February 16, 2021

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000
*Via electronic filing*

Re: Don Pedro and La Grange Hydroelectric Projects, FERC Projects No. 2299 and 14581, Petition for Reconsideration of Section 401 Water Quality Certification

Dear Ms. Townsend:

The Tuolumne River Trust, California Sportfishing Protection Alliance, 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, "**TRT et al.**") respectfully submit a timely petition for reconsideration of the Clean Water Act Section 401 water quality certification ("**Certification**") issued by the California State Water Resources Control Board ("**State Water Board**") for the Don Pedro Hydroelectric Project and La Grange Hydroelectric Project on November 30, 2020 and finalized on January 15, 2021.

TRT et al. filed comments generally supporting the draft Certification with the State Water Board on December 21, 2020. Turlock Irrigation District and Modesto Irrigation District (collectively, the "**Districts**") filed comments in opposition with the State Water Board on January 6, 2021.

Please feel free to contact me if you have any questions.

Respectfully submitted,

Patrick Koepele
Executive Director
Tuolumne River Trust
67 Linoberg Street
Sonora, CA 95370
209-588-8636
patrick@tuolumne.org

**BEFORE THE**
**STATE OF CALIFORNIA**
**STATE WATER RESOURCES CONTROL BOARD**

**In the matter of:**
**January 15, 2021 Water Quality Certification for Federal Permit Or License for Turlock Irrigation District and Modesto Irrigation District's Don Pedro and La Grange Hydroelectric Projects (FERC Nos. 2299 & 14581)**

**PETITION FOR RECONSIDERATION OF**
**TUOLUMNE RIVER TRUST,**
**CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,**
**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**
**OF JANUARY 15, 2021**
**WATER QUALITY CERTIFICATION FOR FEDERAL PERMIT OR LICENSE**

Pursuant to title 23, section 2867, of the California Code of Regulations, Tuolumne River Trust, California Sportfishing Protection Alliance, 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, "**TRT et al.**"), hereby petition the California State Water Resources Control Board's ("**State Water Board**") for reconsideration of the Water Quality Certification (the "**Certification**") for Federal Permit or License, Turlock Irrigation District and Modesto Irrigation District's (the "**Districts**") Don Pedro and La Grange Hydroelectric Projects (the "**Tuolumne River Dam Projects**") (FERC Nos. 2299 & 14581) that the Executive Director issued on November 30, 2020 and finalized on January 15, 2021. [1] [2]

## Executive Summary

TRT et al. is a coalition of non-governmental organizations, most of whom have been actively involved in the relicensing of the Tuolumne River Dam Projects in order to protect the river's environmental and recreational beneficial uses. Since 2011, at the onset of the relicensing process, TRT et al. has engaged in good faith negotiations with the Districts about the management and operation of the Tuolumne River Dam Projects, the extent and scope of environmental analysis required by the National Environmental Protection Act ("**NEPA**") and the California Environmental Quality Act ("**CEQA**") in licensing, and recommended mitigation efforts consistent with Clean Water Act ("**CWA**") requirements, among other matters.[3]

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[1] As of January 15, 2021, the certification is "final" to satisfy the requirements of Cal. Code of Regulations Title 23, § 3867.

[2] *See* California State Water Resources Control Board, *Water Quality Certification for Federal Permit or License, Turlock Irrigation District and Modesto Irrigation District, Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14581* (January 15, 2021).

[3] *See, e.g.*, 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.

Members of TRT et al. have attended relicensing meetings since 2011, consistently providing comments that proposed compromises in the relicensing process: in 2011, available NEPA alternatives;[4] in 2018, modifications to the State Water Board's flow framework in the Bay-Delta Plan;[5] in 2019, alternative approaches to avoiding droughts in Dry and Critically Dry Years.[6]

On numerous occasions, rather than suggesting abandonment of State Water Board flow regimes and frameworks, TRT et al. has worked within the State Water Board's framework, incorporating familiarity with the Tuolumne River's historic flow and ecological resources along with expertise on Climate Change and other dynamic environmental factors.[7] Beginning in 2011, members of TRT et al. participated in a number of collaborative relicensing activities, including the development of Study Requests for Relicensing,[8] negotiations related to whitewater boating access,[9] and the environmental impact statement review process.[10] Over the past decade, TRT et al. has studied and developed scientific and area-based knowledge on healthy flows, carryover storage in Don Pedro Reservoir, gravel restoration, large woody debris and drought management. As a result, TRT et al. has a nuanced understanding of the District's water and power operations, the City and County of San Francisco's ("**CCSF**") water needs, and the vital water quality and aquatic and riparian resources of the upper and lower Tuolumne River.

