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March 24, 2011

Subject: Petition for Reconsideration of Investigation Order Water Rights (WRO) 2011-003-EXEC for the Merced Irrigation District, Merced River Hydroelectric Project, Federal Energy Regulatory Commission, Project No. 2179

Dear Dr. Watts:

Merced River Conservation Committee, Trout Unlimited, California Sportfishing Protection Alliance, Friends of the River, Golden West Women Flyfishers, Northern California Council of Federation of Fly Fishers, and American Rivers (collectively, "Conservation Groups") hereby provide comments in response to Merced Irrigation District's ("Merced ID") Petition for Reconsideration of Water Rights Order 2011-03-EXEC (Feb. 28, 2011), which was noticed by the State Water Resources Control Board ("Board") on March 4, 2011. Water Rights Order ("WRO" or "Order") 2011-03-EXEC (Jan. 28, 2011) requires the Merced ID to perform reasonable studies that will, in part, inform the Clean Water Act Section 401 water quality certification for the ongoing federal relicensing of the Merced River Project, FERC No. 2179. Merced ID's existing license expires in 2014, and a new license cannot issue unless the Board grants or waives water quality certification. In addition to providing comments in response to the Petition, pursuant to 23 CCR § 648.1, Conservation Groups also seek formal party status in any proceeding established by the Board to address the Petition.

Conservation Groups support WRO 2011-03-EXEC. We believe the studies requested under the Order are necessary to address the impacts of the Merced River Project downstream of Merced ID's Crocker-Huffman agricultural diversion dam, which is located at RM 51.9 and 4.1 miles downstream of the nearest project facility. Such studies are typically requested and performed during the course of relicensing a hydroelectric facility.

Conservation Groups dispute Merced ID's contention that WRO 2011-03-EXEC exceeds the Board's authority under Clean Water Action section 401 and state law. FERC's authority to request studies pursuant to its licensing regulations under the Federal Power Act does not preempt the Board from exercising its independent authority under the Clean Water Act to request information that will inform the development of a water quality certification for the project, or its authority under state law to regulate facilities outside of FERC's jurisdiction. The Board must reject Merced ID's claims of federal preemption. Merced ID's flawed logic would lead to an untenable situation in which project impacts on water quality would escape regulation: FERC's authority would be limited to declining to exercise its authority, while the Board's authority would be limited to acquiescing to FERC's non-exercise. The Board should reject Merced ID's jurisdictional shell game.

WRO 2011-03-EXEC seeks to assure that the Board has adequate information on which to base a water quality certification and on which to base any regulatory action on Merced ID's FERC-licensed facilities and operations. The record before FERC contains data gaps as a result of Merced ID's refusal to collect critical information, particularly regarding fish and other aquatic resources downstream of Crocker-Huffman, and by the Commission's decision not to require this information for purposes of its licensing record. As stated above, FERC's determination of the adequacy of the licensing record does not bind the Board. The studies ordered in WRO 2011-03-EXEC will end the more than sixteen years of delay that Merced ID has orchestrated before FERC and in proceedings before this Board. During that period, fisheries resources in the lower Merced River have been seriously degraded by inadequate flows to the point that the remaining salmon in the river are at high risk of extinction.¹

The Board should deny Merced ID's Petition, including its request for a stay.

1. Description of Conservation Groups

While we dispute the necessity of a hearing (*see* section 4c, *infra*), pursuant to 23 CCR §648.1 and other applicable law, Conservation Groups request formal party status in any proceeding established by the Board to address Merced ID's Petition. Conservation Groups have actively participated in the Integrated Licensing Process before FERC, including providing comments on the Pre-Application Document and making study requests. Most recently we filed comments on Merced ID's Initial Study Report, see FERC accession no. 20110131-5038 (January 31, 2011). We provide descriptions for the individual groups below.

¹ Mesick, C. 2010. *The High Risk of Extinction for the Natural Fall-Run Chinook Salmon Population in the Lower Merced River due to Insufficient Instream Flow Releases*. Prepared for California Sportfishing Protection Alliance 30 November 2010. 47 pp. + 2 Appendices.

California Sportfishing Protection Alliance is a nonprofit, public benefit fishery conservation organization incorporated in 1983 to protect, restore, and enhance the state's fishery resources and their aquatic ecosystems. CSPA works to ensure that public fishery resources are conserved to enable public sportfishing activity. As an alliance, CSPA represents over one thousand members that reside in California and use California waterways, including the Merced River. Since its inception, CSPA has been actively involved in the conservation of the San Francisco Bay - Delta estuary, Central Valley, and Sierra fishery resources in proceedings before local, state, and federal government entities.

Friends of the River (FOR) is a nonprofit organization working to protect, preserve, and restore California rivers and streams for both environmental and recreational values. FOR has approximately 3,500 members in the state of California. Many of our members use and enjoy the Merced River and are interested in the long-term protection of the Merced River. The interests of FOR's members are directly affected by the outcome of state and federal proceedings that may determine protection, mitigation, and enhancement measures associated with facilities and operations on the Merced River.

Golden West Women Flyfishers (GWWF) is a 28-year-old angling club based in California which has over several years been very active in supporting wild salmon and steelhead protection and restoration on the Merced River. Members of GWWF fish this river and have been directly engaged in efforts to protect its fish.

Northern California Council of the Federation of Flyfishers is a nonprofit, largely volunteer organization dedicated to the sport of fly fishing and fish conservation. The Council has more than 1,000 regular members with about 6,000 members in 31 affiliated clubs throughout Northern California, many of whom use the Merced River.

