



December 21, 2020

State Water Resources Control Board  
Division of Water Rights – Water Quality Certification Program  
Attn. Chase Hildeburn  
[WR401Program@waterboards.ca.gov](mailto:WR401Program@waterboards.ca.gov)

Via e-mail

**Re: Comments of the Conservation Groups, Draft Water Quality Certification for Federal Permit or License, Modesto Irrigation District and Turlock Irrigation District's Don Pedro and La Grange Hydroelectric Projects, Federal Energy Regulatory Commission Project Nos. 2299 & 14581**

Dear Mr. Hildeburn:

The California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers, Central Sierra Environmental Resource Center, Tuolumne River Conservancy and Sierra Club Mother Lode Chapter (collectively, “Conservation Groups”) respectfully comment on the *Draft Water Quality Certification for Federal Permit or License, Modesto Irrigation District and Turlock Irrigation District’s Don Pedro and La Grange Hydroelectric Projects, Federal Energy Regulatory Commission Project Nos. 2299 & 14581* (Draft Certification). Conservation Groups are parties to the relicensing proceeding for the Don Pedro Project and the licensing proceeding for the La Grange Project, with the exception of Sierra Club Mother Lode Chapter, which filed separately for late intervention.<sup>1</sup> Their motions to intervene contain descriptions of each organization and its interests in these proceedings.

The State Water Board issued the Draft Certification on November 30, 2020. Conservation Groups appreciate the efforts of the State Water Board Staff in completing the Draft Certification. The issues involving the Don Pedro Hydroelectric Project and the La Grange Hydroelectric Project (Projects) that relate to water quality and beneficial uses are complex, controversial, and technically difficult. They are further complicated by the interest of the City and County of San Francisco’s (CCSF) in these issues. Many of these have been analyzed and discussed at length during in the Federal Energy Regulatory Commission (FERC) relicensing and associated proceedings. The State Water Board Staff has done a commendable job in identifying potential Certification conditions that would protect the water quality and beneficial uses of the lower Tuolumne River.

In general, Conservation Groups support the Draft Certification. In many instances, we make specific recommendations for changes or improvements. Conservation Groups oppose Condition 5 of the Draft Certification (Southern Delta Salinity) and recommend its deletion from the Final Certification, for reasons we describe below. With the exception of Condition 5, Conservation Groups support the Draft Certification with the recommended revisions and additions we describe below.

## **I. Conservation Groups’ Engagement in the Project 2299 Relicensing and Project 14581 Original Licensing and Water Quality Certification Proceedings**

Over the past nine years, Conservation Groups have actively engaged with licensees Modesto Irrigation District and Turlock Irrigation District (collectively, Districts or licensees) in

---

<sup>1</sup> See Motion to Intervene by California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center, Don Pedro Hydroelectric Project P-2299-082, (January 23, 2018), eLibrary no. 201801234-5010; see also Motion to Intervene by California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center, La Grange Project P-14581-002, (January 23, 2018), eLibrary no. 20140522-5113. See also Motion to Intervene of Tuolumne River Conservancy, P-2299-082 (Dec. 27, 2017), eLibrary no. 20171227-5142 and Tuolumne River Conservancy Motion to Intervene on Project 14581 LaGrange (Dec. 27, 2017), eLibrary no. 20171227-5053. See also Sierra Club Mother Lode Chapter, Motion for Intervention out of Time, P-2299-082 and P-14581-002 (Dec. 7, 2020), eLibrary no. 20201207-5125.

negotiating the management and operations of Project 2299 and Project 14581 in the Tuolumne River watershed. Many of the representatives of the Conservation Groups were steadfast and regular attendees and participants in the relicensing processes that began in 2011. In general, the Conservation Groups had the same representatives at the relicensing meetings throughout the processes, although some participation was limited in part by the decision of the Districts to require agreements to keep confidential the substance of negotiations of protection, mitigation and enhancement measures, a requirement that was not acceptable to all organizations among the Conservation Groups.

From the beginning of the relicensing of the Don Pedro Project in 2011, Conservation Groups openly and clearly expressed differences of opinion on the appropriate scope of analysis in the licensing and associated NEPA processes. For example, in comments on scoping, the Conservation Groups reminded the Federal Energy Regulatory Commission (FERC or Commission) that its duties under NEPA required broad analysis of alternatives, stating:

This [analysis under NEPA should include analysis of reasonable alternatives submitted by the parties or developed by Staff that are outside of the Districts sole capability and/or outside the Commission's sole jurisdiction. See 40 C.F.R. § 1502.14(c). In determining the range of alternatives:

the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant. ...

An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered.

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981) (hereafter, "Forty Questions"), Questions 2a, 2b.<sup>2</sup>

However, FERC, in its Scoping Document 2, improperly eliminated NEPA alternatives, stating:

The preceding recommended alternatives, that address the consumptive use of water in the Tuolumne River through construction of new structures or methods designed to alter or reduce consumptive use of water (bullets 2 through 6), are alternative mitigation strategies that could not replace the Don Pedro hydroelectric project. As such, these

---

<sup>2</sup> See Conservation Groups' Comments Regarding Pre-Application Document and Scoping Document 1, and Study Requests for the Don Pedro Project P-2299-075 (Jun. 10, 2011), eLibrary no. 20110610-5198, pp. 14-15.

recommended alternatives do not satisfy the NEPA purpose and need for the proposed project and are not reasonable alternatives for the NEPA analysis.<sup>3</sup>

In subsequent responses to Conservation Groups, the Districts cited to this statement to eliminate numerous potential win-win mitigations from the FERC licensing processes.<sup>4</sup> Similarly, CCSF argued that, while it was investigating alternative water supplies, these were not suitable for analysis under NEPA or the Federal Power Act because they were not “feasible” alternatives. This leads one to wonder why CCSF is investigating them in the first place.<sup>5</sup> CCSF further argued that the increased flow requirements in the lower Tuolumne River would, in the absence of such mitigations, create “staggering losses in jobs and economic output across the Bay Area.”<sup>6</sup>

FERC’s truncation of scope is part of what the State Water Board must correct in the Water Quality Certification. It is also what must be corrected in an adequate document under the Californian Environmental Quality Act (CEQA), which to date the Districts as joint lead CEQA agency have failed to initiate or produce.

NGO representatives participated in the development of Study Requests for Relicensing with State and Federal agencies, and in meetings and negotiations for protection, mitigation, and enhancements (PM&Es) for whitewater boating access.<sup>7</sup> Conservation Groups worked diligently from the beginning of the licensing process to study, negotiate, and reach agreements on flows, carryover storage in Don Pedro Reservoir, gravel restoration, and augmentation of large woody material. However, during the relicensing processes, Conservation Groups and staff from the State Water Board and other state resource agencies, and staff from most federal resource agencies, were unable to reach agreement with the licensees on many issues.

Conservation Groups submitted extensive comments and recommendations in response to FERC’s Notices of Ready for Environmental Analysis. In these comments, Conservation Groups proposed modification (not abandonment) of the State Water Board’s percent-of-unimpaired flow framework set forth in the Bay-Delta Plan. Under Conservation Groups’ proposal, flow requirements in wetter years would increase and flow requirements in Dry and Critically Dry years and sequences would be shortened and, in the extreme, changed. This would establish set rules for drought rather than punt to *ad hoc* management.<sup>8</sup> Conservation

---

<sup>3</sup> See FERC, Scoping Document 2 for P-2299, eLibrary no. 20110725-3020, p. 16.

<sup>4</sup> See Reply Comments of Turlock Irrigation District and Modesto Irrigation District in Response to Comments, Recommendations, and Preliminary Terms and Conditions (General Response) (Mar. 15, 2018) eLibrary no. 21080315-5006, p. 15. See also Response of Turlock Irrigation District and Modesto Irrigation District to Comments on the Draft Environmental Impact Statement (Aug. 16 2019) eLibrary no. 20190816-5007, pp. 39, 41, and e.g. 43 (“It would not be within FERC’s jurisdiction to require reduction of water exports, if indeed such an alternative was deemed superior. FERC must limit the alternatives it considers to those that could be implemented within FERC’s jurisdiction.”). Etc.

<sup>5</sup> See Reply Comments of the City and County of San Francisco P-2299-082 and P-14581-002 (Mar. 15, 2018), eLibrary no. 20180315-5138, pp. 17-18.

<sup>6</sup> See CCSF Supplemental Reply Comments (May 22, 20180, eLibrary no. 20180522-5204, p. 5.

<sup>7</sup> See Conservation Groups’ Comments on Initial Study Report,” P-2299, (Mar. 11, 2013), eLibrary no. 20130311-5169; Conservation Groups’ Comments on Draft License Application and Updated Study Report, P-2299-075 (Feb. 24, 2014), eLibrary no. 20140224-5095.

<sup>8</sup> See Conservation Groups’ Comments and Recommendations Ready for Environmental Analysis, P-2299-082, P-14581-002, (Jan. 29, 2018), eLibrary no. 20180129-5200 (Conservation Groups’ REA comments), esp. pp. 6-46.

Groups also submitted extensive comments on FERC's Draft Environmental Impact Statement (DEIS).<sup>9</sup> As Attachment 1 (Draft Drought Measure) to Conservation Groups' DEIS comments, Conservation Groups defined and recommended evaluation of a second alternative approach to flow requirements and related issues during Critically Dry years and sequences of Dry and Critically Dry years.<sup>10</sup>

In addition to Conservation Groups' long and consistent history in the licensing processes, Conservation Groups have long and extensive on-the-ground experience within the Tuolumne River watershed. As a result of this experience, Conservation Groups' representatives have developed a robust and deep understanding of the Districts' and CCSF's water and power operations and of the affected resources, including water quality and the aquatic and riparian resources of the lower Tuolumne River and the upper Tuolumne River downstream of CCSF's Hetch Hetchy Reservoir. Conservation Groups' representatives also have conducted physical habitat restorations and improvements in the lower Tuolumne River.<sup>11</sup> They have participated in scientific studies of rainbow trout genetics in the upper Tuolumne River in association with a federal resource agency.<sup>12</sup> In addition, Conservation Groups' representatives have provided, and continue to provide, institutional memory for stakeholders in the watershed.

