfolios to permit informed decisionmaking.

An EIR is required to ensure that all reasonable alternatives to a proposed project are thoroughly assessed by the responsible official. Therefore, an EIR must describe a range of reasonable alternatives to the project or to the location of the project, which could feasibly attain the basic objectives of the project and evaluate the comparative merits of

³⁸ *Foothill Conservancy v. East Bay Mun. Utility Dist.*, Sacramento Superior Court Case No. 34-2010-80000491 (2011), p. 29.

the alternatives. (*Friends of the Eel River v Sonoma County Water Agency* (2003) 108 Cal App 4th 859, 872.) The discussion must focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if these alternatives would impede to some degree the attainment of project objectives, or would be more costly.³⁹

Subsequent to this ruling, EBMUD concluded an agreement with CCWD to store 20,000 acre-feet of water in Los Vaqueros Reservoir, with a stipulation that the amount may be increased in the future. EBMUD has completed an intertie with CCWD and begun construction of treatment infrastructure so that water from Los Vaqueros can be integrated into EBMUD operations as the need arises.

We have seen no reasons why CCSF cannot join this effort or begin a similar, parallel effort. Indeed, there would appear to be good reason for the CCSF to do so.

Recent actions by SFPUC suggest that CCSF is already looking at options to assure water supply reliability. SFPUC resolution 14-0085, passed on May 27, 2014, contemplates a “partnership” with other Bay Area water agencies and sets forth

principles for cooperative pursuit of short and long-term projects for water supply and/or water quality benefits, which look first to maximize the use of existing infrastructure of each agency, and may eventually include additional joint facilities to assist in providing region-wide water supply reliability and/or water quality benefits⁴⁰

On August 13, 2014, the San Francisco Chronicle reported statements from an SFPUC meeting:

Customers wouldn’t be left without water, Ritchie said. The PUC has four to five months’ worth of water in Bay Area reservoirs at all times – something that hasn’t changed with the drought – *and is in the process of finalizing an emergency response plan that includes agreements with other water agencies*, he said. That storage will be even more robust in 2018, when the reconstruction of the Calaveras Dam is completed, he said.⁴¹

The new regional cooperation between Bay Area water agencies has recently developed a name: the Bay Area Regional Reliability Project. It is featured on the website of the Bay Area Regional Water Management Plan, a site co-sponsored by SFPUC.⁴²

³⁹ *Id.* at 30.

⁴⁰ SFPUC Resolution 14-0085, p. 1.

⁴¹ <http://www.sfgate.com/default/article/Hetch-Hetchy-water-tunnel-in-danger-of-5684825.php> (emphasis added) (last checked Oct. 8, 2014).

⁴² *See e.g.*, <http://bairwmp.org/projects/bay-area-regional-reliability-interties-ebmud-ccwd> (last checked Oct. 8, 2014).

Like its neighbors across the Bay, the SFPUC needs to begin diversifying its water supply portfolio to assure water supply reliability. It is reasonable for the SED to consider such diversification. The SFPUC and the Bay Area Water Supply and Conservation Agency, to whom SFPUC wholesales water, are actively engaged in joint planning with other Bay Area agencies to improve regional system redundancy and to reduce the level of exclusive dependence of each individual water supply agency on its traditional sources.

III. **CONCLUSION**

The San Francisco Board of Supervisors recognized in Resolution 288-14 that the “San Francisco Bay-Delta Estuary helps to power [the Bay Area’s] economic engines, is the globally recognized symbol of our region, and its health reflects on our region’s capacities, values and vibrancy”⁴³ Yet for twenty years, CCSF’s approach to protecting its water supply has been built on an alliance with irrigation districts in seeking to prevent restoration of appropriate flows to the Tuolumne River and other tributaries of the San Joaquin River. In seeking to avoid conflict with the Districts, CCSF has thus in its actions contributed to the “state of ‘chronic drought’” within the San Francisco Bay-Delta Estuary, the “globally recognized symbol” of its region.⁴⁴

Both CCSF, in its actions, and the State Water Board, in the SED for Phase I of the update of the Bay-Delta Water Quality Control Plan, should consider and analyze reasonable and feasible alternatives to current water management that will allow restoration of needed flows to the Bay-Delta Estuary, including flows in the Tuolumne River, while assuring water supply reliability for the City and County of San Francisco and for SFPUC and BAWSCA water customers in the greater San Francisco Bay Area.