Merced River Conservation Committee (MRCC) is a local volunteer organization of members interested in the Merced River watershed and its future, based in Mariposa County. Our principal interests are fisheries and aquatic habitat, trail and boating recreation, and historic sites. Our members fish, raft, and hike on the Merced River and are interested in the long-term protection of the Merced River. The interests of MRCC's members are directly affected by the outcome of FERC hydropower relicensing and SWRCB water quality and quantity proceedings that may determine protection, mitigation, and enhancement measures associated with facilities and operations on the Merced River.

Trout Unlimited is a national conservation organization with its national office in Arlington, Virginia, and California offices in Berkeley, Santa Rosa, Salinas, and Truckee, California. TU is a nonprofit corporation organized under the laws of the state of Michigan. TU is the nation's largest coldwater fisheries conservation organization. TU has approximately 150,000 members nationwide, and is dedicated to protecting, conserving, and restoring North America's trout and salmon resources. In California alone, TU has more than 10,000 members. TU members use and enjoy the Merced River and its tributaries in and around the proposed project area for recreational, aesthetic, and educational purposes, including, but not limited to fishing, and viewing and enjoyment of the outdoors.

American Rivers (AR) is a national conservation organization dedicated to restoring and protecting healthy rivers for the benefit of fish, wildlife and the communities that depend on them. AR believes that rivers are vital to our health, safety and quality of life. AR mobilizes an extensive network comprised of tens of thousands of members and activists located in every state across the country. AR's California regional office focuses on innovative river protection solutions, including meadow restoration, floodplain restoration, instream flow protection, hydropower relicensing and removing barriers to salmon migration. AR has been working to protect and restore the health of rivers impacted by hydropower dams since its founding in 1973. Its members in California use the Merced River and its tributaries to hike, fish, boat, and simply enjoy the beauty of the river corridor.

2. Background.

On April 17, 2009, Merced ID filed its Licensee Proposed Study Plan,² In its Proposed Study Plan, Merced ID did not propose any studies of fish and wildlife downstream of its own Crocker-Huffman agricultural diversion dam. Crocker-Huffman, at River Mile (RM) 51.9, is located 4.1 miles downstream of Lake McSwain, the lowest Merced River Project reservoir. Merced ID declined to undertake such studies despite the fact that the present FERC flow compliance point is located at Shaffer Bridge, 19.4 miles downstream of Crocker-Huffman at RM 32.5. Merced ID's Study Plan also included no studies to evaluate fish passage past project facilities, or habitat upstream of the project and its suitability for reintroduction of anadromous salmon and steelhead.

On July 16, 2009, Conservation Groups, in conjunction with the Resource Agencies, including Board Staff, proposed a suite of 18 studies or study modifications to evaluate project effects on water quality and aquatic resources. Most of the studies requested addressed project effects on aquatic biota throughout the Merced River system.³

On August 14, 2009, Merced ID filed its Revised Study Plan,⁴ which again included a scope of study restricted to the immediate project area, including project reservoirs, downstream to Crocker-Huffman Dam, its agricultural diversion.

On August 31, 2009, Conservation Groups, again joined by Board Staff and other Resource Agencies, submitted 18 study requests, many of them the same as those submitted on July 16, 2009, with some of them modified and resubmitted.⁵

² *Licensee Proposed Study Plan*, FERC eLibrary accession number 20090417-5054. These numbers are used as reference numbers in the rest of the document.

³ Conservation Groups (FERC eLibrary no. 20090716-5008); USDI Bureau of Land Management (BLM) (20090716-5047); National Marine Fisheries Service (NMFS) (20090716-5048); California State Water Resources Control Board (SWRCB) (20090716-5070); California Department of Fish and Game (CDFG) (20090716-5104); and US Fish and Wildlife Service (FWS) (20090720-0119).

⁴ Licensee Revised Study Plan, 20090814-5084.

⁵ Conservation Groups (20090831-5138), BLM (20090831-5273), SWRCB (20090831-5008) and CDFG (20090831-5237). See CDFG filing (20090831-5237), "Attachment," pp. 1-2, for description of which study proposals by Resource Agencies and Conservation Groups were revised versions of July submittals; revised

On September 8, 2009, Merced ID filed a response to some of the comments from Conservation Groups and Resource Agencies.⁶

On September 11, 2009, Conservation Groups provided additional comments to the Commission, notably in response to September 8, 2009, comments by Merced ID.⁷

On September 14, 2009, the Director of the Office of Energy Projects at FERC issued his Study Determination. The Study Determination largely adopted Merced ID's proposed scope of study in the proceeding. It rejected the nexus between the project and most of the study requests submitted by Conservation Groups and Resource Agencies.⁸

On October 2, 2009, the U.S. Fish & Wildlife Service (FWS) filed a request for formal study-dispute resolution. On October 5, 2009, the National Marine Fisheries Service (NMFS) and Board Staff filed separate requests for formal study-dispute resolution. The resource agencies collectively disputed 18 of the studies as proposed in the Study Determination.

On November 17, 2009, the Commission convened a study dispute technical panel, and a study dispute technical meeting was held in Sacramento, California on November 17, 2009.⁹

On November 23, 2009, Conservation Groups filed comments on the study dispute technical meeting.¹⁰

On December 2, 2009, the Study Dispute Panel consisting of a FERC panelist and a neutral agency panelist filed its findings.¹¹ The Resource Agency Panelist filed separate findings on the same date.¹²

On December 15, 2009, Conservation Groups filed comments on the findings of the Study Dispute Panel and the Resource Agency Panelist's reports.¹³

On December 22, 2009, the Director, in a letter addressed to Merced ID, issued a "Formal study dispute resolution determination."¹⁴ In its Formal Study Determination, FERC amended the *Water Balance/Operations Model Study* and the *Water Temperature Model Study* to require that these studies model not only the project reservoirs and the Merced River

studies were submitted as an appendix to CDFG filing.

⁶ 20090908-5128.

⁷ 20090911-5053.

⁸ 20090914-3021.