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[4] *See id.*
[5] *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.
[6] *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, P-14581-002 (Apr. 12, 2019), eLibrary no. 20190412-5156. (Conservation Groups' DEIS comments), pp. 85-87.
[7] *See, e.g., id.*
[8] *See id. See also* Conservation Groups' Comments on Initial Study Report," P-2299, (Mar. 11, 2013), eLibrary no. 20130311-5169.
[9] *See* Conservation Groups' Comments on Draft License Application and Updated Study Report, P-2299-075 (Feb. 24, 2014), eLibrary no. 20140224-5095.
[10] *See* Conservation Groups' DEIS Comments, *op. cit.*

In keeping with its collaborative and science-based approach to licensing, TRT et al. requests that the State Water Board grant reconsideration of the Certification and improve the Conditions in the Certification, as described in Section 6 below, for the following reasons.

First, the Certification's minimum flow requirements for June are inconsistent with its minimum flow requirements for July through October. The same habitat concerns stemming from water temperature that underlie the Certification's higher July through October flows exist in June. Higher minimum flow requirements in June would optimize for all life stages of *O. mykiss* development, including protecting steelhead, which are vulnerable to greater predation due to higher water temperatures during low flow. Separately, the same downstream Tuolumne River recreational beneficial uses that justify July through October minimum flows exist in June. The Certification requires lower minimum flow in June despite the same habitat and recreational concerns existing in June as in July through October, where Certification requirements are substantially higher. We request that the State Water Board increase June minimum flow requirements so they are consistent with July minimum flow requirements.

Second, the Certification expounds on the benefits and necessity of augmenting the Tuolumne River channel to include more Large Wood Material ("**LWM**"), but neither requires a minimum amount or quality of LWM nor specifies geographic placement. The absence of a numerical requirement undermines the State Water Board's endorsement of LWM as dam impact mitigation and delays the protection of habitat through LWM until substantial requirements are implemented. We request that the State Water Board set forth specific guidelines for the Districts to follow in supplementing the Tuolumne River with LWM.

We also request that the State Water Board note the Districts' abuse of federal and state agency licensing and water quality certification administrative procedures in order to delay a

certification when considering this petition. On November 20, 2020, the Districts withdrew their applications for Certification, arguing that the State Water Board had waived its certification authority under Section 401 of the CWA.[11] On November 30, 2020, the State Water Board filed a draft Certification.[12] Despite having previously withdrawn their application, the District filed comments to the draft Certification on January 6, 2021.[13] On January 19, 2021, the Federal Energy Regulatory Commission (**"FERC**") unanimously rejected the Districts' assertion that the State Water board had waived its certification authority.[14] On January 15, 2021, the State Water Board issued a final Certification. In the final Certification, the State Water Board stated that nothing in the CWA, the Porter-Cologne Water Quality Control Act or any of the State Water Board's regulations bars the State Water Board from issuing certification.[15] Nevertheless, in evaluating this petition and in setting Conditions, the State Water Board should consider the Districts' attempt to subvert the Certification process.

In order to protect the beneficial uses and public trust resources of the Tuolumne River, the State Water Board must act swiftly. For these reasons, and for the many others stated in the materials submitted with this Petition, TRT et al. respectfully requests that the State Water Board grant reconsideration of the Certification and promptly modify it as described in the Statement of Reasons below.

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[11] Turlock Irrigation District & Modesto Irrigation District, "Re: Copy of Formal Withdrawal of Requests for Water Quality Certification Before the California State Water Resources Control Board" (Nov. 20, 2020), eLibrary no. 20201120-5247 (Withdrawal of Request for Certification).

[12] State Water Board, November 30, 2020, "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," eLibrary no. 20201201-5044.

