

FEDERAL ENERGY REGULATORY COMMISSION

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Merced Irrigation District )	
_____ )	P-2179-043
Merced River Hydroelectric Project )	
_____ )	P-2467-020
Merced Falls Hydroelectric Project )	
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**CONSERVATION GROUPS' COMMENTS ON THE FEBRUARY 19, 2021  
ADDITIONAL INFORMATION REQUEST**

April 1, 2021

Ms. Kimberley Bose, Secretary  
Federal Energy Regulatory Commission  
Via electronic filing

Dear Secretary Bose:

The California Sportfishing Protection Alliance, Merced River Conservation Committee, Golden West Women Fly Fishers, Friends of the River, American Whitewater, American Rivers, Trout Unlimited, Northern California Council - Fly Fishers International, and Sierra Club, Tehipite Chapter (collectively, Conservation Groups) respectfully comment on Commission staff's February 19, 2021 Additional Information Request (AIR) for the Merced River Hydroelectric Project (P-2179-043) and the Merced Falls Hydroelectric Project (P-2467-020) (collectively, Projects).<sup>1</sup> The AIR addresses information needed to inform staff of the Federal Energy Regulatory Commission (FERC or Commission) in its analysis of the California State Water Resources Control Board's (State Water Board) Water Quality Certification (Certification) for the Projects.<sup>2</sup> The AIR also addresses information needed to inform the National Marine Fisheries Service's (NMFS) consultation under the Endangered Species Act (ESA).

The purpose of this letter is to clarify and/or supplement the record regarding several of the items identified in the AIR. Specifically, the Conservation Groups are providing additional comments and recommendations on the following issues:

<sup>1</sup> FERC, Letter requesting Merced Irrigation District to file additional information within 60 days re the continued operation and maintenance of its 101.25-megawatt for the Merced River Hydroelectric Project under P-2179 et al. P-2179-043, P-2467-020 (Feb. 19, 2021), eLibrary no. 20210219-3035.

<sup>2</sup> Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project, et al. under P-2467. P-2179-043, P-2467-020 (Aug. 12, 2020) eLibrary no. 20200803-5257.

- 1) Staff should provide explicit direction and rules for modeling elements of specified Certification Conditions, including carryover storage, irrigation deliveries, temperature targets and performance metrics, and for modeling specific scenarios for State Water Board's Certification Condition 4 (Extremely Dry Conditions).
- 2) Staff should revise directives related to the pre-project baseline, cumulative effects, and geographic scope.
- 3) Staff should review and analyze those elements of the Certification whose implementation would positively affect tribal interests, in order to more fully inform staff's analysis.

## **I. Summary and Rationale**

One of the primary purposes of the AIR is to allow the Commission to evaluate the inclusion of elements of the combined Water Quality Certification (the Certification) for the Projects. On June 18, 2020, the Commission issued an Order finding that the State Water Board had waived certification for the Projects.<sup>3</sup> Therefore, the staff has based the AIR on the premise that the Commission is not required to include conditions of the Certification in the license orders for the Projects.<sup>4</sup> The Commission plans to issue a Supplemental Environmental Impact Statement (Supplemental EIS) in order to perform its evaluation.<sup>5</sup>

The AIR requires licensee Merced Irrigation District (Merced ID) to model various elements of the Certification. Conservation Groups are concerned that the AIR lacks sufficient specificity and direction to licensee, Merced ID, regarding how to model elements of the Certification that the Certification itself left to be defined or quantified at a future date. Below, we recommend additional directives to Merced ID to make the modeling effort more meaningful and representative of potential future operations and their effects on the Merced River watershed. In particular, water temperature modeling will be highly dependent on the values that Merced ID chooses for elements that the Certification leaves to future quantification.

In addition, Conservation Groups are concerned that the AIR appears, in part, to be premised on the position that the Commission has discretion to decline compliance with those elements of the Certification that are also elements of the adopted Bay-Delta Plan. Regardless of whether the Commission includes these conditions in the new licenses for the Projects, the Bay-Delta Plan is also grounded in the State Water Board's water right authorities. The apparent premise that waiver of certification would absolve Merced ID of compliance with the Bay-Delta Plan is unfounded. It would be informative for the Commission to clarify this distinction and to

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<sup>3</sup> 171 FERC ¶ 61,240, Order on Waiver of Water Quality Certification re Merced Irrigation District under P-2179. P-2179-043, P-2467-020 (Jun. 18, 2020) (Order on Waiver). The State Water Board and several Conservation Groups have petitioned for legal review. *See e.g.*, United States Court of Appeals for the Ninth Circuit Form 3. Petition for Review of Order of a Federal Agency, Board, Commission, or Officer. P-2179-043, P-2467-020 (Oct. 5, 2020) eLibrary no. 20201005-5175.