⁹ See transcript of Study Dispute technical meeting, 20091117-4014.

¹⁰ 20091123-5016.

¹¹ 20091202-3015.

¹² 20091202-5060.

¹³ 20091215-5129

¹⁴ Director's Formal Study Dispute Resolution Determination, 20091222-3035. Except for "Formal," in lower case in the original. For clarity, we use caps in this document, and cite as "Formal Study Determination."

downstream to Crocker-Huffman Dam, but also model the Merced River from Crocker-Huffman Dam to the existing FERC flow compliance point at Shaffer Bridge (RM 32.5).¹⁵ The Director ordered two new studies: a *Gravel Sediment Budget and Mobility Study*¹⁶ to evaluate channel armoring downstream of Crocker-Huffman and to compare the armoring in that reach to the armoring in the reach directly upstream, between Merced Falls Dam and Crocker-Huffman; and an *Instream Flow Study* in the reach between Merced Falls Dam and Crocker-Huffman.¹⁷ Finally, the Director of Office of Energy Projects ordered Merced ID to consider additional studies in the second season of studies based on the results provided by studies performed during the first season:

I am requiring that four studies be considered during the second study season ((5) *Reservoir Water Temperature Management Feasibility Study*; (12) *Salmonid Floodplain Rearing Study*; (13) *Chinook Salmon Egg Viability Study*; and (14) *Instream Flow (PHABSIM) Study downstream of Crocker-Huffman*). These four studies would evaluate a biological or ecological response to water quality and quantity variables associated with project operations. Because of the confounding effects of the downstream Crocker-Huffman diversion dam, an evaluation of the need for these studies should be based upon receipt of results from two approved first-season studies (*Water Balance/Operations Model Study* and the *Water Temperature Model Study*) to identify and isolate direct project effects on water quality and quantity variables.¹⁸

On November 15, 2010, Merced Irrigation District filed its Initial Study Report (ISR).¹⁹ In the Initial Study Report, Merced ID did not comment on whether the results of the Water Balance/Operations Model or Water Temperature studies will inform potential second-year studies.²⁰ On this topic, Merced ID simply quoted the Director's Formal Study Determination as we have quoted it in the paragraph immediately above. The ISR also did not recommend any modifications to ongoing studies or any new studies.

On November 30, 2010, the District convened a meeting with Commission staff and stakeholders to discuss the progress of the study plan and data collected. During that meeting, Conservation Groups and Resource Agencies (including Board Staff) stated concern regarding the lack of recommended modifications or additions to the study plan in light of what they considered to be deficiencies in the data collected. FERC Staff stated that it had expected comment in the ISR on how results generated from the water balance and water temperature models informed the need or lack of need for second-year studies. Merced ID's representatives declined to make oral comment and stated that Merced ID

¹⁵ Ibid, p. 3.

¹⁶ Merced ID labeled this study "*Channel Armoring Study*."

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ 2010115-5115.

²⁰ The ISR reports that the models were completed.

would respond to comments and requests for new or modified studies after they were filed by other relicensing participants.

On December 15, 2010, the District filed its meeting summary.²¹ The District again declined to recommend any modifications or additions to the study plan.

On January 28, 2011, the Board issued WRO 2011-03-EXEC. The Order requires studies that Merced ID declined to undertake on its own initiative and which FERC declined to require. According to the Board, these studies will provide information necessary to the processing of Merced ID's inevitable application for water quality certification, as well as the Board's regulation of facilities and operations that FERC maintains are out of its jurisdiction. The Order is consistent with Board Staff's position throughout the study plan process before FERC.

The studies requested by the Board in WRO 2011-03-EXEC are required for the water quality certification. FERC has so far declined to require them for its FPA ILP process, so the Board is now requesting these studies.

3. Licensing Context

Renewal of FERC licenses is envisioned in the Federal Power Act as a five-year process. When that process fails to achieve its timelines, FERC generally issues a series of annual licenses to continue operations under the terms and conditions of the existing licenses, which can be fifty years old or more. These outdated licenses often fail to meet contemporary resource protection, mitigation, and enhancement objectives. Thus, any delay in the issuance of a new license decision will have real consequences on the condition of public trust resources.

In the past FERC has attributed delays in license issuance to the often sequential rather than parallel efforts of FERC's licensing process pursuant to the Federal Power Act and the SWRCB's water quality certification process pursuant to section 401 of the Clean Water Act and relevant state authorities. Both of these processes are required by federal law to take place before FERC can issue a new license:

“[t]he principal causes of delay are the need for additional information or studies after the application is filed, untimely receipt of biological opinions under the ESA, ***and state water quality certification.***”²²

One of the principal causes for this delay in California is FERC's unwillingness to require applicants to perform studies that the Board has determined are needed in order to issue a water quality certification for a given project. Board Staff has had a number of difficult and so-far unsuccessful discussions with FERC on how to more thoroughly and formally

²¹ 20101215-5095

²² FERC Notice of Proposed Rulemaking on the Integrated Licensing Process (102 FERC 61,185, ¶26) Emphasis added.

integrate water quality certification needs into FERC licensing. The Hydropower Reform Coalition Comments on FERC's ILP Effectiveness Evaluation 2010, to which several authors of the present comment letter were signatory, highlights the problems:

Unlike the TLP and ALP, the Integrated Licensing Process is a heavily front-loaded process. The effects of decisions made at the beginning of the process will carry through to the entire process.²³

Because NEPA scoping now takes place at the beginning of the licensing process (before information has been gathered), the FERC-approved study plan sets the table for NEPA analysis as well as the analysis that must be prepared by other agencies pursuant to their own authorities.²⁴