[13] Turlock Irrigation District & Modesto Irrigation District, "Re: Copy of Turlock Irrigation District's and Modesto Irrigation District's Comments on the Draft Water Quality Certification Issued by the California State Water Resources Control Board" (Jan. 6, 2021), eLibrary no. 20210106-5183. (Districts' Comments on Draft Certification)

[14] 174 FERC ¶ 61,042, Declaratory Order on Waiver of Water Quality Certification, Project Nos. P-2299-082 and P-14581-002 (Jan. 19, 2021).

[15] California State Water Resources Control Board, *Water Quality Certification for Federal Permit or License, Turlock Irrigation District and Modesto Irrigation District, Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14581* (Jan. 15, 2021), p. 7.

1. **Names, addresses and telephone numbers of the petitioners (Cal. Code Regs., title 23, § 3867, subd. (d)(1))**

Patrick Koepele
Executive Director
Tuolumne River Trust
67 Linoberg Street
Sonora, CA 95370
209-588-8636
patrick@tuolumne.org

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

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

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

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

Michael Martin, Ph.D.
Director
Merced River Conservation Committee
PO Box 2216, Mariposa, CA 95338
(209) 966-6406
mmartin@sti.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

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

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

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

Sean Wirth
Conservation Committee Chair
Sierra Club - Mother Lode Chapter
909 12th Street #202
Sacramento, CA 95814
wirthsoscranes@yahoo.com

2. **The specific action or failure to act which the State Board is requested to reconsider and a copy of any document issuing or denying certification that is referred to in the petition (Cal. Code Regs., title 23, § 3867, subd. (d)(2))**

The State Water Board is requested to reconsider the Water Quality Certification for Federal Permit or License for the Don Pedro and La Grange Hydroelectric Projects (FERC Nos. 2299 & 14581) as issued on November 30, 2020 and finalized by Order of the State Water Board on January 15, 2021. A copy of the draft Certification is attached to this Petition as Attachment C. A copy of the final Certification approved by the State Water Board on January 15, 2021 is also attached to this Petition as Attachment D.

3. **The date on which the certification action or failure to act occurred (Cal. Code Regs., title 23, § 3867, subd. (d)(3))**

The Executive Director of the State Water Board issued the draft Certification on November 30, 2020 and the final Certification on January 15, 2021.

4. **A full and complete statement of reasons why the action or failure to act was inappropriate or improper (Cal. Code Regs., title 23, § 3867, subd. (d)(4))**

As explained in detail in the Statement of Reasons Why The Action Or Failure To Act Was Inappropriate Or Improper (the "**Statement of Reasons**"), attached as Attachment A and supported by the attached Exhibit 1, the issuance of the Certification was inappropriate and improper because:

- The Certification violates the intent and purpose of the Clean Water Act Section 401 and the State Water Board's own regulations.
- Condition 1.B requires minimum instream flows in the lower Tuolumne River in June that are inconsistent with stated rationales for higher minimum instream flows in later summer months;
- Condition 9 requires the Districts to develop a plan to add large wood in the Tuolumne River without specifying quantity or geographic placement, creating an unenforceable standard.

5. **The manner in which the petitioner is aggrieved (Cal. Code Regs., title 23, § 3867, subd. (d)(5))**

As explained in more detail in the Attachments and Exhibit submitted in support of this Petition, TRT et al. is aggrieved by the Certification because:

- TRT et al. is a coalition of public interest and resource conservation organizations that have invested thousands of hours of staff time and related expenses into the licensing of the Tuolumne River Dam Projects. They are therefore harmed by the issuance of the deficient final Certification
- The Certification specifies insufficient minimum flows for June that will harm the fishery and other public trust resources, including downstream recreational resources, that TRT et al. is dedicated to protect and that the State Water Board is legally obligated and entrusted to protect.
- The Certification contains an unenforceable standard for LWM, creating uncertainty about the future suitability of habitat along the Tuolumne River. This uncertainty harms TRT et al. as it threatens the viability of fisheries in the Tuolumne River in which TRT et al. is significantly invested. Environmental stewardship of the Tuolumne River is embedded in the missions of the members of TRT et al., and harm to the fisheries harms TRT et al. and the investment its members make in protecting the Tuolumne River.