## **II. Comments and Recommendations on Draft Certification Conditions**

### **CONDITION 1 Instream Flows**

**General issue:** The instream flow requirements as stated in the Draft Certification are in many cases overlapping. As a result, it is difficult to understand which aspect of the flow requirements will be controlling at any given time. In particular, it is completely unclear how the Districts would reconcile the simultaneous requirements under Condition 1.C (pulse flows derived from the proposed Tuolumne River Voluntary Agreement) and Condition 1.D (requirement to comply with February-June flows as adopted for the Bay-Delta Plan on December 12, 2018). Added to this an apparent requirement to meet certain water temperatures at defined river miles pursuant to Condition 3 (Temperature Management and Monitoring Plan). Condition 3 further complicates the flow requirements, because it sets up a tail-wagging-the-dog situation in which the flows will chase water temperatures.

---

<sup>9</sup> See Conservation Groups' Comments on the Draft Environmental Impact Statement for the Relicensing of the Don Pedro Project and the Original Licensing of the La Grange Project, P-2299-082 and P-14581-002 (Apr. 12, 2019), eLibrary no. 20190412-5156 (Conservation Groups' DEIS Comments).

<sup>10</sup> See *id.*, pp. 84-87.

<sup>11</sup> The Tuolumne River Trust has undertaken three restoration projects: Big Bend Floodplain and Riparian Habitat Restoration, 250 acres, RM 6-7 (completed 2006); Dennett Dam Removal, RM 16 (completed 2018); Dos Rios Ranch, 1600 acres of floodplain and riparian restoration, RM 0-3 and additional work on the San Joaquin River; (acquisition completed 2012; restoration work ongoing). The Tuolumne River Conservancy has undertaken five restoration projects: Grayson River Ranch (RM 5-6), 138 acres of riparian forest planted (2000); Waterford Percolation Ponds (RM 32), 950 riparian trees planted (2005); Bobcat Flat Phase I (RM 43), 10.5 acres of floodplain restored and 11,000 cubic yards of spawning gravel added to 1/3 mile of river channel (2005); Bobcat Flat Phase II (RM 43), 19,000 cubic yards of spawning gravel added to 1/3 mile of river channel (2011); Duck Slough (RM 43), 1,000 foot long side channel excavated and 7,000 cubic yards of spawning gravel added to new side channel (2016).

<sup>12</sup> See Pearse, DE and MA Campbell (NMFS) 2018. *Ancestry and adaptation of rainbow trout in Yosemite National Park. Fisheries* 2018:1-13.

**Discussion:** The Draft Certification is excessively inclusive of different organizing principles for flow requirements in the apparent effort to not offend.

As described in more detail below, FERC Staff intended the pulse flows in the draft Voluntary Agreement to replace, not to supplement, the February-June flows required under the Bay-Delta Plan. As reflected in the Draft Certification, both Condition 1.C and Condition 1.D establish water budgets that implementation committees of some type would allocate as flows during the spring according to various biological objectives. Condition 1.D clearly has the larger water budget. Each Condition contains within it various elements that define how the budget should be expended. Trying to integrate the two sets of budgets as compliance measures would likely create a situation in which the implementation committee had to chase compliance with the various allocation requirements rather than the biological objectives.

The conflicting organizing principles of the Voluntary Agreement and the Bay-Delta-Plan as adopted would both conflict with a third organizing principle in the Draft Certification: the water temperature requirements of Condition 3. Simply stated, one can use water temperature modeling to identify flow requirements that in most cases achieve desired water temperatures, or one can organize one's flow regime around complying with defined water temperature requirements (if shown to be achievable) and subordinate the rest of one's flow requirements to the water that is left. If one tries to do both at once, the result is a mess.

Since the Districts clearly have *sought waiver to avoid compliance* with the flow requirements of the Water Quality Certification and have opposed the flow requirements set forth in the Revised Water Quality Control Plan for Lower San Joaquin River Flows, it is extremely likely that the Districts and their attorneys will exploit confusing, conflicting or overlapping requirements in the Water Quality Certification to say that the Districts *cannot comply*. The State Water Board must not enable challenge by the Districts because the conditions of the Certification are not clear and enforceable.

**Recommendation:** Conservation Groups recommend simplification of the flow requirements in the Final Certification, as described below. In addition, Conservation Groups recommend modification of Condition 3 so that the temperatures stated are (with modification) objectives and *not compliance requirements*.

#### **CONDITION 1.A Water Year Types**

**Recommendation:** Conservation Groups have no comment on this Condition. We recommend adoption of Condition 1.A in the Final Certification.

#### **CONDITION 1.B Minimum Instream Flows Below La Grange Dam and Below One or More Potential Points of Diversion or Rediversion**

**Issues:** Baseflow requirements recommended by FERC in its Final Environmental Impact Statement (FEIS), and largely reproduced in the Draft Certification, are in some cases too

low to protect fishery resources in the lower Tuolumne River.<sup>13</sup> In addition, the required summer flows downstream of the proposed infiltration galleries at ~RM 25.9 do not require sufficient flow to maintain boatable conditions. The required summer flows downstream of the proposed infiltration galleries also do not maintain good visual conditions or conditions for contact recreation in the Tuolumne River in Modesto, which is heavily used by members of disadvantaged communities. The required summer flows downstream of the proposed infiltration galleries also do not require sufficient flow from the Tuolumne River into the lower San Joaquin River.

**Discussion:** FERC’s required June baseflows and its required baseflows in spawning months from November through January follow the recommendations of the Districts. These flows are based on the Districts’ interpretations of PHABSIM modeling. In particular, the June baseflows are based on PHABSIM modeling for juvenile *O. mykiss*, and the late fall and early winter baseflows are based on PHABSIM modeling for salmon spawning.

As the rationale in the Draft Certification states:

A recent (ISAP, 2019) evaluation of juvenile Chinook salmon survival data on the Stanislaus River shows that measured juvenile survival decreased with increased instream physical rearing habitat (WUA). This occurs because WUA modeling estimates for juvenile Chinook physical rearing habitat are maximized at relatively low flows (e.g., 75 cfs). However, “spawner and juvenile data show that higher juvenile survival occurs during times of higher flows rather than under model estimates of increased physical rearing habitat. The same analysis shows that higher instream flows have a stronger, positive relationship with spawning success than WUA [weighted usable area measured in PHABSIM modeling].”<sup>14</sup>

Reliance on PHABSIM modeling in June ignores the importance of water temperatures that by June in the lower Tuolumne become highly elevated. Low flows leave less, not more, suitable habitat for juvenile *O. mykiss*, due to the reduction of river miles with suitable water temperatures. The minimum flow requirement in June is more appropriately considered in the same light as flows in the subsequent summer months. In addition, compressing wetted habitat in June makes both rearing *O. mykiss* juveniles and outmigrating *O. mykiss* and salmon smolts more subject to predation by bass, which by June become particularly active due to elevated water temperatures.

Under careful review, the reliance on the Districts’ interpretation of PHABSIM modeling for salmon spawning was chosen from the lower end of flows that show good conditions, as can be seen in Figure 21 from the Districts 2013 Lower Tuolumne River Instream Flow Study.<sup>15</sup>

---

<sup>13</sup> See FERC, Final Environmental Impact Statement for Hydropower Licenses, Don Pedro Hydroelectric Project, Project No. 2299-082—California, La Grange Hydroelectric Project, Project No. 14581-002—California (July 2020), eLibrary no. 20200707-3000.

<sup>14</sup> Draft Certification, pp. 23-24.

<sup>15</sup> Districts, Lower Tuolumne River Instream Flow Study, 2013, eLibrary no. 20130429-5026, p. 46.

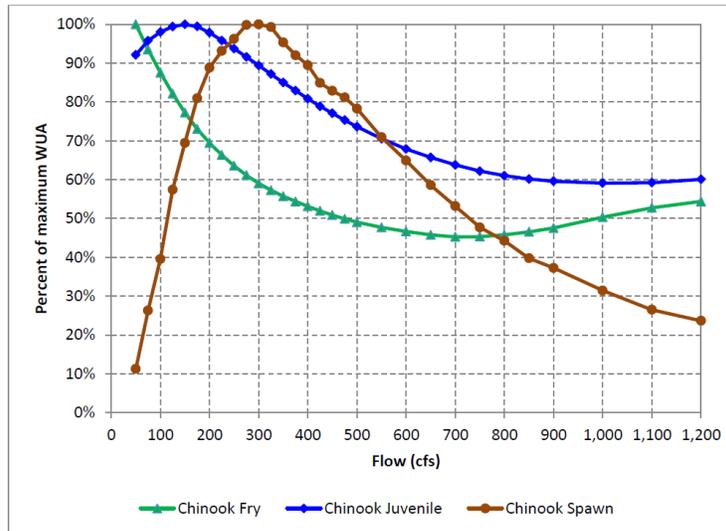


Figure 21. Chinook salmon WUA results for the lower Tuolumne River.

In consideration of the findings of the Independent Scientific Advisory Panel’s 2019 report,<sup>16</sup> as quoted in the Draft Certification 2019, above, gaming the WUA by choosing the lowest flow within a range of relatively good flows for spawning does not consider other factors, such as the more general finding that higher flows improve salmonid survival.

Conservation Groups’ DEIS Comments described how the DEIS provided no information or analysis to demonstrate that June 1 through October 15 flows of less than 200 cfs downstream of RM 25.5 will mitigate project effects on recreational opportunities and visual quality in the lower Tuolumne River in the Modesto urban corridor.<sup>17</sup> The FEIS did not address this deficiency, stating only that the FEIS added mention of a few elements that are remotely related to these issues, but concluding:

As noted previously, balancing the many resource values associated with a given flow regime often involves a complex series of tradeoffs that affect conditions for different fish species and life stages, consumptive water uses, recreation, and power generation. We believe that the flow regime that we recommend in the final EIS represents an appropriate balance among these resource values and provides a substantial improvement over existing conditions for boating.<sup>18</sup>

The perfunctory mention in the FEIS of recreation in the reaches of the lower Tuolumne River downstream of RM 25.9, and the recitation as quoted above of a conclusory statement

<sup>16</sup> See Delta Science Program, Developing Biological Goals for the Bay-Delta Plan: Concepts and Ideas from an Independent Scientific Advisory Panel, April 2019. Available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjLjNSo9bftAhUKIjQIHdk8BuMQFjABegQIAhAC&url=https%3A%2F%2Fwww.deltacouncil.ca.gov%2Fpdf%2Fscience-program%2Fbiological-goals%2F2019-09-18-April-2019-biological-goals-final-report.pdf&usg=AOvVaw3he4t51A250U1sF3rW29\\_W](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjLjNSo9bftAhUKIjQIHdk8BuMQFjABegQIAhAC&url=https%3A%2F%2Fwww.deltacouncil.ca.gov%2Fpdf%2Fscience-program%2Fbiological-goals%2F2019-09-18-April-2019-biological-goals-final-report.pdf&usg=AOvVaw3he4t51A250U1sF3rW29_W)

<sup>17</sup> See Conservation Groups’ DEIS Comments, pp. 53-54.