When the information needs of other agencies with regulatory mandates of their own are not met early in the process, the process is no longer fully integrated, leading to a delayed and contentious licensing proceeding. For example, FERC Staff may reject a state agency's request for a particular water quality study because Staff deems the study unnecessary for purposes of compliance with the FPA. However, the state agency may maintain the study is necessary for purposes of compliance with the Clean Water Act, and may require the applicant to conduct it in the context of the water quality certification proceeding. This staggered approach to conducting studies may result in some duplication of effort and delays in the issuance of the license. It also may undermine the working relationship between FERC Staff and the staff of the state agency. Such a lack of coordination places added burdens on both FERC Staff and agency staff and forces limited resources to be stretched further. Because individual agency staffers are often assigned to multiple proceedings, a lack of cooperation in one ILP can lead to delays in more than one proceeding. Thus, ***when FERC fails to fully cooperate with agencies to help them meet their information needs, it bears significant responsibility for any resulting delays.***²⁵

Conservation Groups have advocated throughout the relicensing proceeding for the Merced River Project that FERC order studies to meet the information needs of the Board, as well as those of other Resource Agencies with mandatory conditioning authority. We continue to dispute FERC Staff's decisions regarding scope, project effects, and the appropriate suite of studies needed to inform license.

The Board's Order offers an affirmative way forward out of the procedural disconnect between FERC's ILP and the Board's 401 processes for relicensing the Merced River Project. If the Board were to wait to request necessary studies until Merced ID filed an application for water quality certification, it would almost certainly result in a substantial

²³ *Hydropower Reform Coalition Comments on FERC's ILP Effectiveness Evaluation 2010*, 20101203-5220, p. 6.

²⁴ *Ibid*, p. 7

²⁵ *Ibid*, pp. 7-8.. Emphasis added.

delay in license issuance. By ordering studies during the pre-filing stages of the licensing process, when scoping and record development is taking place, the Board can minimize the potential for delay. The Board's action here seeks to assure effective and efficient action by both FERC and the Board consistent with the scheme of cooperative federalism established in Clean Water Act section 401. The Board's actions here demonstrate to FERC, relicensing participants, and other interested parties that it clearly intends to have a solid evidentiary record for its 401 proceeding, and that it intends to avoid delays in that proceeding.

4. Merced ID's arguments of irregularity in process, abuse of discretion, and lack of fair hearing are without merit.

a. There is no irregularity in process.

In its "*Points and Authorities in Support of Petition for Reconsideration*," (hereinafter, Points and Authorities), Merced ID states:

MID has not applied to the State of California for water quality certification and thus has not begun the process of obtaining water quality certification under Section 401 of the Clean Water Act. Therefore, SWRCB has no authority under Section 401 of the Clean Water Act to obtain or provide information related to water quality certification.²⁶

It is equally true that Merced ID has not applied to FERC for a new FERC license. Nonetheless, Merced ID is undertaking studies to support the license application which it clearly intends to file. The absence of a formally defined process for Section 401 certification (in contrast to FERC's elaborately defined Integrated Licensing Process) does not thereby mean that requiring studies prior to formal application for certification is irregular. Like FERC, the Board is requiring studies in anticipation of Merced ID certification request, which is a required element of its application for a new FERC license.

In support of its argument, Merced ID cites Title 23, CCR § 3836:

"SWRCB's Order requests information prior to the receipt of an application and before determining that the application is complete [*Id*] The issuance of the order is both premature and in direct contravention of both Federal and State law requiring a complete application to be received before requesting further information."²⁷

There is nothing in Title 23, Division 3, Chapter 28 that says that the Board **cannot** order studies or data gathering in order to inform certification prior to receipt of an application. On the contrary, CCR § 3836 provides: "Once a certifying agency determines that an

²⁶ *Points and Authorities* at page 2.

²⁷ *Ibid* at 6.

application is complete, it may request *further* information from the applicant.”²⁸ On the issue of requesting information *prior* to application, the regulations are silent.

It is undisputed that before FERC can issue a new license to Merced ID, Merced ID will have to obtain a 401 certification (or a waiver of certification). Merced ID has already filed notice with FERC that it intends to file an application with FERC for a new license; it follows that Merced ID also intends to file an application with the SWRCB for a 401 certification. It is similarly undisputed that the development of the decisional record for this licensing is well underway and that information that the Board has clearly and repeatedly stated that it will need for certification is not being collected. A minimum of two years of study are required to gather much of the information requested by the Board. Merced ID's license expires in 2014. The Board is correct to order studies now. Any other action would delay the issuance of a new license in the FERC proceeding.

b. The Board has not abused its discretion in ordering studies.

Merced ID claims that the Board has abused its discretion by issuing an investigation order: “FERC has rightly determined that the studies previously requested by SWRCB were not required by the ILP regulations and would not inform FERC or the participants of potential license conditions.”²⁹ Merced ID's claim is not consistent with either FERC's or the Board's interpretation of the Integrated Licensing Process.

In its *Notice of Proposed Rulemaking on the Integrated Licensing Process* (102 FERC ¶ 61,185), FERC recognized that instances might occur in which the study plan ordered by FERC during the ILP might not address the information needs of agencies responsible for water quality certification under the separate authority of the Clean Water Act. FERC maintained that it was bound by its own interpretation of its responsibilities under the Federal Power Act and would not necessarily defer in its study determinations to the stated information needs of state agencies with Clean Water Act Section 401 jurisdiction:

There are limits to what the Commission can do to coordinate its activities with state processes. Some states for instance indicate that the problem of incomplete water quality certification applications when the license application is filed would be eliminated if the Commission would treat states as “full partners” in the licensing process, which appears to entail, among other things, complete deference to state agency study requests. The Commission may in fact require an applicant to complete all of the information-gathering or studies requested by a state agency, but must exercise its independent judgment with respect to each study request in light of the comprehensive development standard of FPA Section 10(a)(1), the Commission's policies, and any other applicable law.³⁰

²⁸ CCR § 3836. Emphasis added.