6. **The specific action by the State Board which the petition requests (Cal. Code Regs., title 23, § 3867, subd. (d)(6))**

TRT et al. requests that the State Water Board reconsider and amend the Certification consistent with the recommendations contained in the Statement of Reasons attached to this petition.

In brief, TRT et al. recommends that the State Water Board:

- Amend Condition 1.B to require a minimum instream flow release of 300 cfs from La Grange Dam and 200 cfs downstream of River Mile 25.9 during the month of June.
- Amend Condition 9 to require placement of a minimum of 1600 pieces of LWM throughout the length of the lower Tuolumne River

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7. **A list of persons, if any, other than the petitioner and applicant, if not the petitioner, known to have an interest in the subject matter of the petition (Cal. Code Regs., title 23, § 3867, subd. (d)(7))**

The Federal Energy Regulatory Commission. The City and County of San Francisco. The U.S. Environmental Protection Agency, Region 9. The Central Valley Regional Water Quality Control Board. The National Marine Fisheries Service. The Bay Area Water Supply and Conservation Agency. The California Department of Fish & Wildlife. The US Fish & Wildlife Service.

8. **A statement that the petition has been sent to the appropriate regional board or executive officer and to the applicant, if not the petitioner (Cal. Code Regs., title 23, § 3867, subd. (d)(8))**

Electronic copies of this Petition, and all materials submitted with this Petition, have been sent to the following:

Mr. Patrick Pulupa
Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670
patrick.pulupa@waterboards.ca.gov

Kimberly Ognisty
Winston & Strawn
1901 L Street, N.W.
Washington D.C. 20036-3506
kognisty@winston.com

9. **A copy of a request to the executive director or appropriate executive officer for preparation of the state board or regional board staff record, if applicable and available, which will include a tape recording or transcript of any pertinent regional board or staff hearing (Cal. Code Regs., title 23, § 3867, subd. (d)(9))**

A copy of the February 16, 2021 letter sent to the Executive Director requesting the preparation of the administrative record is attached to this Petition as Attachment B.

**10. A summary of the manner in which and to what extent the petitioner participated in any process (e.g., public hearing testimony, discussion with agency personnel, correspondence), if available, leading to the action or failure to act in question (Cal. Code Regs., title 23, § 3867, subd. (d)(10))**

This petition was jointly developed and signed by non-governmental organizations (TRT et al.) participating in the Don Pedro and La Grange Hydroelectric Projects licensing. Most of these organizations have participated in the licensing processes for the past 11 years.

TRT et al. member organizations have contributed thousands of hours in countless meetings as part of the licensing processes for the Tuolumne River Dam Projects.

Under the title "Conservation Groups," most members of TRT et al. have made the following major filings regarding water quality certification for the licensing proceedings of the Don Pedro and La Grange Hydroelectric Projects:

- On November 2, 2020, "Conservation Groups" filed a 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.[16]
- On December 7, 2020, "Conservation Groups" filed with FERC 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.[17]
- On December 21, 2020, "Conservation Groups" submitted to the State Water Board 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.[18]

[16] Conservation Groups, "Conservation Groups' Motion to Intervene in Opposition to the Petition for Declaratory Order or 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.
[17] 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.
[18] Conservation Groups, 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 (Dec. 21, 2020); copy filed with FERC (Jan. 8, 2021), eLibrary no. 20210108-5209.

## Conclusion

For the reasons set forth above, and in the Statement and additional materials submitted with this Petition, TRT et al. respectfully requests that the State Water Resources Control Board grant reconsideration of the Certification, amend the specified conditions and re-issue an amended Certification.

Dated: February 16, 2021

Respectfully submitted,

Tuolumne River
TRUST

Patrick Koepele
Executive Director
Tuolumne River Trust
67 Linoberg Street
Sonora, CA 95370
209-588-8636
patrick@tuolumne.org

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

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

Dave Steindorf
California Field Staff
American Whitewater
4 Baroni Dr., Chico, CA  95928
(530) 343-1871
dave@amwhitewater.org

Mike Davis
Associate Director, California Central Valley River Restoration
American Rivers
120 Union St.
Nevada City, CA 95959
(510) 295-5422
mdavis@americanrivers.org

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

Michael Martin, Ph.D.
Director
Merced River Conservation Committee
PO Box 2216, Mariposa, CA 95338
(209) 966-6406
mmartin@sti.net