<sup>18</sup> See FEIS, pp. A-86 and A-87.

about balancing flow requirements without reference to such recreation, does not adequately disclose the recreational impacts of these proposed flows.

Conservation Groups proposed year-round minimum flow requirements of 300 cfs downstream of La Grange Dam and 200 cfs downstream of the proposed infiltration gallery at or about River Mile (RM) 25.9.<sup>19</sup> For the reasons stated above and in Conservation Groups' REA Comments and DEIS comments, Conservation Groups believe that this strikes the appropriate balance between baseflows and the flow requirements of the Bay-Delta Plan as adopted December 12, 2018. The California Department of Fish and Wildlife (CDFW) and the National Marine Fisheries Service (NMFS) recommended year-round minimum of at least 200 cfs downstream of the proposed infiltration galleries, and generally recommended baseflows as high or higher than those of the Conservation Groups.<sup>20</sup>

Draft Certification Attachment B, Tables 1 and 2 contain the following explanation: "When LSJR flow requirements exceed minimum instream base flows, LSJR requirements control and can also be used to meet Conditions 1.B and 1.C."<sup>21</sup> This suggests that the intent of the Draft Certification is to make the FERC-required flows a floor. Thus, flows required pursuant to the Bay-Delta Plan Flow Objectives (Draft Certification Condition 1.D) would not be allowed to go below the values shown in Condition 1.B. The Final Certification should revise the text of Condition 1.B to explicitly establish the values in that Condition as minimum values that control when flows pursuant to other requirements would be less than Condition 1.B values.

**Recommendation:** Conservation Groups recommend adoption of Condition 1.B in the Final Certification, with the following modifications:

The Final Certification should include year-round baseflow requirements for the lower Tuolumne River of 300 cfs downstream of La Grange Dam and 200 cfs downstream of RM 25.9, recognizing that these flows will become a floor for flows required for compliance with additional flow requirements such as those pursuant to the Bay-Delta Plan and requirements for fall attraction flows. The State Water Board should also assure that the CEQA document that supports the Certification evaluates the impacts of the baseflows required in the Final Certification to the recreational beneficial uses and visual quality of the lower Tuolumne River downstream of RM 25.9. The Final Certification should clearly establish the values in Condition 1.B as amended to be floor values so that Condition 1.B controls when flows pursuant to other flow conditions would be less than Condition 1.B values.

#### **CONDITION 1.C Pulse Flows**

#### **CONDITION 1.D Bay-Delta Plan Lower San Joaquin River Flows**

**Issues:** The pulse flow requirements in Condition 1.C of the Draft Certification can be broken into two parts: fall pulse flows and spring pulse flows.

Conservation Groups have no issues with the fall pulse flows as stated in Condition 1.C.

---

<sup>19</sup> See Conservation Groups' REA Comments, *op. cit.*, pp. 13-15.

<sup>20</sup> FEIS, pp. 3-123 to 3-125 (NMFS recommended flows) and 3-125 to 3-132 (CDFW recommended flows).

<sup>21</sup> Draft Certification, pdf p. 109.

The spring pulse flows in Condition 1.C derive from the proposed Tuolumne River Voluntary Agreement, which FERC Staff adopted in the FEIS as part of the Staff Alternative.<sup>22</sup> The requirements are stated in terms of flow volumes in acre-feet that change according to water-year type.

The spring flows in Condition 1.D require implementation of the Bay-Delta Plan's Lower San Joaquin River Flow Objectives as adopted by the State Water Board December 12, 2020. Until and unless amended, these flow objectives require release of 30-50% of the February-June unimpaired flow into the lower Tuolumne River, adaptively implemented.

Taken together, Condition 1.C's spring pulse flows and Condition 1.D's percent of unimpaired flow requirements create a confusing overlap of flow requirements that not even FERC staff intended.

*Discussion:* FERC staff in the FEIS explicitly describes the spring pulse flows under the Voluntary Agreement as a binary (either/or) alternative to flows required by the State Water Board pursuant to the Bay-Delta Plan:

## **2.4 STAFF ALTERNATIVE WITH MANDATORY CONDITIONS**

In this final EIS, we analyze revised conditions filed by BLM and preliminary conditions filed by the Water Board in response to the REA notice. We recognize that the Commission is required to include valid section 4(e) conditions and section 401 conditions in any license issued for the project.

### **2.4.1 Don Pedro Project**

The staff alternative with mandatory conditions includes staff-recommended measures along with the mandatory conditions that we did not include in the staff alternative: ... **(6) provide minimum instream flows to be specified by the Water Board (Water Board preliminary 401 conditions 1 and 2)**...

**In any license issued for the project, these mandatory conditions would replace the following environmental measures that we include in the staff alternative: (1) implement the staff-recommended minimum flows, floodplain rearing pulse flows, spring outmigration pulse flows, fall pulse flows, gravel mobilization flows, and boating flows for the duration of any license...**<sup>23</sup>

In contrast, Condition 1.D states in part: "Implementation of the Bay-Delta Plan LSJR flow objectives, including through adaptive implementation, may result in flows that achieve minimum instream flows and pulse flows set forth in Conditions 1.B and 1.C subject to the criteria and approval process set forth in this certification and the Bay-Delta Plan's program of implementation."<sup>24</sup>

---

<sup>22</sup> See FEIS, pp. 2-14 to 2-15/pdf 103-104; p. 2-22/pdf 111; p. 2-25/pdf 114.

<sup>23</sup> See FEIS, pp. 2-36 to 2-37/pdf 125-126 (emphasis added).

<sup>24</sup> Draft Certification, p. 46.

The inclusion of both Conditions 1.C and 1.D in the Draft Certification creates two competing sets of flow volumes and organizing principles for shaping those flows. Compliance with both would be difficult or impossible to determine, at least at many given times during the February-June period when the licensees would need to release water, adaptively implemented, pursuant to the Bay-Delta Plan.

Further confusing the issue is the fact that the Districts seek to have the State Water Board substitute the Tuolumne River Voluntary Agreement for the Bay-Delta Plan. FERC Staff's inclusion of the conditions of the draft Voluntary Agreement as the Staff Alternative in the FEIS can reasonably be seen as an effort by a federal agency to usurp the approval authority of the State Water Board, without independent evaluation by the State Water Board of whether the Voluntary Agreement conforms with the requirements of State law.

The State Water Board has the right to amend the Bay-Delta Plan. However, in the absence of such amendment, the Water Quality Certification for the Don Pedro Project must require conformance of the licensees' operations with the requirements of the adopted Bay-Delta Plan. It is confusing and a compliance nightmare to also include the terms of the proposed Tuolumne River Voluntary Agreement that under a speculative outcome may substitute for the adopted flow objectives.

In contrast, it is appropriate that the Water Quality Certification for the Don Pedro and La Grange projects include and line up with flows required by the Bay-Delta Plan. For clarity and compliance, it is important that all flow requirements for the lower Tuolumne River be delineated in one place. In addition, many FERC licensees have complained about conflicting requirements pursuant to different regulatory authorities. The Water Quality Certification provides an opportunity to reconcile and explain requirements that may overlap and that on their own may appear to differ or conflict.

Clearly, the instant Water Quality Certification cannot and should not resolve all issues relating to the implementation of the Bay-Delta Plan. The Lower San Joaquin River flow objectives regrettably failed to require higher flows in good water years and to define how the objectives might be adjusted during droughts and dry-year sequences. However, reference to the Bay-Delta Plan in the Water Quality Certification is appropriate and important. In addition, deferring to the resolution of the Bay-Delta Plan, however it may finally be implemented, is the most appropriate approach in the instant Water Quality Certification.

**Recommendation:** Conservation Groups recommend revision of Condition 1.C of the Draft Certification so that Condition 1.C in the Final Certification is entitled "Fall Pulse Flows," addresses fall pulse flows alone and deletes all references to and discussion of spring pulse flows. Conservation Groups support the adoption in the Final Certification of the fall pulse flow requirements stated in Draft Certification Condition 1.C.

Conservation Groups recommend the inclusion of Condition 1.D in the Final Certification.

Conservation Groups recommend modification of Section 7.1 of the Draft Certification, (“Rationale for Condition 1 – Instream Flows”) to eliminate discussion of Voluntary Agreements.<sup>25</sup> Conservation Groups recommend modification of Section 7.1.3 of the Draft Certification (“Rationale for Condition 1.C: Pulse Flows”) so that it is retitled “Rationale for Condition 1.C: Fall Pulse Flows” and deletes the first and last paragraphs of the section in the Draft Certification, consistent with modification of Condition 1.C to address fall pulse flows alone.

Conservation Groups recommend modification of Attachment B, Tables 1 and 2. As shown, Tables 1 and 2 in Attachment B of the Draft Certification do not accurately reflect the flow requirements in Draft Certification Condition 1. Whatever the final decision of the State Water Board, the flow tables must be accurate. As it happens, the inaccuracy of Tables 1 and 2 centers primarily on the spring pulse flows in Condition 1.C, which, as stated above, Conservation Groups recommend eliminating. Conservation Groups also recommend reconciling the numeration of the footnotes in these tables and eliminating the “function” columns, which are not necessary for compliance and invite dispute to no good purpose.

### **CONDITION 1.E Compliance Methods**

**Issues:** The Districts propose a new compliance point for flows downstream of the proposed infiltration galleries at or near RM 25.9. Districts have proposed using a mass balance calculation based on the releases at La Grange and the measurement of amounts diverted to measure compliance, rather than installing a new gage downstream of the RM 25.9 point of diversion.