²⁹ *Ibid* at 3.

³⁰ 102 FERC ¶ 61,185 at 98.

In other words, FERC will only require studies that it believes are consistent with its own authority. Nevertheless, while FERC signaled that it would not allow its own authority to be bound by state agencies' determination of *their* information needs, the Commission also recognized that its study plan determination could not bind the discretion of state agencies acting pursuant to their own independent authority to issue water quality certifications for hydropower projects pursuant to Section 401 of the Clean Water Act.

First, FERC acknowledged states' view of their authorities:

Several states moreover commented that they cannot be bound by the result of any Commission decisions on information and study needs insofar as their independent water quality certification authority is concerned, and if they are not satisfied with the information resulting from the Commission-approved study plan or dispute resolution process, they will deny water quality certification or use their other authorities to require the information they believe is needed.³¹

FERC then acknowledged that it does not dispute those agencies' view of their independent authority to require applicants to provide information:

Finally, several states request that we reaffirm that the Commission's dispute resolution process does not bind state water quality certification agencies in the sense that participation by such agencies in the Commission's processes does not affect whatever independent authority it has to require a potential license applicant to produce data or information in the context of the water quality certification application. Alaska states that this holds for state CZMA processes as well. ***We affirm our prior statement.*** [Footnote: California requested that this statement be included in the regulations. We think it is unnecessary to do so, as ***the authority of states and Indian tribes in this connection is not affected by anything in our regulations.***]³²

Next, FERC stressed its preference that information gathering for water quality certification purposes be handled before an application is filed:

The current rule requiring a license applicant to apply for water quality certification by the time the license application is filed ***rests on the assumption that water quality data issues will have been resolved during pre-filing consultation.*** The integrated licensing process we are proposing provides greater opportunity for that to occur. The applicant and water quality certification agencies will know well before the application is filed what related data the Commission will require to be filed with it.³³

³¹ Ibid.

³² *Final Rule on the Integrated Licensing Process*, 104 FERC 61,109 at 194. Emphasis added.

³³ Ibid at 104. Emphasis added.

Finally, ***FERC explicitly discussed the sequence in which license applicants should begin to collect additional information not collected within the ILP in order to inform the water quality certification process.*** The Board's Order is consistent with this sequence:

Thus, states should be in a position to inform license applicants if additional information will be required by the state for water quality certification purposes before the application is filed, ***and applicants should be prepared to begin obtaining any such information and assembling a water quality certification application before the license application is filed.***³⁴

Merced ID argues that the SWRCB water quality certification study-requirement determination is bound by the outcome of FERC's dispute-resolution process. Merced ID states the following:

At the conclusion of a technical conference chaired by 3-person Dispute Resolution Panel, FERC issued its Final Study Plan Determination (attached hereto as Exhibit "A"), in which FERC rightly determined that studies previously requested by SWRCB were not required by the ILP regulations and would not inform FERC or the participants of potential license conditions. Rejected by FERC, the SWRCB issued the Order in a misguided effort to subvert federal law.³⁵

This argument equally fails. FERC explicitly anticipated this issue in its final rule and denied this line of argument:

PG&E and SCE request that we modify the proposed rule to make clear that agencies and Indian tribes with mandatory conditioning authority may not invoke the Commission's dispute resolution processes and then use authorities they have under other statutes to require potential applicants to do information gathering or studies in addition to those the Commission requires. We cannot do this, for we have no authority to control the activities of these entities under other statutes. We do however fully expect these entities to participate in the integrated process in good faith in order that the Commission's decisional record will, to the extent reasonably possible, serve as the basis for the decisions of entities with conditioning authority, and that any additional information these entities may require is known early in the process.³⁶

The Board Order is consistent with a "good faith" effort to acquire information necessary "early in the process" contemplated by FERC that the mandatory conditioning agencies

³⁴ Ibid. Emphasis added.

³⁵ Merced ID, *Points and Authorities*, p. 2.

³⁶ *Final Rule* at 207.

participating in its licensing proceedings would undertake. A stay of the Board's Order until after Merced ID files its application for water quality certification would not be.

Merced ID further argues that the Board cannot order studies outside the scope of project effects as initially determined by FERC in the ILP:

SWRCB also exceeds the geographic scope of the Project, for purposes of water quality, by extending the studies many miles past the end of the geographical scope established by FERC. FERC states that the geographic scope shall end at the Snelling Road Bridge. On the other hand, SWRCB has included studies in the Order that extend more than 100 miles downstream of the bridge and into the San Joaquin River, well outside the limits of any Project-caused effects.³⁷

This argument also lacks merit. California Water Code § 13165 expressly permits the State Board to require a local agency (in this case, Merced ID) to provide information on water quality at any time. Something outside the scope of project effects is by definition not preempted by federal law. To the degree that WRO 2011-03-EXEC goes beyond the scope of relicensing, the Board is clearly within its jurisdiction under state laws to order studies. To the degree that studies are inside the scope of project effects, as determined by the Board in the exercise of its independent authority to issue a water quality certification pursuant to section 401 of the Clean Water Act, the Board is clearly within its jurisdiction under state and federal laws to order studies.

c. Merced ID has not been harmed by lack of hearing.

Merced ID's complaint that it has had no hearing ignores voluminous documents in the FERC record. Merced ID has produced thousands of pages during the course of the FERC licensing proceeding that have presented its own vision of project effects and studies it believes are appropriate to measure those effects. It has held numerous meetings and conference calls over two years in order to make its viewpoints known to the Board Staff. It has had adequate opportunity to be heard.

With its current petition for reconsideration, moreover, Merced ID has ample opportunity to present its arguments directly to the State Board.