<sup>4</sup> AIR, pp. 3-4. ("As a result, the 401 WQC conditions are no longer considered mandatory, but will be considered as recommendations under section 10(a) of the Federal Power Act (FPA) in any license(s) issued for the projects.")

<sup>5</sup> AIR, p. 4.

direct Merced ID on how to model the adopted Bay-Delta Plan in light of the fact that it will require Merced ID's compliance.

Conservation Groups take note of the loss of time and resources that has come about in relicensing because Commission staff, during the study planning and NEPA processes, took the position that it had only to answer the perceived information needs of staff under the Federal Power Act (FPA). Now faced with the need for an analysis to meet the analytical mandate of the National Marine Fisheries Service (NMFS) for an Endangered Species Act (ESA) consultation, staff is faced with the need for a Supplemental EIS that both analyzes impacts against a pre-project baseline and conducts a cumulative effects analysis that takes into account past actions.

There is a lesson here. Though the Commission has held the State Water Board responsible for delay of the Certification and on this basis found waiver certification, staff missed the opportunity to meet the information needs of mandatory agencies in the study planning and NEPA processes.<sup>6</sup> This has led to the need for a do-over that will prolong licensing, regardless of the Commission's position that State Water Board delay "usurps" the Commission's licensing timeline and control of its process.<sup>7</sup>

Item AIR #7 attributes to the National Marine Fisheries Service the characterization that the ESA analysis requested by NMFS under the ESA, including a pre-project baseline, is not equally applicable to NEPA.<sup>8</sup> Conservation Groups disagree with NMFS's reported characterization. As stated in 2018 in *American Rivers and Alabama Rivers Alliance v. FERC*, No 16-1195 (D.C. Circuit, 2018), at 39:

As a result, the Service's failure [in its ESA analysis] to factor the damage already wrought by the construction of dams into the cumulative impacts analysis fatally infected this aspect of the Commission's NEPA decision as well. The Commission gave scant attention to those past actions that had led to and were perpetuating the Coosa River's heavily damaged and fragile ecosystem. Nor did it offer any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision. The Commission's cumulative impact analysis left out critical parts of the equation and, as a result, fell far short of the NEPA mark.<sup>9</sup>

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<sup>6</sup> This position was described explicitly and concisely in the Director's Study Plan Determination for the nearby La Grange Hydroelectric Project (Feb. 2, 2015), eLibrary no. 20150202-3011, p. B-9:

While the results of the proposed study may inform a NMFS decision [under FPA Section 10(j), FPA Section 18 and the ESA] on the reintroduction of anadromous fish into the upper Tuolumne River, the proposed study is not necessary for Commission staff to evaluate the potential effects of operation of the La Grange Project on fisheries resources in the lower Tuolumne River. Therefore, we do not recommend that the Districts be required to conduct a study of anadromous salmonid migration barriers, water temperature monitoring and modeling, and characterization of habitat conditions in the upper Tuolumne River above the Don Pedro Project.

<sup>7</sup> Order on Waiver, p. 7 ("[B]y shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue.")

<sup>8</sup> See NMFS' comments on FERC staff's Biological Assessment for the for the Upper Drum-Spaulding, Lower Drum, Deer Creek, and Yuba-Bear Hydroelectric Projects (Oct. 16, 2020), eLibrary no. 20201016-5119, p. 7.

<sup>9</sup> Available at: <https://law.justia.com/cases/federal/appellate-courts/cadc/16-1195/16-1195-2018-07-06.html>

The current additional analysis should not limit its scope to effects on ESA-listed species. Also, following the quotation immediately above, it may be necessary in the Supplemental EIS to evaluate the fish passage options and habitat upstream of the Projects that the previous NEPA document did not analyze.

## **II. Specific Recommendations**

### **A. Commission staff should provide explicit direction to Merced ID on how to model specified Certification conditions, particularly those that require plans or future determinations.**

#### **1. Staff should direct Merced ID to model alternative values for carryover storage (AIR #3c).**

Condition 3 of the Certification requires Merced ID to initiate a “collaborative effort” to specify a carryover storage requirement for Lake McClure.<sup>10</sup> Leaving aside the unlikelihood of collaborative agreement on such a value, it is worth noting that there have been widely divergent recommendations for a carryover storage value for Lake McClure. The value in the existing FERC license, also proposed by Commission staff in the Final Environmental Impact Statement (FEIS), is 115,000 acre-feet, below which Merced ID must restrict its releases to those required to meet minimum instream flows. Conservation Groups recommended a value of 130,000 acre-feet with the same release limitation as in the existing FERC license. The California Department of Fish and Wildlife recommended a value of 200,000 acre-feet. The State Water Board conducted its modeling for Phase 1 of the update of the Bay-Delta Plan using a value of 300,000 acre-feet, without however providing a written requirement specifying any operational restrictions should storage in Lake McClure drop below this level.<sup>11</sup>

In evaluating impacts to irrigation deliveries, this disparity in values could account for a difference of up to 185,000 acre-feet per year in available water based on this single variable. In order to capture a representative range, Conservation Groups recommend that staff require Merced ID to model all of these scenarios for the Certification under carryover storage requirements of 115,000, 130,000, 200,000, and 300,000 acre-feet. We recommend that Merced ID assume that when storage in Lake McClure falls below such values, Merced ID would be required to restrict its releases to those required to meet minimum instream flows and have no irrigation deliveries.