Condition 1.E establishes, in the subsection Condition 1.E.2, compliance requirements for the spring pulse flows in Condition 1.C; Conservation Groups have recommended deletion of the spring pulse flow section of Condition 1.C.

**Discussion:** In relicensing, the Districts sought to avoid a requirement to install a gage downstream of the proposed infiltration galleries at or near RM 25.9, seeking to use instead a calculation based on the difference between the instream release at La Grange and the measured diversion at the infiltration galleries. FERC Staff did not recommend installation and operation of a new gage downstream of RM 25.9.<sup>26</sup> The Draft Certification would require installation of a gage. In order to ascertain compliance with streamflow requirements, a gage is appropriate.

Condition 1.E.2 contains provisions for evaluating compliance with the spring pulse flow requirements of the Voluntary Agreements, adopted by FERC Staff in the Staff Alternative. Conservation Groups recommend deletion of these spring pulse flow requirements in favor of a requirement to comply with the February-June flow requirements of the adopted Bay-Delta Plan. Accordingly, Conservation Groups recommend deletion of that portion of Condition 1.E.2 that addresses compliance with spring pulse flows per the Voluntary Agreement.

---

<sup>25</sup> Currently on Draft Certification, p. 21.

<sup>26</sup> See FEIS, pp. 5-112, 5-118.

**Recommendation:** Conservation Groups recommend inclusion of a requirement in Condition 1.E that the Districts install, maintain and report real-time information from a new gage downstream of RM 25.9, with the gage located in a proximity as close downstream of the infiltration galleries as is technically feasible. Conservation Groups support deletion of those provisions of Condition 1.E.2 that address spring pulse flows. Conservation Groups support adoption of the remaining sections of Condition 1.E and its subsections in the Final Certification.

## **CONDITION 1.F Annual Operations Plan**

**Issues:** Condition 1.F of the Draft Certification would require the Districts to submit an annual operations plan to one or more review groups and the State Water Board by November 1 of each year, and to submit a revised operations plan by January 10 of each year.

What the Districts will reliably know by November 1 of any given year will be the amount of water stored in Don Pedro Reservoir. On November 1, the Districts will have some idea of their water supply situation for the following year only if storage on that date is unusually high or unusually low. By January 10 of each year, there will still be almost no reliable forecast of water supply conditions for the remainder of the water year.

**Discussion:** The bulk of the Districts' irrigation deliveries take place each year from March through October.<sup>27</sup> The Districts will typically set irrigation allocations in March, with potential adjustments near the end of the runoff season, presumably May or June.<sup>28</sup>

The purpose of an operations plan from the perspective of aquatic resource protection appears to be preparation for allocating flows during the February-June period (for instance, "flow shifting" as described in the Bay-Delta Plan); to assure sufficient storage to meet flows and water temperature objectives throughout the year; and to meet end-of-year carryover storage targets. Barring unusual drought conditions, the amount of work involved in preparing an operations plan by November 1 of any given year does not provide sufficient information to make the effort worthwhile. A more reasonable approach would be to require a preliminary operations plan by January 15 of each year, with an operations plan by mid- to late March. These deadlines would allow sufficient opportunity for an implementation group to evaluate flow shifting options while not prejudging the characteristics of an as yet unknown water year. Making the due date for a complete plan allows the benefit of review of the Department of Water Resources (DWR) Bulletin 120 runoff forecasts for February and March. A final adjustment or report might reasonably be required in mid- to late May, following issuance of the May Bulletin 120, which is the final such bulletin in the water year.

---

<sup>27</sup> See Districts, Pre-Application Document for the Don Pedro Project relicensing (Feb. 10, 2011), eLibrary no. 20110210-5159, p. 3-29.

<sup>28</sup> See e.g. Modesto Irrigation District's *Agricultural Water Management Plan 2015 Update*, pp. 23, 26. Available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjBv5nywMDtAhVBrJ4KHUIrAK8QFjACegQIBRAD&url=https%3A%2F%2Fwww.mid.org%2Fwater%2Firrigation%2Fdocuments%2FMI2015AWMPFinal.pdf&usg=AOvVaw1sZSnoYsdYsTH\\_pW4nL13H](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjBv5nywMDtAhVBrJ4KHUIrAK8QFjACegQIBRAD&url=https%3A%2F%2Fwww.mid.org%2Fwater%2Firrigation%2Fdocuments%2FMI2015AWMPFinal.pdf&usg=AOvVaw1sZSnoYsdYsTH_pW4nL13H)

**Recommendation:** Conservation Groups recommend the revision of Condition 1.F such that an initial operations plan is due to named review groups and the State Water Board on January 15, a completed plan is due on March 20, and a report or adjusted plan due on May 20.

### **CONDITION 1.G Dry Year Management Operations Plan**

**Issues:** Condition 1.G of the Draft Certification would require the licensees to develop a default Dry Year Management Operations Plan for deployment during dry years and dry year sequences to “outline operations strategies for optimizing water supply reliability for instream flows and water deliveries during Dry years in anticipation of multiple, sequential dry years.” Condition 1.G describes the elements the Plan should contain but does not provide numeric guidance or sideboards for any of these elements. The Condition also requires development of the Plan in consultation with the Tuolumne River Watershed Group (Condition 6), but does not provide opportunity for public comment.

**Discussion:** As a general matter, Conservation Groups support establishment of clear and enforceable standards. Establishing such conditions up front is preferable to requiring a regulated entity to submit a plan that does the initial work of defining standards, even if that plan is subject to approval. This is particularly true with entities that are hostile to the regulator. That said, the State Water Board has not established clear and enforceable standards to manage dry year conditions in the Draft Certification and does not appear prepared to do so in the Final Certification. In these circumstances, requiring the Districts to develop an explicit plan that addresses dry year contingencies is preferable to having no plan.

The elements that the Board requests in a Dry Year Management Operations Plan are appropriate.<sup>29</sup> It is also appropriate to require plan development in consultation with the Tuolumne River Watershed Group. Considering the potential breadth and importance of this Plan, there should be opportunity for public comment.

Condition 1.G is not clear about which water year types it applies to. It appears to apply to both Dry and Critically Dry water years as defined in Section 1.A Water Year Types, as well as to sequences of these water year types, but as stated it appears to apply to Dry years alone.

**Recommendation:** Conservation Groups recommend the adoption of Condition 1.G in the Final Certification, with two modifications. The Condition should clarify with precision the water year types (Condition 1.A) to which it applies. The Condition should also include a

---

<sup>29</sup> See Draft Certification Condition 1.G, p. 51, which requires in relevant part:

a description of the process for allocating water to users during years with and without water shortages, a description of options for reservoir storage targets that address water deliveries and the need for instream flows and downstream temperature management in anticipation of multiple, sequential dry year conditions, and management strategies to guide operations in multiple, sequential, dry years. Management strategies should include water allocation approaches that assess risks and costs of meeting immediate and future water supply needs and instream flow requirements, considering the uncertainty of future inflows and the risk of drought. This effort should be coordinated with development of carryover storage requirements required in Condition 3.

requirement for a public comment period prior to approval of the Condition by the Deputy Director, Water Rights (Deputy Director).

## **CONDITION 2 Ramping Rates**

**Issues:** Condition 2 of the Draft Certification would require a maximum downramping rate of 2 inches per hour and 500 cfs in a 24-hour period. The Staff Alternative in the FEIS recommends the hourly rate but not the 24-hour maximum.<sup>30</sup>

**Discussion:** The prohibition of rapid flow fluctuations downstream of La Grange Dam was one of the few substantial achievements of the 1995 Tuolumne River Settlement Agreement. Continuation of this prohibition did not become a contested issue in the current Don Pedro relicensing or La Grange licensing processes. Conservation Groups strongly support inclusion in the new licenses for Don Pedro and La Grange of a measure that similarly prevents rapid downramping downstream of La Grange Dam. We believe that the 2-inch-per-hour limitation is sufficiently protective. At very high flow ranges, particularly if the Districts are trying to follow a percent-of-unimpaired flow regime in real time, or if flood control is a potential issue, the 500 cfs daily limitation might be unnecessarily restrictive.

**Recommendation:** Conservation Groups recommend adoption of Draft Certification Condition 2 that includes the limitation on downramping to 2 inches per hour. Conservation Groups recommend that the Final Certification not include a daily limitation on downramping of 500 cfs. Conservation Groups also recommend modification of the Condition that explicitly allows faster downramping when needed to avoid an identified flood or public safety risk.

## **CONDITION 3 Temperature Management and Monitoring Plan**

**Issues:** Condition 3 of the Draft Certification would require a series of measures related to water temperature and water temperature monitoring. At the center of this measure is Table 3, which sets forth a series of “Tuolumne River Temperature Requirements.”<sup>31</sup> The values in this table appear to establish compliance requirements: “The Licensees shall take actions within their reasonable control to achieve the water temperatures outlined in Table 3 and any amendments to the temperature requirements as approved in the Licensees’ Annual Operations Plan (Condition 1) or amendments to the Water Temperature Management and Monitoring Plan.”<sup>32</sup>

In addition, Condition 3 requires the development within one year and approval by the Deputy Director of a Water Temperature Management and Monitoring Plan.

Condition 3 also requires the Districts to inform the Deputy Director whenever they are “unable to meet temperature requirements due to uncontrollable factors.”

---

<sup>30</sup> See FEIS, p. 5-37.

<sup>31</sup> Draft Certification, pp. 52-53.

<sup>32</sup> *Id.*, p. 53.

Finally, Condition 3 requires the Districts, within one year of license issuance, to establish carryover storage requirements for Don Pedro Reservoir and submit those requirements for approval of the Deputy Director.

**Discussion:** Condition 3 contains many important elements. However, the overarching element of Condition 3 that establishes the temperature values in Table 3 as compliance requirements is unreasonable, cumbersome, and unnecessary. As discussed above, there are too many organizing principles for flow requirements in the Draft Certification.

Establishing Table 3 as a compliance requirement is all the more problematic because some of the temperature values shown in Table 3 are *simply not achievable*. The October values for Shiloh Bridge (RM. 3.4) are likely never achievable, regardless of how much water is released, because the heating of the water in the 46 miles of river upstream is too dependent on ambient (air) temperatures. Similarly, the water temperature of 13°C value at Roberts Ferry Bridge (RM 39.5) or in drier years Basso Bridge (RM 47.4) is also too dependent on ambient temperatures and can likely not be achieved until about mid-November.