³⁷ Merced ID, *Petition for Reconsideration*, p. 2

5. Merced ID's claim on lack of substantial evidence fails.

a. Merced ID presents a vision of certification that is incorrectly limited as a matter of established law.

In its petition for reconsideration, Merced ID states, in part, at Point 4(b): “[t]he scope of the order goes far beyond the Project effects.”

As noted earlier, it is FERC's view that the information needed to support a 401 certification decision is ultimately the responsibility of the certifying agency (here, the Board) to determine. The courts have held that a state's authority to issue and condition 401 certifications under the Clean Water Act is broad.

In *Jefferson PUD No. 1*, the Supreme Court held that a certification shall include “any effluent limitations and other limitations, and monitoring requirements necessary to assure [compliance with water quality standards] ... and with any other appropriate requirement of State law set forth in such certification ...” *A certification thus regulates “... the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”*³⁸

A certification may require capital improvements as well as changes in operational rules to attain water quality standards or comply with related requirements of State law. See *S.D. Warren Company v. Maine Board of Environmental Protection*, 547 U.S. 370, 385-386 (2006). Such conditions may include capital improvements and operational changes intended to mitigate a project's impacts on fisheries. *Id.* Coldwater fisheries are among the designated beneficial uses of the Merced River. Therefore, although the Water Board has not yet required studies of fish passage options, it is reasonable to expect them to do so in the future. As noted above, the Merced ID's study plans does not include such studies.

b. Merced ID fundamentally requests “substantial evidence” of project effects before studies to determine those effects are permitted to go forward.

In its petition for reconsideration, Merced ID also states at Point 4(b): “[t]he order is not supported by substantial evidence.”

The extent of project effects has been in dispute since commencement of relicensing of Merced ID's project, and Merced ID's view of project effects is substantially different than the view held by resource agencies and other parties to the licensing. Merced ID's claim that there is no substantial evidence of project effects downstream of Crocker-Huffman Dam or Snelling Road Bridge ignores an extensive FERC record populated with dozens of filings by Conservation Groups and Resource Agencies, including Board Staff.

Conservation Groups note that many of the studies previously proposed in the FERC process have sought to quantify the extent of project effects. However, Merced ID prefers to simply argue that no evidence exists in order to avoid such quantification.

³⁸ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994). Emphasis added.

Regardless of the result of this dispute, the argument is irrelevant. Studies are intended to develop record evidence where such evidence is lacking or incomplete. There is no requirement under FERC's regulations or elsewhere that a study order be supported by substantial evidence. It is a procedural order, not a final order on the merits.

c. The cost burden of requested studies is reasonable

Merced ID argues in its Points and Authorities that "the most astounding burden facing MID in complying with the Order is the huge cost involved."³⁹ Merced ID states that the studies ordered by the Board in WRO-2011-03-EXEC would cost "between \$3,480,000 and \$7,315,000 over the next two or three years," and cites an attached declaration by James Lynch, general consultant to Merced ID for its relicensing.⁴⁰

The five "MOU studies" ordered by the SWRCB in point 6 of its Order were previously funded in 2009, in the amount of \$1,902,289, by the Merced ID Board of Directors. Presumably, the \$1,902,289 appropriated two years ago but until today unspent would be subtracted from Mr. Lynch's figures. That leaves a cost estimate of between \$1,577,711 and \$5,412,711, if one were to accept Mr. Lynch's figures in spite of the lack of explanation of his assumptions or calculations.

The lower figure strikes us as a relative bargain given the typical costs associated with studying highly complex river ecosystems during the relicensing of a large multi-dam hydropower project. Even the higher figure, though likely inflated, is a reasonable amount to spend to analyze the fishery resources of one of the three major tributaries of the Lower San Joaquin.

A substantial portion of the overall cost could have been covered by Merced ID's 2010 water transfer of 15,000 acre-feet, sold at \$200/acre-feet to a number of Central Valley Project and State Water Project contractors. This transfer was largely achieved during test flows for model calibration required for a relicensing study. Merced ID is already preparing for further transfers in 2011. Conservation Groups recommend that the Board consider a requirement in any future approval of temporary water transfers that studies required by the Board be funded as a condition on such future transfers.

Conservation Groups point out that the refusal by Merced ID and its consultant HDR/DTA to conduct many requested studies at all has reduced Merced ID's opportunity to negotiate cost efficiencies in study design and execution. This was a choice made by Merced ID and its consultant. A lack of planning for meeting one's regulatory requirements in a cost-effective manner should not excuse one from having to fulfill those requirements. Conservation Groups and Resource Agencies have spent two years in relicensing trying to find accommodation with Merced ID that would provide necessary information at a reasonable cost. If Merced ID seeks to reduce the cost of required studies, Conservation Groups recommend that it propose equally effective but less expensive ones.

³⁹ *Points and Authorities*, p. 4

⁴⁰ *Ibid.*

6. Merced ID's claims of error in law are without merit.

a. Merced ID presents an incorrectly limited vision of 401 Certification.

In its *Points and Authorities*, Merced ID sets forth a constricted vision of 401 certification that has been rejected by the courts:

The focus of the 401 certification should be on the operation of the hydroelectric project and its effects on water quality. The project that will be the subject of the 401 application is the relicensing of the Exchequer and McSwain hydroelectric projects, not the entire operation of the MID, the operation of the Merced Falls Hydroelectric Project, or the operation of Crocker-Huffman Dam.⁴¹

As we have demonstrated above, Merced ID's view is contradicted by *Jefferson PUD No 1*. Studies to inform a 401 may go beyond the effects of mere hydroelectric operations because a 401 certification addresses the "activity of the whole." Even FERC has adopted a broader vision of its process than the vision promoted here by Merced ID. Specific to the relicensings currently taking place for projects on the Merced River, FERC has already announced its intention to provide a single NEPA document for the relicensing of the Merced River Project and the Merced Falls Project. Moreover, as a practical matter the Board will not be able to evaluate the water quality effects of the project and the effects on beneficial uses without considering the operation of Crocker-Huffman Dam, which seasonally diverts substantial portions of the flow of the Merced River and through which nearly all the flows in the lower Merced River pass.

b. Merced improperly limits Water Code §13383 to Section 402 of the federal Clean Water Act.