Cindy M. Charles
Conservation Chair
Golden West Women Flyfishers
1140 Rhode Island St.
San Francisco, CA 94103
cindy@ccharles.net

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

Sean Wirth
Conservation Committee Chair
Sierra Club - Mother Lode Chapter
909 12th St #202
Sacramento, CA 95814
wirthsoscranes@yahoo.com

/s/

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

**STATE OF CALIFORNIA**
**STATE WATER RESOURCES CONTROL BOARD**

**In the matter of:**
**January 15, 2021 Water Quality Certification for Federal Permit Or License for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro and La Grange Hydroelectric Projects (FERC Nos. 2299 & 14581)**

**STATEMENT OF REASONS WHY THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER**
**(Cal. Code Regs., Title 23 § 3867, subd. (d)(4))**

**in Support of**

**PETITION FOR RECONSIDERATION OF**
**TUOLUMNE RIVER TRUST, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, 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**
**OF JANUARY 15, 2021**
**WATER QUALITY CERTIFICATION FOR FEDERAL PERMIT OR LICENSE**

**Attachment A**

**STATEMENT OF REASONS WHY THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER**
**(Cal. Code Regs., Title 23 § 3867, subd. (d)(4))**

## I. Introduction

A petition for reconsideration must include "a full and complete statement of reasons why the action or failure to act was inappropriate or improper." (Cal. Code Regs., title 23, § 3867, subd. (d)(4).) As described below, the Water Quality Certification for the relicensing of the Don Pedro Hydroelectric Project and for the original licensing of the La Grange Hydroelectric Project (the "**Certification**")[19] inappropriately and improperly:

- Requires in Condition 1.B minimum instream flows in the lower Tuolumne River in the month of June that fail to comport with stated rationales articulated elsewhere in the Certification and that for this and other reasons fails the test of substantial evidence and reasoned analysis;
- Requires in Condition 9 that the licensees Turlock Irrigation District and Modesto Irrigation District (collectively, the "**Districts**") develop a plan to supplement large wood in the lower Tuolumne River without specifying the amount of wood, the geographic range of its placement, or the required level of effort, thereby creating a Condition that is unclear and unenforceable.

The State Water Board should modify the Certification consistent with the recommendations stated in this petition. Specifically, the State Water Board should amend Condition 1.B to

[19] *See* California State Water Resources Control Board, In the Matter of Water Quality Certification for Turlock Irrigation District and Modesto Irrigation District Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 (Jan. 15, 2021), https://www.waterboards.ca.gov/docs/dplg_fwqc_complete_20210105.pdf

require a minimum instream flow release of 300 cfs from La Grange Dam and 200 cfs downstream of River Mile 25.9. The State Water Board should also amend Condition 9 to require placement of a minimum of 1600 pieces of Large Wood Material throughout the length of the lower Tuolumne River.

## II. Legal Requirements

### A. A Certification Must Fulfill the Purpose and Intent of Clean Water Act Section 401.

The Federal Clean Water Act (33 U.S.C. §§ 1251-1387) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Section 101 of the Clean Water Act requires federal agencies to "co-operate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." (33 U.S.C. § 1251 (g)).

Section 401 of the Clean Water Act (33 U.S.C. §1341) requires every applicant for a federal license or permit which may result in a discharge into navigable waters to provide the licensing or permitting federal agency with certification that the project from the State where the discharge originates will comply with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to Section 303 of the Clean Water Act (33 U.S.C. § 1313). Clean Water Act Section 401 directs the agency responsible for certification, in this case the State Water Board, to prescribe effluent limitations and other limitations necessary to ensure compliance with the Clean Water Act and with any other appropriate requirement of state law. (*S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373 (2006); *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)).

As discussed below, the Certification's minimum instream flow requirements for the lower Tuolumne River in June do not adequately protect the designated beneficial uses of the lower Tuolumne River established pursuant to the Clean Water Act.

**B. A Certification Must Protect Beneficial Uses and Public Trust Resources.**

"Water quality objectives established pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) must ensure the reasonable protection of beneficial uses, taking into consideration specified factors, including the environmental characteristics of the hydrographic unit under consideration, the water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area, and economic considerations." (Wat. Code, § 13241.)