Respectfully submitted,



Richard Roos-Collins
Julie Gantenbein
Nicholas Niiro
WATER AND POWER LAW GROUP PC
2140 Shattuck Ave., Suite 801
Berkeley, CA 94704
(510) 296-5588
rcollins@waterpowerlaw.com
jgantenbein@waterpowerlaw.com
nniiro@waterpowerlaw.com

⁴³ Resolution 288-14, p. 1.

⁴⁴ *Id.* at 3.

Attorneys for AMERICAN RIVERS,
AMERICAN WHITEWATER,
CALIFORNIA TROUT, and TUOLUMNE
RIVER TRUST



Chris Shutes
CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE
1608 Francisco St.
Berkeley, CA 94703
(510) 421-2405
blancapaloma@msn.com



Patrick Koepele
TUOLUMNE RIVER TRUST
111 New Montgomery Street
San Francisco, CA 94105
(209) 588-8636
Patrick@tuolumne.org



Steve Rothert
AMERICAN RIVERS
432 Broad Street
Nevada City, CA 95959
(530) 478-0206
srothert@americanrivers.org



Dave Steindorf
AMERICAN WHITEWATER
4 Baroni Dr.
Chico, CA 95928
(530) 343-1871
dave@americanwhitewater.org



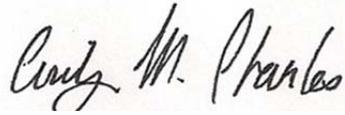
Curtis Knight
CALIFORNIA TROUT
619 S. Mt. Shasta Blvd.
Mt. Shasta, CA 96067
(530) 926-3755
cknight@caltrout.org



John Buckley
CENTRAL SIERRA ENVIRONMENTAL
RESOURCE CENTER
P.O. Box 396
Twain Harte, CA 95383
(209) 586-7440
johnb@cserc.org



Ronald Stork
FRIENDS OF THE RIVER
1418 20th Street, Suite 100
Sacramento, CA 95814
(916) 442-3155, Ext. 220
rstork@friendsoftheriver.org



Cindy Charles
GOLDEN WEST WOMEN FLYFISHERS
1940 Sacramento St. #6
San Francisco CA 94109
(415) 860-0070
cindy@ccharles.net



Michael Martin, Ph.D.
MERCED FLY FISHING CLUB
P.O. Box 2216
Mariposa, CA 95338
(209) 966-6406
mmartin@sti.net



Chandra Ferrari
TROUT UNLIMITED
2239 5th Street
Berkeley, CA 94710
(916) 214-9731
cferrari@tu.org

Cc:

Felicia Marcus, Chair, State Water Resources Control Board
Felicia.Marcus@waterboards.ca.gov

Barbara Evoy, Deputy Director, Division of Water Rights
bevoy@waterboards.ca.gov

Ellen Levin, Deputy Manager, Water Enterprise, San Francisco Public Utilities Commission
elevin@sfgwater.org

Jonathan Knapp, Assistant City Attorney, City of San Francisco
Jonathan.Knapp@sfgov.org

Dennis Herrera, City Attorney, City of San Francisco
cityattorney@sfgov.org

David Chiu, Chair, San Francisco Board of Supervisors
David.Chiu@sfgov.org

Kimberley Bose, Secretary
Federal Energy Regulatory Commission
(filed in the docket for the relicensing of the Don Pedro Project, P-2299)