Water Code § 13383(a) addresses "any person who discharges, or proposes to discharge, to navigable waters." Both *Jefferson PUD No. 1* and *SD Warren* have affirmed that flow in the context of a hydropower project constitutes a discharge for the purposes of Clean Water Act section 401. Flow is a large part of what Section 401 of the Clean Water Act regulates. Therefore, § 13383 is not limited exclusively to pollutants.

c. The State Board is not federally preempted from ordering studies.

On the final page of its *Points and Authorities*,⁴² Merced ID cites to *Karuk Tribe v. California Regional Water Quality Control Board*. When the passage from this case that Merced ID cites is presented in its entirety, the Board's authority to regulate make water quality certification decisions in FERC licensing procedures is affirmed:

⁴¹ Merced ID, *Points and Authorities*, p. 6.

⁴² *Ibid*, p. 9.

A determination of federal preemption does not automatically mean that state input is categorically prohibited and state opinion of no consequence. ***The Clean Water Act gives states what appears to be a very substantial role by requiring that an applicant for any federal license comply with state water quality procedures.*** (See fns. 17, *ante*; *S.D. Warren, supra*, 547 U.S. 370, 386; *PUD No. 1, supra*, 511 U.S. 700, 707, 713.) But the crucial points are (1) that it is Congress that determines what is the extent of state input, and (2) that input takes place within the context of FERC licensing procedures as specified in the FPA. It is only when states attempt to act outside of this federal context and this federal statutory scheme under authority of independent state law that such collateral assertions of state power are nullified.⁴³

We agree. The court's opinion is consistent with FERC's interpretation of its authority and with the Board's Order. The Federal Power Act does not preempt the federal Clean Water Act. As stated by the court, in the context of the application of the Clean Water Act, "an applicant for any federal license must comply with state water quality procedures." The opinion in *Karuk* as well as FERC's opinions, *supra*, defeat Merced ID's claim of preemption and undermine its premise that the Board's exercise of its Clean Water Act authority is bound by FERC's determinations made under FERC's rules implementing the Federal Power Act.

And as we have noted above, to the degree that the area of study ordered by the Board is outside hydroelectric project effects, Water Code § 13165 governs.

7. The Request for Stay should be denied as Merced's petition for reconsideration is only the latest instance of a longstanding strategy of delay.

We request that the Board deny Merced ID's request for a stay. We believe that there has been a history of unnecessary delays in the analysis of project impacts on aquatic resources, specifically anadromous fish. The studies requested in the Order are long overdue. The Board should deny Merced's request for a stay as it would only contribute to further, unnecessary delays.

Merced has not alleged facts and produced proof of the following in support of its request for stay as required by 23 CCR § 2053(a):

- (1) substantial harm to petitioner or to the public interest if a stay is not granted,
- (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and

⁴³ *Karuk Tribe v. California Regional Water Quality Control Board* (2010) 183 Cal. App 4th 330 at 360. Emphasis added.

(3) substantial questions of fact or law regarding the disputed action.

Instead, grant of a stay potentially will cause substantial harm to Conservation Groups and the public interest as it will contribute to the further decline of imperiled, anadromous fish. As stated above, a stay of the Order will result in a delay in the conduct of studies, which will delay the Board's action on Merced's ID application for water quality certification, which potentially will delay issuance of the new FERC license and require FERC to issue annual licenses under conditions that do not comply with existing law and are not protective of aquatic resources. Again, such delay is inappropriate given that these studies already are long overdue.

In the event the Board considers granting a stay, we request that it hold a hearing pursuant to CCR § 2053(b). We further request party status in such hearing consistent with 23 CCR §§ 2053(b), 648.1(a). We incorporate by reference the description of Conservation Groups provided in section 1, *supra*. As provided in those descriptions, we have unique interests in this proceeding, as well as the related FERC proceeding, which cannot be represented adequately by the Board. As shown by these comments, our interests certainly cannot be represented by Petitioner Merced ID.

Delay 1995 – 2001

On April 14, 1995, the California Sportfishing Protection Alliance (CSPA) filed a complaint with FERC over the decline of anadromous fisheries in the Merced River. This complaint alleged, among other things, inadequate instream flow requirements. It also documented numerous alleged violations by Merced ID of the applicable instream flow requirements over the period 1971 through 1992, amounting to a total of 912 days when Merced ID was in violation with a cumulative release deficiency of more than 54,000 acre-feet. In its request for relief, CSPA requested that the Commission reopen the license and adjust minimum flows, penalize Merced ID for past streamflow deficiencies and carefully monitor flow compliance, and compel Merced ID to fund a Merced River ecosystem restoration program.

FERC asked Merced ID to comment on this complaint on May 10, 1995. FERC summarized Merced ID's response in a February 20, 1998 issuance:

Your response, filed on June 9, 1995, stated, *inter alia*, that such a proceeding would be untimely, in light of negotiations currently underway with the California Department of Fish and Game (CDFG) regarding measures to enhance the Merced River salmon and also comprehensive regional negotiations concerning water quality standards for the Bay-Delta.