Leaving linguistic wiggle room in a compliance requirement does not solve the problem. Instead, it opens the door to annual advocacy about which measures merit compliance. The language adopted from the Sacramento River temperature requirements (“uncontrollable factors”) simply invites perpetual debate about which factors are controllable and which ones are discretionary. And as a compliance requirement, water temperatures would still tend to overwhelm other considerations, when they would more appropriately be one of the factors that the Tuolumne River Watershed Group and the Tuolumne River Anadromous Fish Committee should consider when establishing recommendations for flows and related issues such as carryover storage.

Simplifying Condition 3 so that it became primarily a tool to monitor and evaluate water temperatures under the required flow regime would turn a compliance problem into a very useful evaluation tool. The water temperature monitoring and data collection and compilation requirements of Condition 3 are completely appropriate. They could be used by the Tuolumne River Watershed Group and the Tuolumne River Anadromous Fish Committee both in the long term and in real time.

The element of Condition 3 that is appropriate as a compliance measure is the establishment of carryover storage requirements. These requirements should be numeric. However, the State Water Board needs to recognize that carryover storage requirements need to be matched to both the aggressiveness of annual flow release requirements and to the degree to which dry year management and drought measures restrict operations.

**Recommendation:** Conservation Groups recommend modification of Condition 3. First, the Final Certification should modify Condition 3 to make the water temperature requirements in Table 3 objectives, not compliance requirements. As such, the Final Certification should also strike the section of the condition entitled *Inability to Meet Temperature Requirements Due to Uncontrollable Factors*.

The modified Condition 3 should require the Districts to include (with modification as appropriate) the objectives in Table 3 in the required Water Temperature Monitoring and Management Plan. Condition 3 should continue to require the Districts to develop and submit this Plan within two years of license issuance, following consultation with the Tuolumne River Watershed Group and the Tuolumne River Anadromous Fish Committee. It should also require public comment on the Plan (not currently required), subsequent approval by the Deputy Director, and implementation of the Plan.

Conservation Groups support and recommend adoption of the provisions of Condition 3 that require installation of 4 to 8 water temperature monitoring gages. Conservation Groups recommend that Condition 3 specify annual reporting to the State Water Board, FERC, the Tuolumne River Watershed Group and the Tuolumne River Anadromous Fish Committee, and the public at a specified level of detail.

Conservation Groups support and recommend adoption of the provisions of Condition 3 that require the Districts to establish a carryover storage requirement for Don Pedro Reservoir. The requirement should be numeric. Conservation Groups recommend that the Districts evaluate, to start, 400 and 500 TAF as bottom end requirements, beneath which the Districts would be allowed no releases from the reservoir except those to meet instream flow requirements.<sup>33</sup>

#### **CONDITION 4 Extremely Dry Conditions**

*Issue:* Condition 4 allows the Districts to develop a “Revised Operations Plan” in consultation with the Tuolumne River Working Group and file it for approval with the Deputy Director. Such a Revised Operations Plan would respond to “extremely dry” conditions and could propose temporary changes to requirements of the Certification.

*Discussion:* As stated above concerning Condition 1.G (Dry Year Management Operations Plan), Conservation Groups support establishment by the State Water Board of guidelines for managing contingencies in Dry and Critically Dry water years and sequences of such water years. In this regard, Condition 4 must be considered together with Condition 1.G, in part because Condition 4 requires any Revised Operations Plan to explain why the measures in the Condition 1.G Plan were inadequate to avoid a request for temporary changes in requirements of the Certification. This provides some direction regarding the issues that the Deputy Director will evaluate in reviewing any Revised Operations Plan.

However, Condition 4 does not explicitly describe any objective criteria the Deputy Director will use in such review. Conservation Groups have recommended such objective criteria in our aforementioned Draft Drought Plan.<sup>34</sup> These criteria include guidelines concerning water supply deliveries in recent years and carryover storage. They also include retention of the framework of a percent of unimpaired flow in February through June, albeit at a reduced percentage value. While criteria for a temporary urgency change cannot anticipate all

---

<sup>33</sup> See more extensive discussion in Conservation Groups’ Draft Drought Plan in Conservation Groups’ DEIS Comments, pp. 84-87.

<sup>34</sup> *Id.*

contingencies, guidelines for contingencies reduce the pressure on the State Water Board, the Districts and other stakeholders.

As written, Condition 4 requires notice by the Districts to “interested parties” of any Revised Operations Plan. However, it is unclear who those interested parties might be and specifically whether they would include non-governmental organizations (NGO’s) such as the organizations that make up the Conservation Groups. It is particularly important that the State Water Board require such notice so that NGO’s can make their cases before the State Water Board. FERC does not allow NGO intervention in license implementation proceedings unless the NGO’s are named entities to be consulted.<sup>35</sup>

**Recommendation:** Conservation Groups are generally supportive of Condition 4, particularly in its definition (by reference to Condition 1.G) of the issues any “Revised Operations Plan” must address. However, Conservation Groups recommend inclusion of objective criteria that provide guidelines by which the Deputy Director will evaluate any Revised Operations Plans, such as those suggested in Conservation Groups’ Draft Drought Plan, as cited above.<sup>36</sup> Conservation Groups also request an explicit requirement that they be notified in the event of submittal of a Revised Operations Plan. We address this issue more globally in our comments on Draft Certification Condition 6, below.

#### **CONDITION 5 Southern Delta Salinity Objective**

**Issue:** Condition 5 would require the Districts (and apparently CCSF) to contribute to salinity control in the southern Delta. It would require the Districts and CCSF to cease diversions whenever the Bureau of Reclamation was releasing stored water from New Melones Reservoir on the Stanislaus River for the purpose of meeting salinity requirements at Vernalis.

**Discussion:** This Condition is a back-door effort to impose what would effectively be standard water rights permit Term 91 on the Districts and CCSF using the Water Quality Certification. It is a bad idea for the reasons we describe below. Many of the same Conservation Groups made the same argument in comments on the Draft Certification for the Merced River Project and the Merced Falls Project. Though our comments there did not result in removal of the Condition from the Final Certification for Merced and Merced Falls, we nonetheless reprise them here.

The State Water Board tried a similar approach in explicitly inserting water rights permit Term 91 in the Water Quality Certification for the El Dorado Irrigation District’s El Dorado Project in 2006. This occurred even in the midst of ongoing litigation by El Dorado Irrigation District contesting the imposition of Term 91 in its water rights, which had a priority date of 1927. The Superior Court had rejected inclusion of Term 91 in 2003, and the Appeals Court

---

<sup>35</sup> See FERC, Notice Granting Motion to Intervene, P-2101-161 (Nov. 20, 2020), p. 1 (“The Commission issues notices and entertains intervention requests in post-licensing proceedings that (1) entail a material change in the plan of project development or in the terms and conditions of the license, or (2) would adversely affect the would-be intervenor’s rights in a manner not contemplated by the license, or (3) are filed by an agency or entity dealing with matters on which it was to be consulted.”)

<sup>36</sup> Draft Drought Plan in Conservation Groups’ DEIS Comments, pp. 84-87.

upheld (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937) (*El Dorado v. SWRCB*). There, the Appeals Court noted: "Every effort . . . must be made to respect and enforce the rule of priority. A solution to a dispute over water rights 'must preserve water right priorities to the extent those priorities do not lead to unreasonable use.'" *Id.* at 966.

The approach of the Bay-Delta Plan that requires each of the salmon-bearing tributaries to the Delta to contribute flow, notwithstanding water rights priorities from one watershed to the next, has its legal foundation in substantial part in the public trust. The public trust resources in the Tuolumne River cannot, for example, be protected by instream flow releases in the Stanislaus River. The dual purpose of protecting public trust in tributaries and the Delta alike, in part because many of the public trust resources are anadromous fish that move between the Delta and the tributaries, means the Bay-Delta Plan can subordinate the rule of priority in requiring flows from each tributary. As stated in *El Dorado v. SWRCB* as a corollary of the doctrine of reasonable use, "[w]hen the public trust doctrine clashes with the rule of priority, the rule of priority must yield." *Id.* The principle was later reaffirmed and cited explicitly in *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463,

For salinity control, however, we do not see a similar reasonable use or public trust justification that would support requiring the Districts and CCSF, with pre-1914 as well as post-1914 water rights priority dates, to support the legal requirements of Reclamation's New Melones 1982 priority date water rights. Water released from New Melones for salinity control at Vernalis will just as effectively meet its purposes as would releases from the Tuolumne River.

In addition, Reclamation's Central Valley Project (CVP) supplies water to highly saline drainage impaired lands on the west side of the San Joaquin Valley. The agricultural runoff from these lands is a substantial source of salinity in the San Joaquin River. The CVP is thus part of the source of the salinity that releases from New Melones Reservoir (a CVP reservoir) serve to mitigate. There is no comparable source of salinity from the Tuolumne River watershed.

Finally, the imposition of a requirement that would shift part of the responsibility of the CVP for southern Delta salinity control to other (senior) water rights holders in the San Joaquin River watershed would be a major legal policy shift that would overturn a fundamental aspect of Water Rights Decision 1641. Any legal and policy shift of this magnitude warrants well-noticed, extensive, and explicit public review.

Tucking such a major legal and policy decision into a Water Quality Certification for a pair of hydroelectric projects does a disservice to the State Water Board as well as to regulated entities and other stakeholders. It was a bad idea when the State Water Board made such an attempt in 2006, an attempt that a court decision forced the State Water Board to rescind. It is still a bad idea in 2020. The Board should entertain (or not) any change in responsibility for Delta salinity control away from the Central Valley Project (and implicitly, the State Water Project) in implementing the Bay-Delta Plan or in a subsequent water right proceeding.<sup>37</sup> The

---

<sup>37</sup> See Revised Water Quality Control Plan with Adopted Changes, SED op. cit., Appendix K, p. 42 (Program of Implementation for Southern Delta Agricultural Salinity Objectives, San Joaquin River at Airport Way near Vernalis):

State Water Board would not foreclose any opportunities by addressing this issue in a more appropriate forum.

***Recommendation:*** The State Water Board should delete Draft Certification Condition 5 (Southern Delta Salinity Objective) from the Final Certification.