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<sup>10</sup> Certification, p. 45.

<sup>11</sup> Final Environmental Impact Statement for Hydropower Licenses, Merced River Hydroelectric Project-FERC Project No. 2179-043, Merced Falls Hydroelectric Project, FERC Project No. 2467-020 (Dec. 4, 2015), eLibrary no. 20151204-4003, p. 5-51, p 5-52.

**2. Staff should direct Merced ID to provide a written description of its rules for modeling irrigation deliveries and a rationale for those rules (AIR Item #3f).**

Despite the fact that the effects of the “non-Project” Crocker-Huffman Diversion Dam were a frequent gatekeeper barring study during the study planning phase,<sup>12</sup> the AIR now directs Merced ID to conduct analyses that “include effects from interrelated and interdependent activities, including the magnitude and timing of non-project diversions.”<sup>13</sup> It is important that these analyses be thoughtful and realistic representations of how Merced ID would operate its combined water and power deliveries. A simple assumption that Merced ID will divert irrigation water until it hits the Lake McClure minimum carryover storage requirement will produce one type of answer. When Merced ID modeled irrigation deliveries in the SWRCB\_35\_20140721 scenario, whose output Merced ID filed with the Commission on November 7, 2014, Merced ID<sup>14</sup> appears to have modified this approach and reduced irrigation deliveries so that storage levels in Lake McClure in drought year sequences 1976-1977 and 1987-1992 approximated Lake McClure storage under the “current condition” scenario. Merced ID should provide a written description of the rules it deployed in modeling scenarios for the AIR and a rationale for those rules.

**3. Staff should direct Merced ID to model the temperature values in Certification Condition 8.A as targets and performance metrics and not as compliance requirements (AIR Item #5).**

During relicensing, relicensing participants collaboratively reviewed temperature modeling data for the lower Merced River. The conclusion for Conservation Groups from this temperature modeling review, and from additional analysis, was that some of the temperature values in Certification Condition 8 are not achievable at least some of the time.

Condition 8.A of the Certification requires Merced ID to develop and file a plan to meet specified water temperature values at defined locations in the lower Merced River. It also states a protocol for instances in which Merced ID cannot meet specified temperatures “due to an event or circumstance beyond its reasonable control.”

One of the immediate purposes of the AIR is to inform the Commission and NMFS how different flow regimes will perform in providing thermally suitable habitat for *O. mykiss* in the lower Merced River. It is not possible to model how Merced ID would inform regulators how and when temperature targets were beyond its reasonable control. A model scenario that used all available water to meet temperature values would be equally uninformative, even if those temperature values were achievable.

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<sup>12</sup> See Director’s Study Plan Determinations, eLibrary nos. 20091222-3035, 20110401-3042.

<sup>13</sup> AIR, p. A-3.

<sup>14</sup> Merced ID, Supplement to Merced ID’s Reply to Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions, eLibrary No. 20141107-5024.

In addition, the Bay-Delta Plan allows “flow shifting” using the required water volumes in February-June as a water budget. It is not known how Merced ID, in combination with one or more implementation committees, might implement this element.

The most informative temperature modeling for the AIR would be for Merced ID to assume that the Bay-Delta Plan’s requirement to release to the lower Merced River 40% of the unimpaired flow at Lake McClure as a daily or weekly value. After modeling this in the operations model, Merced ID could input the operations model output into the water temperature model and report the resulting water temperatures at the nearest node to the specified locations in Condition 8A. We recommend that the Commission direct Merced ID to model water temperature in this manner.

**4. Staff should direct Merced ID to assume in its modeling specific scenarios how it would implement Certification Condition 4 (Extremely Dry Conditions) (AIR Items #3, 5).**

Condition 4 of the Certification (Extremely Dry Conditions) allows Merced ID to request variances from the State Water Board under conditions of a declared drought emergency or in sequential dry or critically dry years. In responding to the AIR, Merced ID should provide a narrative description and rationale for years whose hydrology in the period of record would likely have prompted Merced ID to request a variance and what that variance would likely have been. Merced ID should model each AIR scenario with and without such variances, and report the differences with and without variances in irrigation deliveries, carryover storage, and water temperature.