At this time we are requesting that you provide us with an update concerning the status of these negotiations, any agreements that may affect water release or anadromous salmonids at the project, and any additional comments you

may have concerning CSPA's request. By copy of this letter we are also inviting comments of CSPA and CDFG (page 1).⁴⁴

On March 30, 1998, CSPA responded, asking FERC to reopen the license the Merced River Project, increase minimum flows, provide migration and attraction flows for salmonids, maintain adequate water temperatures, require fish screens, cease flow fluctuations, replenish gravel, reintroduce Spring-run Chinook, provide and protect adequate water quality, consult with federal agencies under the ESA, and comply with applicable laws and requirements for environmental review. In that same letter, CSPA also requested that it be allowed to attend negotiations between Merced ID and CDFG, and that CSPA be provided a copy of any draft agreement between the parties.⁴⁵

On April 21, 1998, Merced ID filed with the Commission a letter heralding "significant recent developments." It announced the imminent presentation of the Vernalis Adaptive Management Plan (VAMP) to the State Water Resources Control Board and stated that "Merced believes that it is very close to reaching final agreement with CDFG on fishery enhancement and study measures." Merced ID concluded:

Meanwhile, Merced continued to maintain that CSPA's request to reopen the license is wholly without legal or factual merit, maintaining that any action by the Commission to reopen the license at this time would have a most unfortunate effect on the voluntary, good-faith efforts of the District and other stakeholders to address Bay-Delta water quality concerns and to improve the status of salmonid species in the San Joaquin River system.⁴⁶

On June 19, 1998, Merced ID informed the commission that approval of the VAMP by the Board was imminent, that a "San Joaquin River Agreement" had allocated responsibility for meeting VAMP flows, that these flows largely met CDFG's flow request for the Merced, and that "Merced has made a substantial contribution toward funding the cost of conducting significant studies on the Merced River While the source of additional funding to meet the total cost of studies remains an unresolved issue, Merced and CDFG have committed to cooperate in seeking additional funding sources to insure completion of the studies."⁴⁷

Merced ID's letter of June 19, 1998 specifically recommended that these issues be put off until the current relicensing:

CSPA has presented no creditable [sic] scientific evidence that reopening of license terms is warranted. Indeed, all of the parties to the VAMP Implementation Agreement have acknowledged that there currently is a lack of scientific evidence concerning the relative impacts of flow conditions and Delta operations on salmonid populations. This is precisely why the 12-year VAMP study will be undertaken. By the time the studies are completed,

⁴⁴ 980220-0583-3, p. 1.

⁴⁵ 980320-0262-3, pp. 4-5.

⁴⁶ 980421-0230-3, pp. 2-3.

⁴⁷ 980623-0403-3, p. 4.

Merced will be commencing the process of relicensing the project (the initial license expires in 2014). ***The relicensing process will be the appropriate time and forum for the Commission to assess the need for any modifications to the existing license terms concerning minimum flows.***

Any action by the Commission to reopen the District's license at this time would be counterproductive in view of the fruitful, voluntary efforts that have taken place to resolve Bay-Delta water quality and Merced River fishery concerns.⁴⁸

On November 16, 2000, the Commission issued an Order requiring another update from Merced ID within sixty days.⁴⁹

On January 11, 2001, Merced ID responded to the Commission. Merced ID noted the conclusion of the San Joaquin River Agreement [organizing responsibility for VAMP], the issuance by the Board of Decision 1641 and appended to its filing a "Scope of Work for Merced River Chinook Salmon Investigations." Merced ID requested that the Commission dismiss CSPA's complaint and opined that "the type of scientific evidence that would be needed to support any permanent amendment of the New Exchequer Project license will not be available until after two separate studies of at least ten years' duration are completed. Those studies include the ten-year Merced River salmon study described in Ross Rogers' accompanying correspondence and the VAMP"⁵⁰ In its January 11, 2001, letter, Merced ID again concluded the following:

By the time those studies are completed and adequate data exists to assess the relative impact of freshwater flows and other factors on salmon production and survival, the District will be approaching the end of its current license for Project 2179 (the license expires in 2014). ***The relicensing process will be the appropriate forum to address the needs for any permanent modification to the project's minimum flow requirements or other terms and conditions.***⁵¹

On March 5, 2001, FERC issued an order dismissing CSPA's complaint and declining to reopen the license for the Merced River Project. The order stated that Merced ID has "agreed to conduct a series of studies over the next 10 – 12 years designed to assess the benefits of the augmented flows and to determine factors that may limit salmon production in the Merced River."⁵²

Five of the studies referred to by FERC in its March 5, 2001, order are studies that were never completed. These studies have now been ordered by the Board in WRO-2011-03-EXEC. Despite Merced ID's insistence ten years ago that these

⁴⁸ Ibid, p. 5.

⁴⁹ 20010301-0160, p. 1. Emphasis added.

⁵⁰ 010111-0191-3, p. 2.

⁵¹ Ibid, p. 3. Emphasis add.

⁵² 20010306-0250, p. 1.

studies would be necessary to properly evaluate the effect of project flows on salmon production and survival, Merced ID now contends that the studies are not appropriate for the current relicensing.

Conclusion

Merced ID has chosen its course. For sixteen years, it has delayed studies requested by state agencies and other stakeholders. It has reneged on its promises to address anadromous fisheries in the Merced River in the relicensing. It has instead chosen an aggressive campaign to prevent information from being collected and introduced into the decisional record for the FERC relicensing. It now seeks to extend that strategy to the State's 401 process.

The Board's Order is proper. By requiring Merced ID to perform the studies that the Board has already identified as necessary for developing a 401 certification, the Board is encouraging timely license issuance. Merced ID will need to provide the Board with this information in any case, but by requiring it now, the Board seeks to avoid unnecessary delay in the certification process that may contribute to delay in license issuance. A new license will provide substantial benefit for a number of public trust resources; a series of annual licenses based on the terms and conditions of Merced ID's existing license will cause additional harm to those resources. By proactively attempting to minimize such delays, Board Staff is acting in the public interest, consistent with the Board's authority. The Board should support Staff, should deny reconsideration, and should not grant a stay.

Respectfully submitted,



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