## **CONDITION 6 Tuolumne River and Regional Watershed Management Coordination**

***Issues:*** There are multiple Conditions in the Draft Certification that require oversight or review by one or more of three groups or committees. Condition 6 of the Draft Certification describes these entities: a) the Tuolumne River Watershed Group, b) the Tuolumne River Anadromous Fish Committee (a “subgroup” of the Tuolumne River Watershed Group), and c) the Lower San Joaquin River Watershed Group. Condition 6 requires the Districts to establish and convene the Tuolumne River Watershed Group and its subgroups. Condition 6 also explains that the State Water Board will convene the Lower San Joaquin River Watershed Group, and requires the Districts to participate in it.

The Draft Certification only partially defines membership in these oversight groups.

***Discussion:*** Condition 6 describes the general topics that may involve the Tuolumne River Watershed Group and the Tuolumne River Anadromous Fish Committee. However, the State Water Board’s expectations for the division of tasks and responsibilities is not clear. Further, while membership in the Tuolumne River Watershed Group may include “other members identified by the Deputy Director,” the Draft Certification does not explicitly require the membership of NGO participants. The Draft Certification requires one NGO member of the Tuolumne River Anadromous Fish Committee.

As described above, Conservation Groups are concerned that lack of specificity in naming (or at least naming the number) of NGO participants in post-licensing oversight groups will deprive NGO’s of standing before the Commission on post-license decisions.

It would be useful for the Final Certification to include a table that shows the Conditions and the subject matters on which review and oversight of each of the three oversight groups is required and expected.

Regarding the Lower San Joaquin River Watershed Group, Conservation Groups believe it is appropriate that the Certification require participation by the Districts. It is appropriate that the Certification sufficiently define this Group so that the responsibility of the Districts under the Certification is clear, but that the State Water Board define details regarding this Group elsewhere.

---

As part of implementing the salinity water quality objective for the interior southern Delta, USBR shall be required to continue to comply with these salinity levels, as a condition of its water rights. Implementation of the southern Delta salinity objective at Vernalis may be modified by the State Water Board in a future Bay-Delta Plan update and a subsequent water right proceeding, ....

**Recommendation:** Conservation Groups recommend that the Final Certification explicitly require the inclusion of at least one representative of the Conservation Groups in the Tuolumne River Watershed Group and its subgroups. Conservation Groups also recommend that the Final Certification add a table showing the Conditions and the subject matters on which the Final Certification requires review and oversight of each of the three oversight groups. With these additions, Conservation Groups recommend adoption of Condition 6 in the Final Certification.

### **CONDITION 7 Annual Review Meeting**

**Recommendation:** Conservation Groups have no comment on Condition 7 (Annual Review Meeting) and recommend its adoption in the Final Certification.

### **CONDITION 8 Water Quality Monitoring and Management**

**Recommendation:** Conservation Groups have no comment on Condition 8 (Water Quality Monitoring and Management) and recommend its adoption in the Final Certification.

### **CONDITION 9 Large Woody Material Management**

**Issue:** In relicensing, NMFS, CDFW, and Conservation Groups recommended a Large Woody Material (LWM) Management Plan.<sup>38,39,40</sup> While CDFW's recommendations and those of Conservation Groups are largely consistent, NMFS's recommendations differ in some of the details.

**Discussion:** In light of some differences between the CDFW/CG recommendation and the NMFS recommendation, we support the Water Board's Condition 9, which incorporates the recommendation of CDFW. However, the CDFW recommendation does not provide clarity that the Districts shall install LWM along the entire 52-mile reach of the lower Tuolumne River. Thus, as we described in our recommendation, we urge the Water Board to clarify that the Licensees shall distribute LWM pieces equally among the following reaches:

- RM 51.7 to RM 40
- RM 40 to RM 21.5
- RM 21.5 to the confluence with the San Joaquin River.

LWM provides important cover for migrating salmonids, even during migration through reaches of river with poor rearing habitat, such as that downstream of RM 21.5.

---

<sup>38</sup> NMFS, NOAA Fisheries' Resource Management Goals and Objectives; our Preliminary Federal Power Act § 18 Prescriptions, Reserving our Authority to Prescribe Fishways; Recommendations for § 10(j) Conditions, and § 10(a) Recommendations for the Don Pedro (P-2299-082) and La Grange (P-14581-002) Hydroelectric Projects on the Tuolumne River, California (Jan. 29, 2018), eLibrary no. 20180129-5258.

<sup>39</sup> CDFW, Response to Notice of Ready for Environmental Analysis Federal Power Action Section 10(j) and 10(a) Recommendations for the Amendment of Application for Don Pedro Hydroelectric Project (FERC No. 2299) and for the Final License Application of La Grange Hydroelectric Project (FERC No. 14581), Stanislaus and Tuolumne Counties, California (Jan. 29, 2018), eLibrary no. 20180129-5315.

<sup>40</sup> Conservation Groups' REA Comments.

The Water Board's Condition 9 also requires that the licensees consult with Caltrans (as well as other agencies) in developing the plan. Caltrans has not previously been engaged in Tuolumne River fisheries and river management issues, and thus it is unclear why the department has been included. We recommend that the Water Board either provide greater clarity and rationale for requiring consultation with Caltrans, or remove Caltrans altogether. We believe that the inclusion of Caltrans without a clear purpose would create an additional and unnecessary bureaucratic hurdle with likely little benefit.

**Recommendation:** We recommend adoption of Condition 9 in the Final Certification with the two amendments described above: adding specificity to the reaches of the river where LWM is to be added and either removing Caltrans as a consulting agency or providing the purpose and rationale for consultation with Caltrans.

### **CONDITION 10 Erosion and Sediment Management**

**Recommendation:** Conservation Groups have no comment on Condition 10 and recommend its adoption in the Final Certification.

### **CONDITION 11 Gravel Augmentation and Management**

**Issue:** Most relicensing participants agreed that a gravel augmentation plan is warranted. There were, however, significant differences between what FERC staff recommended and what the resource agencies and Conservation Groups recommended, as well as disagreement about the goals of such a gravel augmentation program.

**Discussion:** Conservation Groups' REA Comments recommended that the Districts be required to add a volume of sediment to the lower Tuolumne River that is commensurate with the volume of sediment that is captured by the reservoirs. This volume would mitigate the loss of sediment that the reservoirs prevent from moving downstream and thus from supporting the recovery of a healthy and functioning geomorphic system in the lower Tuolumne River.<sup>41</sup> The stated goals of our proposed gravel augmentation program were:

- a. To mitigate the loss of gravel and sediment (both spawning-sized gravel and fine sediment) due to direct effects of Project operations.
- b. To mitigate the abundance of habitat for piscivorous fish that was created by Project effects.

The Tuolumne River has 10 large, inactive in-channel mining pits whose volume equates to nearly 2,000,000 cubic yards. These former mining pits, known as Special Run-Pools (SRP's), act as bedload sediment traps that interrupt the transport of sediment and prevent re-establishment of healthy geomorphic processes. The SRP's also serve as large areas of habitat for bass and other piscivorous fish. Don Pedro Reservoir totally blocks and captures fine and coarse sediment that would otherwise be transported downstream. This sediment capture prevents the recovery of a healthy river system.

---

<sup>41</sup> See Conservation Groups' REA Comments, *op. cit.*, pp. 71-74.

The Licensees' Study Report "Spawning Gravel in the Lower Tuolumne River" concluded that 330,943 cu yds/year of total sediment and 33,094 cu yds/year of coarse sediment is trapped by Don Pedro Reservoir.<sup>42</sup> These amounts are somewhat greater than the amounts identified in the 2004 Coarse Sediment Management Plan for the Tuolumne River, which estimated the annual capture of 18,800 cu yds/year of coarse sediment in the reservoir.<sup>43</sup> Based on these study findings, Conservation Groups recommended augmentation of 200,000 cu yds/year of total sediment (including 20,000 cu yds/year of coarse sediment).

Conservation Groups' recommendation would allow for the placement of smaller material, because we recognized that a range of sediment sizes would naturally occur in the river channel. Additionally, inclusion of smaller sized sediment provides an opportunity to more cost-effectively fill former mining pits within the river channel. In certain locations (*e.g.*, at the bottom of former in-channel gravel mine pits) coarse sediment may be more costly without providing additional ecological benefit.

We also recommended that sediment augmentation be conducted in tandem with floodplain restoration projects, which will create the need to dispose of material removed from lowered floodplain surfaces. Harvesting this material would thus serve the dual purpose of disposal and in-channel augmentation.

Finally, Condition 11 requires the addition of gravel only during the first 15 years following license issuance. The license term will likely be at least 40 years.

***Recommendation:*** Conservation Groups support Condition 11 with modifications. We recommend that Condition 11 allow for the placement of smaller sediment sizes than coarse sediment in SRP's. We also recommend the annual augmentation of 200,000 cubic yards/year of total sediment, including at least 20,000 cubic yards/year of spawning-sized sediment, for 10 years, until Licensees have filled the SRPs in the river with 1,950,824 cubic yards of total sediment, including 195,082 cubic yards of coarse sediment. With these modifications, Conservation Groups recommend adoption of Condition 11 in the Final Certification.

## **CONDITION 12 Riparian, Spawning, and Floodplain Management**

***Issue:*** Outmigrating juvenile salmon in Central Valley rivers that have a significant amount of high quality and functioning floodplain rearing habitat have greater growth rates and

---

<sup>42</sup> Amended Final License Application, Att. C, Spawning Gravel in the Lower Tuolumne River Study Report, W&AR-12, p. 6-2. Figures converted from tons/year to cu yds/year by dividing tons/year by 1.13.