"The State Water Board's duty to balance competing interests in formulating water quality objectives can be harmonized with its duty under the common law public trust doctrine to protect public trust resources to the extent feasible and consistent with the public interest." (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 777-778.)

The California Regional Water Quality Control Boards have adopted, and the State Water Board has approved, water quality control plans (basin plans) for each watershed basin in the State. The basin plans designate the beneficial uses of waters within each watershed basin, and water quality objectives designed to protect those uses pursuant to Section 303 of the Clean Water Act. (33 U.S.C. § 1313.) The beneficial uses together with the water quality objectives that are contained in the basin plans constitute State water quality standards.

As discussed below, the Certification's minimum instream flow requirements for the lower Tuolumne River in June do not adequately protect the public trust resources and the

beneficial uses of the lower Tuolumne River pursuant to the California Water Code, the Porter-Cologne Act, and the Public Trust Doctrine.

### C. A Certification Must Comply with the State Board's Articulated Standards.

Ten years ago, the water quality certification for the Oroville Facilities Hydroelectric Project succinctly described the State Water Board's standards for meeting the requirements of Section 401, stating:

> State Water Board staff has determined that certain measures as written in the [Settlement Agreement] are either not enforceable, will not fully protect the beneficial uses, or will not meet water quality standards in a timely manner. Beneficial uses currently impacted by the Project may not be reasonably protected if the proposed measure has a management plan with unclear or unenforceable standards, an excessively long period prior to implementation, or unspecified implementation dates. State Water Board staff modified each measure to provide assurance that the beneficial uses will be reasonably protected.[20]

In contrast, Condition 9 of the Certification proposes that the applicant develop a plan to augment the lower Tuolumne River with Large Woody Material, but with no sideboards, direction, or clearly enforceable conditions. The Board must modify Condition 9 in order to meet its well-articulated requirements for enforceability and clarity.

### D. A Certification Must Provide a Reasoned Explanation of its Decisions Based on Evidence in the Record.

In issuing a decision, an agency must "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community vs. County of Los Angeles* (1974) 11 Cal.3d 506, 515). Thus, a water quality certification must provide a reasoned explanation for its decisions. It must cite to the record in support of those decisions.

[20] State Water Board, 401 Certification for Oroville Hydroelectric Project, p. 4 (2010). Available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/oroville_ferc2100/121510/401certification.pdf

Because the Certification offers no reasoned basis for the decisions contested herein, the Certification fails the requirement under *Topanga*.

## III. <u>The June Minimum Instream Flow Requirement in Condition 1.B of the Certification Fails to Protect the Beneficial Uses and Public Trust Resources of the Lower Tuolumne River and Contradicts the Certification's Stated Rationale.</u>

### A. Condition 1.B Fails to Protect the Recreational Beneficial Uses of the Lower Tuolumne River.

Condition 1.B sets minimum instream flow requirements downstream of La Grange Dam, River Mile 51.7, and downstream of Potential New Point or Points of Diversion or Rediversion near River Mile (RM) 25.9. Condition 1.B requires a minimum flow of 100 cubic feet per second (cfs) below RM 25.9 for the June 1-30 period, 200 cfs for the July 1- October 15 period, and 200-275 cfs (depending on water year type) for the October 16-December 31 period.

In the rationale for Condition 1.B, the Certification states: "Canoeing and rafting, contact recreation, and non-contact recreation are existing beneficial uses for the Tuolumne River from Don Pedro Reservoir to the confluence with the SJR (SJ/SJR Basin Plan, Central Valley Regional Water Board, 2018)."[21] Starting from this observation, the Certification describes how flows of less than 200 cfs in the lower Tuolumne River downstream of RM 25.9 would be insufficient to protect these uses in the July through January period:

> The Districts propose to modify operation of the infiltration galleries to provide flows of 200 cfs for 12 boatable recreational days in June through October 15; however, the record does not support the conclusion that 12 boatable days provides reasonable access to the urban and rural communities seeking boating recreation opportunities downstream of the infiltration galleries and is protective of recreational uses generally.[22]

The Certification further notes that flows of less than 200 cfs downstream of RM 25.9 "inequitably affect access to natural resources for urban and rural communities."[23] While the

[21] Certification, fn. 8, p.22.
[22] Certification, pp. 23-24.
[23] *Id.*, p 24.