**B. Staff should revise directives related to the pre-project baseline and cumulative effects to require data that inform analysis of ongoing project impacts (AIR Item #7)**

**1. Temperature modeling data for the lower Merced River under unimpaired conditions has limited probative value.**

AIR items #s 7a and 7b direct Merced ID to model flows and water temperatures in the lower Merced River and the lower San Joaquin River and Sacramento – San Joaquin Delta under both proposed operations and under unimpaired conditions.<sup>15</sup>

While modeled unimpaired flows may provide useful information, temperature modeling of such flows has limited value, particularly in the lower Merced River. Construction of dams (part of “all past activities” as cited in AIR item #7)<sup>16</sup> on the Merced River limited actual or potential cold-water habitat to the areas downstream of the dams. Prior to dam construction, summer cold-water habitat in the Merced River was confined to reaches now well upstream of the present dams. The life-history strategy adaptations of anadromous fish in the Merced River watershed allowed populations to find thermal refugia by migration, prior to streamflow impairments and barriers. Barrier dams and lack of fish passage prevent connection between

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<sup>15</sup> AIR, p. A-4.

<sup>16</sup> *Id.* The analysis cannot stop with evaluation of only *some* past activities.

above-dam and below-dam habitat. The comparison between pre-dam and present cold-water habitat would more appropriately be made by evaluating the cold-water habitat upstream of Lake McClure that was historically available to cold-water fish and comparing it to the present cold-water habitat downstream of Crocker-Huffman Diversion Dam.

**2. The Supplemental EIS must expand the geographic scope of its analysis upstream of Lake McClure in order to make an adequate comparison with pre-project conditions and to conduct an adequate cumulative effects analysis.**

The upstream limit of the scope of the cumulative effects analysis in the FEIS was the upper end of Lake McClure.<sup>17</sup> In order to complete an effects analysis that compares that accounts for “all past activities,” the Supplemental EIS must expand the geographic scope of the analysis to include the cold-water habitat upstream of the project, access to which was lost due to the construction of dams (both for the Projects and non-Project).

**C. Staff must also provide and review additional information so that the cultural resources review for the Supplemental EIS documents and analyzes elements of the Certification that positively affect tribal interests (AIR Item #8).**

Item #8 of the AIR (Cultural Resources) asks Merced ID to evaluate the potential effects of increased flows under the Certification on cultural resources due to erosion. In addition, as Commission staff decides after ten years of refusal that it must analyze fish passage on the Merced River, item #8 also asks Merced ID to evaluate the possible negative effects on cultural resources due to siting and facilities.

In its evaluation “of the effects of the Water Board’s conditions on tribal resources,” the Supplemental EIS should also review filings in the record by from the Southern Sierra Miwuk in support of improved conditions for anadromous fish and their reintroduction to the upper Merced River. For instance, a December 16, 2009 letter from Anthony C. Brochini, Chairman of Southern Sierra Miwuk Nation, noted: “Reconnection and restoration of anadromous fish species are important Tribal goals for the Merced River. Tribal interests in the Merced River include all fish and aquatic resources. Prehistoric and historic use of salmon and aquatic life by the indigenous Tribes of the Merced River have been (and continue to be) of enormous significance...”<sup>18</sup>

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<sup>17</sup> FEIS, p. 3-5.

<sup>18</sup> Anthony C. Brochini, Chairman of Southern Sierra Miwuk Nation, aka American Indian Council of Mariposa County, Inc., Comments on Pacific Gas and Electric's Revised Study Plan for the Merced Falls Hydroelectric Project, FERC Project No. 2467-019, Merced River, California (Dec. 16, 2009), eLibrary no. 20101229-5026, p. 1. *See also* confidential submittals of Anthony C. Bronchini (Dec. 22, 2009), Final Study and Document of the Indigenous Fisheries of the SSM and Wauhoga Finding of fish proteins from the Wauhoga Arch. Study, eLibrary nos. 2009-1222-4008, 20091228-0012, 20091228-0013.

### III. Conclusion

Thank you for the opportunity to comment on the February 19, 2021 Additional Information Request for the Merced River Project and the Merced Falls Project.

Respectfully submitted,



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**FEDERAL ENERGY REGULATORY COMMISSION**

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**Certificate of Service**

I hereby certify that I have this day served the foregoing document, Conservation Groups' Comments on the February 19, 2021 Additional Information Request for the Merced River and Merced Falls Hydroelectric Projects via email or surface mail (as required), upon each person designated on the official Service Lists compiled by the Commission Secretary in the above-captioned proceedings.

Dated at San Francisco, California this 1<sup>st</sup> day of April, 2021.



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