<sup>43</sup> McBain & Trush, 2004. Course Sediment Management Plan for the Lower Tuolumne River Revised Final (CSMP). Prepared for the Turlock and Modesto Irrigation Districts, U.S. Fish & Wildlife Service, and California Bay-Delta Program, and Tuolumne River Technical Advisory Committee. Available at: [http://tuolumnerivertac.com/Documents/7-2004\\_Revised\\_CSMP\\_Report.pdf](http://tuolumnerivertac.com/Documents/7-2004_Revised_CSMP_Report.pdf), p. 23.

higher survival rates.<sup>44,45,46,47</sup> Based on Emigrating Salmonid Habitat Estimation (ESHE) modeling, the Tuolumne River has a lack of suitable floodplain rearing habitat. This lack of floodplain rearing habitat acts as a limiting factor for production of successful juvenile and smolt outmigrants.<sup>48,49,50,51,52,53</sup>

**Discussion:** ESHE modeling results published in Appendix H of the Central Valley Flood Protection Plan provides an estimate of 810 acres of 100% suitable floodplain rearing habitat needed to support the Anadromous Fish Population Doubling Goal.<sup>54,55</sup> Condition 12 of the Draft Certification prescribes the creation of a minimum of 150 acres of 100% suitable floodplain rearing habitat in the first 10 years following completion of the Riparian, Spawning, and Floodplain Restoration Plan and 15 acres of such habitat every year thereafter. The State Water Board provides no end timeline or overall acreage goal for this Condition, so it is unclear if this is an open-ended mandate. Instead, Condition 12 would require that the Licensees demonstrate to the Deputy Director of the State Water Board that available habitat and flows are meeting the narrative and numeric objectives and goals for the LSJR and Tuolumne River.

It would take the Districts 54 years of work to construct 810 acres of 100% suitable habitat. However, the term of the new license is unknown at this time. As such, we recommend that the Final Certification establish a numeric goal for total acreage.

---

<sup>44</sup> Sommer, T.R., Nobriga, M.L., Harrell, W.C., Batham, W., Kimmerer, W.J., 2001. *Floodplain rearing of juvenile Chinook salmon: evidence of enhanced growth and survival*. Can. J. Fish. Aquat. Sci. 58:325–333. Available at: <http://dx.doi.org/10.1139/f00-245>

<sup>45</sup> Sommer, T.R., W.C. Harrell, A.M. Solger, B. Tom, and W. Kimmerer, 2004. *Effects of flow variation on channel and floodplain biota and habitats of the Sacramento River, California, U.S.A.* Aquatic Conservation: Marine and Freshwater Ecosystems. 14: 247-261. Available at: <http://www.water.ca.gov/aes/docs/AquaticConservManuscript.pdf>

<sup>46</sup> Sommer, T.R., W.C. Harrell, M.L. Nobriga. 2005. *Habitat use and stranding risk of juvenile Chinook salmon on seasonal floodplain*. North American Journal of Fisheries Management, 25: 1493-1504. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.591.7404&rep=rep1&type=pdf>

<sup>47</sup> Jeffres, C.A., J.J. Opperman, P.B. Moyle. 2008. *Ephemeral floodplain habitats provide best growth conditions for Chinook salmon in a California river* Environmental Biology of Fishes, 83(4): 449-458

<sup>48</sup> Chapman, D. W. 1966. *Food and Space as Regulators of Salmonid Populations*. American Naturalist 100:345–357.

<sup>49</sup> Allen, K. R. 1969. *Limitations on Production in Salmonid Populations in Streams*. in T. G. Northcote (Editor), Symposium on Salmon and Trout in Streams. University of British Columbia, Vancouver. 3-18.

<sup>50</sup> Grant, J. W. A., and D. L. Kramer. 1990. *Territory Size as a Predictor of the Upper Limit of Population Density of Juvenile Salmonids in Streams*. Canadian Journal of Fisheries and Aquatic Sciences 47:1724–1737.

<sup>51</sup> Cramer, S. P., and N. K. Ackerman. 2009. *Linking Stream Carrying Capacity for Salmonids to Habitat Features*. Pages 225–254 in E. E. Knudsen and J. H. Michael, Jr. (Editors), Pacific Salmon Environmental and Life History Models: Advancing Science for Sustainable Salmon in the Future. American Fisheries Society, Symposium 71, Bethesda, Maryland.

<sup>52</sup> Keeley, E. R., and P. A. Slaney. 1996. *Quantitative Measures of Rearing and Spawning Habitat Characteristics for Stream-Dwelling Salmonids: Implications for Habitat Restoration*. Watershed Restoration Project Report 2. British Columbia Ministry of Environment, Lands and Parks. Available at: [http://www2.isu.edu/~keelerne/k\\_s96.pdf](http://www2.isu.edu/~keelerne/k_s96.pdf)

<sup>53</sup> [DWR] California Department of Water Resources. 2016. *Central Valley Flood Protection Plan Conservation Strategy*. Appendix H Central Valley Chinook Salmon Rearing Habitat Required to Satisfy the Anadromous Fish Restoration Program Goal.

<sup>54</sup> [DWR] California Department of Water Resources. 2016. *Central Valley Flood Protection Plan Conservation Strategy*. Appendix H Central Valley Chinook Salmon Rearing Habitat Required to Satisfy the Anadromous Fish Restoration Program Goal.

<sup>55</sup> Flow West and Cramer Fish Sciences, Unpublished Data.

Additionally, Conservation Groups' REA Comments provided an alternative metric for achieving floodplain rearing habitat: acre-days of floodplain inundation. This metric is useful because it establishes a goal that adjusts acreage requirements depending on flow. Relatively higher flow requirements would require construction of fewer acres of floodplain habitat; relatively low flows would require construction of more acres of floodplain habitat.

Based on analysis completed by the US Fish & Wildlife Service, Conservation Groups recommended the following goals:<sup>56</sup>

- In Above Normal years, a median of at least 100,000 acre-days;
- In Below Normal years, a median of at least 65,000 acre-days;
- In Dry years, a median of at least 36,000 acre-days.

We further recommended the Licensees be required to implement whichever approach (total acres of floodplain habitat creation or acre-days of inundation) would result in the greater amount of suitable floodplain habitat acreage in a Below Normal water-year under the hydrology of the 1971-2012 period of record.

**Recommendation:** Conservation Groups support Condition 12 with modifications. We recommend that the State Water Board provide greater clarity and provide a specific acreage goal for the amount of floodplain habitat whose construction Condition 12 requires. More specifically, we recommend that the goal be 810 acres of 100% suitable habitat over the term of the license, with appropriate intermediate goals (such as 150 acres within the first 10 years following license approval). We also recommend that the State Water Board provide the acre-day alternative described above. With these modifications, Conservation Groups support adoption of Condition 12 in the Final Certification.

### **CONDITION 13 Predator Suppression Plan**

**Issues:** It is unclear whether predator suppression is an effective strategy in improving the survival of juvenile salmonids.

**Discussion:** Throughout relicensing, the Districts and their flawed fish population models posited predator removal as the single greatest opportunity to improve survival of salmonids in the lower Tuolumne River.<sup>57</sup> Districts and CCSF further argued that predator suppression reduced the need for flow improvements.

In contrast, the Draft Certification states in the rationale for Condition 13: "There is large uncertainty in the magnitude of the impact of predation on native salmonid populations, especially the role of predation as a proximate or ultimate cause of mortality to native salmonids."<sup>58</sup> Conservation Groups generally agree with this much more qualified perspective,

---

<sup>56</sup> US Fish & Wildlife Service. 2017. *Use of Cumulative Acre-Days to Evaluate Changes in Floodplain Inundation on the Lower Tuolumne River Under Different Hydrological Regimes and Quantification of Mitigation Measures*.

<sup>57</sup> For discussion, see Conservation Groups DEIS Comments, pp. 27-29, 44-50.

<sup>58</sup> Draft Certification, pp. 37-38.

although we do not agree with the more definitive statement in the Draft Certification that immediately follows it: “The implementation of non-flow actions such as predator suppression to increase native salmonid survival is necessary to bolster native salmonid populations and is consistent with the Bay-Delta Plan.”<sup>59</sup>

**Recommendation:** Condition 13 will require development of a plan and is directed to focus on structures and other man-made habitat features such as gravel pits. It also directs that the plan consider the effects on predatory fish species of physical habitat improvements required in other conditions, such as augmentation of LWM. It does not single out direct removal of predatory fish as the only outcome of the plan. Finally, it does not substitute control of predatory fish for flow and physical habitat improvements in the lower Tuolumne River. Because of these specific characteristics, Conservation Groups have no objection to adoption of Condition 13 as written in the Final Certification, with the exception that the Final Certification should clarify whether the requirement for “consultation with the agencies of the Tuolumne River Anadromous Fish Committee” includes NGO member(s) as well as “agencies.”

#### **CONDITION 14 Aquatic Invasive Species Management Plan**

**Recommendation:** Conservation Groups have no comment on Condition 14 (Aquatic Invasive Species Management Plan) and recommend its adoption in the Final Certification.

#### **CONDITION 15 Recreation Facilities Management**

**Recommendation:** Conservation Groups have no comment on Condition 15 (Recreation Facilities Management) and recommend its adoption in the Final Certification.

#### **CONDITION 16 Road Management**

**Recommendation:** Conservation Groups have no comment on Condition 16 (Road Management) and recommend its adoption in the Final Certification.

#### **CONDITION 17 Biological Resources Management**

#### **CONDITION 18 Monitoring, Assessment, Reporting, and Special Studies**

**Issues:** As we understand it, Condition 17 is specific to biological monitoring, and Condition 18 provides the requirements for an overall framework of monitoring and reporting for all subject matter areas.

Condition 17 specifies the timing, frequency and level of effort required for biological monitoring.

Condition 18 in aggregate establishes the overall framework for monitoring and reporting on all elements required in the Draft Certification. It also explains the relationship between

---

<sup>59</sup> *Id.*, p. 38. Conservation Groups recommend qualifying this sentence in the Final Certification, striking “is necessary to bolster native salmonid populations and is consistent with the Bay-Delta Plan” and replacing it with something like: “may assist in bolstering native salmon populations.”

overarching monitoring and reporting requirements for the Certification and the parallel requirements for the implementation of the Lower San Joaquin River portion of the Bay-Delta Plan and other monitoring and reporting efforts in the Lower San Joaquin River region and the greater Bay-Delta region.

**Discussion:** Fishery scientists and managers are looking for monitoring tools and a network that provides quantitative information about the status of threatened fish species at key life stages and geographic locations over time for sustainable management of fisheries resources.<sup>60</sup> For anadromous species, management actions in one geographic domain can substantially affect abundance of subsequent life stages that span broad geographic regions. Quantitative metrics (e.g., abundance, movement, survival, life history diversity, and condition) at multiple life stages are needed to inform how management actions (e.g., hatcheries, harvest, hydrology, and habitat restoration) influence salmon population dynamics.