Certification sites ample evidence for the minimum flows to meet recreational needs in the July-December period, the Certification is silent on the need for flows sufficient to protect recreational beneficial uses in June.

June is a time of high recreational demand, similar to July and August. June weather is generally sunny and warm, similar to July and August, and most schools are released for summer vacation by the first week of June, so that families have more time to be outside recreating, as in July and August. Yet, for no clear reason and without explanation, the Certification does not require minimum flows of 200 cfs below RM 25.9 in June to support recreation in a month when recreation demand is particularly high.

**B. There is no aquatic justification for the June flows that Condition 1.B requires.**

Condition 1.B requires minimum instream June flows downstream of La Grange Dam of 200 cfs in all water year types and flows downstream of RM 25.9 of 100 cfs in Wet, Above Normal and Below Normal water years and 75 cfs in Dry and Critically Dry years.

The Federal Energy Regulatory Commission's (FERC) Final Environmental Impact Statement (FEIS) for the relicensing of the Don Pedro Project and the original licensing of the La Grange Project describes the basis for June minimum flows in the lower Tuolumne River as physical habitat (PHABSIM) modeling for *O. mykiss* (rainbow trout or steelhead) performed in the licensing.[24] The FEIS states: "In the lower Tuolumne River, *O. mykiss* are predominately found upstream of RM 43, with peak fry densities occurring into June. Flow management for the benefit of *O. mykiss* in June consists of striking a balance between providing hydraulic habitat suitability and temperature suitability for fry and adult life stages."[25]

[24] *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, pp. 3-150 and 3-151.
[25] *Id.*, p. 3-150.

Reviewing the Districts' Amended Final License Application, there is no clear basis for the assertion that "peak fry densities occur into June."[26] The FEIS's use of the Districts' fry density exhibit provided no independent citation. So, in the first instance, it is not clear that the proposal is based on a life stage that is actually dominant in June. A review of the Districts' annual reports (Appendix 4 of each report) shows diverse numbers of *O. mykiss* detected in snorkel surveys, with very low sample sizes.[27]

Second, the rationale of the Certification contests the basis of the rationale that uses PHABSIM habitat modeling to set flows in waters that hold anadromous fish. The Certification states: "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."[28] The Certification cites to a 2019 study by the Independent Science Advisory Panel that made such findings for Chinook salmon.[29] Considering the Districts' own arguments on the importance of predation in limiting the populations of salmonids in the lower Tuolumne River, it is reasonable to assume that the reduction of flows to achieve low velocities would also expose *O. mykiss* fry, juveniles and resident adults greater levels of predation mortality as well. Low velocities are more conducive to predatory bass, both because of increased chance of encounter with *O. mykiss* and because higher water temperatures increase activity for warm-water species such as bass and cold-water species such as *O. mykiss*.

Assuming for the sake of argument the validity of PHABSIM modeling, the Districts' September 2017 "Evaluation of Effective Usable Habitat Area for Over-Summering *O. mykiss*"

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[26] *See* Districts, Amended Final License Application, Exhibit E., pp. 3-140 to 3-157.
[27] *See, e.g.*, Districts, 2017 Lower Tuolumne Annual Report, eLibrary no. 20180329-5354.
[28] Certification, p. 24.
[29] *See* Independent Science Advisory Panel, Developing Goals for the Bay-Delta Plan: Concepts and Ideas from an Independent Science Advisory Panel. Available at: https://deltacouncil.ca.gov/pdf/science-program/biological-goals/2019-09-18-April-2019-biological-goals-final-report.pdf.

shows that habitat for *O. mykiss* fry only increases at flows less than 200 cfs in thermal conditions that are less than optimal.[30] Once one assumes that conditions will improve at optimal or closer to optimal thermal conditions, the importance of velocity diminishes relative to water temperature, and conditions for both the fry and juvenile life stages of *O. mykiss* are shown to improve in June at levels of 300 or even 400 cfs. *See* Exhibit 1 for examples of figures that demonstrate that the values of low flows diminish as thermal conditions improve.