Johnson *et al.*<sup>61</sup> describe a proposed California monitoring network to assess resource management actions in more or less real time: (1) incorporate genetic run identification; (2) develop juvenile abundance estimates; (3) collect data for life history diversity metrics at multiple life stages; (4) expand and enhance real-time fish survival and movement monitoring; (5) collect fish condition data; and (6) provide timely public access to monitoring data in open data formats. The overarching purpose for development and implementation of monitoring efforts associated with anadromous fish is to have the information necessary to identify how salmonids in the lower Tuolumne River respond to changes in flow conditions and other biological/ecological factors from the current license to the new license. Salmonid monitoring is also an essential component for making decisions regarding the timing and duration of pulse flows.

In general, Condition 17 is consistent with CDFW's recommendations in relicensing for monitoring of anadromous fish. Though the Districts proposed many of these actions in the Don Pedro relicensing, FERC Staff declined on principle to order many of them. The required actions and levels of effort appear appropriate, and the State Water Board's inclusion of them is a welcome contrast.

Condition 18 in general provides helpful guidance. However, Condition 18 states in part: "Development and implementation of the Tuolumne River Monitoring, Assessment, and Science Plan shall be integrated and coordinated with monitoring programs in the LSJR watershed and Bay-Delta including, but not limited to..." a series of other related or parallel monitoring programs.<sup>62</sup> The Final Certification should strike the words "development and" and "integrated and" from this sentence. While it is reasonable to coordinate the implementation of the Tuolumne River Monitoring, Assessment, and Science Plan with other programs, it is not reasonable to coordinate its development with other programs. And while it reasonable to

---

<sup>60</sup> Johnson RC, Windell S, Brandes PL, Conrad JL, Ferguson J, Goertler PAL, Harvey BN, Heublein J, Israel JA, Kratville DW, Kirsch JE, Perry RW, Pisciotto J, Poytress WR, Reece K, and Swart BG. 2017. *Science Advancements Key to Increasing Management Value of Life Stage Monitoring Networks for Endangered Sacramento River Winter-Run Chinook Salmon in California*. San Francisco Estuary and Water Science, Vol. 15, Issue 3, Article 1. 41 pp. Available from: <https://doi.org/10.15447/sfew.2017v15iss3art1>.

<sup>61</sup> *Id.*

<sup>62</sup> Draft Certification, p. 82.

require coordination with other programs, it is not reasonable to require integration, and it is not clear what that would actually require.

**Recommendation:** With the suggested deletions discussed above, Conservation Groups recommend adoption of Conditions 17 and 18.

### **CONDITION 19. Construction and Maintenance**

Conservation Groups have no comment on Condition 19 (Construction and Maintenance).

### **CONDITION. 20. Reintroduction of Anadromous Fish**

**Recommendation:** Condition 20 as written is basically a reservation of authority in the event of reintroduction of anadromous fish in the project area. As such, we have no comment, and recommend adoption of Condition 20 in the Final Certification.

## **III. Procedural Recommendations**

The November 30, 2020 Notice soliciting comments on the Draft Certification specified an original deadline for comments of December 11, 2020.<sup>63</sup> The Notice further stated: “**The comment period may be extended** depending on when FERC includes on its meeting agenda possible consideration of a decision regarding the Districts’ request for a waiver of the State Water Board’s water quality certification authority for the Projects.” On December 10, 2020, FERC issued the “Sunshine Notice” for its December 17, 2020 meeting, showing that the Districts’ “Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification” (Petition) was not on the agenda.<sup>64</sup> Within hours, the State Water Board issued a Revised Notice, changing the comment deadline on the Draft Certification to January 4, 2020.<sup>65</sup>

The State Water Board appears to be allowing the timing of FERC’s action on the Districts’ Petition to drive the timing of the issuance of a Final Certification. This approach is complicated by the Districts’ November 20, 2020 withdrawal of their application for certification.<sup>66</sup>

---

<sup>63</sup> State Water Board, Public Comment Period for Draft Water Quality Certification, Turlock Irrigation District’s and Modesto Irrigation District’s Don Pedro and La Grange Hydroelectric Projects Federal Energy Regulatory Commission Project Nos. 2299 & 14581. (Nov. 30, 2020, p. 3). Emphasis in original.

<sup>64</sup> See Sunshine Act Meeting Notice (Dec. 10, 2020). Available at: <https://www.ferc.gov/sites/default/files/2020-12/sunshine-notice.PDF>. See also Districts, Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification, P-2299- and p-14581- (Oct. 2, 2020), eLibrary no. 20201002-5186.

<sup>65</sup> State Water Board, Extension of Public Comment Period for Draft Water Quality Certification, (Dec. 10, 2020).

<sup>66</sup> Letter from Michael I. Cooke, TID, and John Davids, MID to Eileen Sobeck, Executive Director, State Water Board, “Formal Withdrawal of Requests for Water Quality Certification Don Pedro Hydroelectric Project, FERC Project No. 2299 La Grange Hydroelectric Project, FERC Project No. 14581” (Nov. 20, 2020), filed with FERC as eLibrary no. 20201120-5247.

Conservation Groups agree with the State Water Board that the Districts' Petition is without merit.<sup>67</sup> However, Conservation Groups do not agree that the State Water Board should subordinate established process in this instance to an accelerated process in anticipation of an adverse decision by a federal regulator on a meritless petition. The issuance of a Draft Certification has made clear that the State Water Board is close to completion of its Section 401 process. AB-92 has cleared the Districts' CEQA obstruction from the critical path. The State Water Board can act well within one year of the Districts' most recent re-application for certification on July 20, 2020, even if yet another application by the Districts following denial of waiver would initiate a new one-year clock.

Rather than rushing to issue a Final Certification in the absence of an active application, the State Water Board should first revise the Draft Certification in order to make it clear and enforceable, consistent with the recommendations of Conservation Groups and other constructive commenters. Conservation Groups recommend that on completion of this revision, the State Water Board issue a Second Draft Certification and simultaneously announce its intention to issue a 21-day notice of Final Certification once the Districts re-apply for certification. This will make clear to both FERC and any prospective judge that the State Water Board is ready to act in fulfillment of its duties under the Clean Water Act. It will also make clear that any delay is solely attributable to the Districts' irresponsible action to game the process in withdrawing their application for certification.

#### **IV. Conclusion**

Conservation Groups greatly appreciate the efforts of numerous State Water Board personnel in completing the Draft Certification for the relicensing of Projects 2299 and 14581. We request that the State Water Board adopt a Final Certification consistent with the revisions and the process we recommend in these comments.

Respectfully submitted,



---

Chris Shutes, FERC Projects Director  
California Sportfishing Protection Alliance  
1608 Francisco St.  
Berkeley, CA 94703  
(510) 421-2405  
[blancapaloma@msn.com](mailto:blancapaloma@msn.com)

---

<sup>67</sup> See State Water Board, California State Water Resources Control Board's Motion to Intervene and Comments on Turlock Irrigation District's and Modesto Irrigation District's Petition for Declaratory Order under open dockets P-2299- and P-14581- (Oct. 29, 2020), eLibrary no. 20201029-5212; Conservation Groups, Conservation Groups' Motion to Intervene in Opposition to the Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification for the Don Pedro and La Grange Hydroelectric Projects (Nov. 2, 2020), eLibrary no. 20201102-5205; Conservation Groups, Conservation Groups' Supplemental Comments in Opposition to the Petition for Declaratory Order of Turlock and Modesto Irrigation Districts Requesting Waiver of Water Quality Certification for the Don Pedro and La Grange Hydroelectric Projects (Dec. 7, 2020) eLibrary no. 20201207-5137.



---

Patrick Koepele  
Executive Director  
Tuolumne River Trust  
67 Linoberg Street  
Sonora, CA 95370  
209-588-8636  
[patrick@tuolumne.org](mailto:patrick@tuolumne.org)



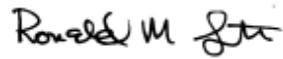
---

Michael Martin, Ph.D.  
Director  
P.O. Box 2216  
Mariposa, CA 95338  
(209) 966-6406  
[mmartin@sti.net](mailto:mmartin@sti.net)



---

Cindy Charles  
Conservation Chairperson  
Golden West Women Flyfishers  
1140 Rhode Island Street  
San Francisco, CA 94107  
(415) 860-0070  
[cindy@ccharles.net](mailto:cindy@ccharles.net)



---

Ronald Stork  
Senior Policy Advocate  
Friends of the River  
1418 20th Street, Suite 100  
Sacramento, CA 95811-5206  
(916) 442-3155 x 220  
[rstork@friendsoftheriver.org](mailto:rstork@friendsoftheriver.org)



---

Theresa Simsiman  
California Stewardship Director  
American Whitewater  
12155 Tributary Point Drive #48  
Gold River, CA 95870  
(916) 835-1460  
[theresa@americanwhitewater.org](mailto:theresa@americanwhitewater.org)



---

Mike Davis  
Associate Director, California Central Valley  
River Restoration  
American Rivers  
120 Union St.  
Nevada City, CA 95959  
[mdavis@americanrivers.org](mailto:mdavis@americanrivers.org)



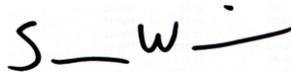
---

John Buckley  
Executive Director  
Central Sierra Environmental Resource Center  
P.O. Box 396  
Twain Harte, CA 95383  
209-586-7440  
[johnb@cserc.org](mailto:johnb@cserc.org)

/s/

---

Allison Boucher  
Tuolumne River Conservancy, Inc.  
1163 E March Lane  
Ste. D PMB 708  
Stockton, CA 95210  
209-471-0476  
[feathersfurflowers@gmail.com](mailto:feathersfurflowers@gmail.com)



Sean Wirth  
Conservation Chair  
Mother Lode Chapter, Sierra Club  
909 12<sup>th</sup> Street Suite 203  
Sacramento, CA 95814  
[wirthsoscrales@yahoo.com](mailto:wirthsoscrales@yahoo.com)



---

Brian Johnson  
California Director  
Trout Unlimited  
5950 Doyle Street, Suite 2  
Emeryville, CA 94608  
(510) 528-4772  
[bjohnson@tu.org](mailto:bjohnson@tu.org)