Therefore, there is no basis for June minimum instream flows of 200 cfs from La Grange Dam. It would be more appropriate to require flows of 300 cfs downstream of La Grange Dam, placing the emphasis on optimal thermal suitability rather than low velocities and the accompanying exposure to predation and suboptimal thermal conditions.

Regarding flows downstream of RM 25.9, the FEIS admits, as cited *supra*, that the majority of *O. mykiss* are concentrated above RM 43. There is no aquatic benefit to flows of 75-100 cfs downstream of RM 25.9, except that it provides optimal thermal and velocity conditions for the invasive bass that the Districts otherwise propose to cull in order to benefit salmon. Since salmon have generally completed their downstream migration by the end of May except in Wet years likely accompanied by flood releases, the recreational beneficial use should take precedence. As stated in the Certification on pp. 23-24 as cited *supra*, 200 cfs is the minimum flow that provides adequate summer recreational opportunities downstream of RM 25.9.

[30] Turlock Irrigation District & Modesto Irrigation District, Lower Tuolumne River Instream Flow Study—Evaluation of Effective Usable Habitat Area for over-summering *O. mykiss*, September 2017, submitted as part of the Districts' Amended Final License Application for the Don Pedro Project, (Oct. 11, 2017), eLibrary no. 20171011-5063, pp. D-1, D-2, D-9 and D-10. The excerpted pages are attached hereto as Exhibit 1.

### C. Amendment of Condition 1.B Is Necessary Notwithstanding the Fact that other Conditions May at Times Control June Flows.

Conditions 1.D and 3 may control flows in the lower Tuolumne River in June in some situations. However, Condition 1.D as it currently stands allows "adaptive implementation" that may move flows into months other than June. In addition, the June temperature requirements in Condition 3 are subject to a determination of feasibility. Modification of the June flow requirements in Condition 1.B to require release of 300 cfs from La Grange Dam and 200 cfs downstream of RM 25.9 will assure an adequate floor for flows that protect aquatic values and recreational uses.

## IV. Condition 9 of the Certification (Large Woody Material Management) Is Unclear and Unenforceable.

Condition 9 of the Certification requires the Districts to submit a Large Woody Material Management Plan (LWMMP) to the Deputy Director for review and consideration for approval. Condition 9 states nothing that defines or suggests the level of effort or expense the State Water Board expects the Districts to incur in implementing such a plan. Most problematic, Condition 9 is silent about the volume of Large Woody Material (LWM) that the Districts are required to place in the stream channel of the lower Tuolumne River, thus making this condition difficult, if not impossible, to enforce.

The Certification must examine the record, develop a rationale for the level of effort in general, and the volume of LWD specifically, that the Districts should be required to expend in improving the condition of the channel in the lower Tuolumne River, and develop a condition that meets that level of effort.

A certification requires clear and enforceable standards. Yet Condition 9 provides no clear or enforceable standard, other than the development of a plan. The record provides justification for 1,600 pieces of LWD placed at regular locations along the entire length of the lower Tuolumne River.[31] Article 414 in the FERC EIS would require the Districts to develop a Lower Tuolumne River Habitat Improvement Program with a provision to incorporate a minimum of 6,535 cubic feet of large woody material into the design of the first group of habitat enhancement projects. FERC notes that the volume it proposes to require is lower than either NMFS' or DFW's recommendation. The State Water Board should do a careful review of the record and make a clear determination of what to require in its own condition.

Additionally, Condition 9 provides no requirements that the Districts provide LWM along the entire 52-mile reach of the lower Tuolumne River. Historically, the Districts have primarily focused on restoring instream habitat along the upper 26 miles of the lower Tuolumne River, and have not contributed to any restoration projects below RM 26. Unless the Certification directs otherwise, this unjustified practice may continue under a new license. The river below RM 26 is important migratory and rearing habitat, and thus LWM is important for providing cover for juveniles and smolts.

The State Water Board must provide a definitive quantity of LWM and require that the Districts provide LWM to locations along the entire 52-mile length of the lower Tuolumne River.

## V. Requested Modifications to the Certification and Selected Citations to the Record that Support Such Modifications.

TRT et al. requests the following remedies:

[31] The Draft Certification referenced the CDFW Measure M4 on large wood; *see* Draft Certification, p. 65. CDFW 10(j) Condition M4 recommended 1600 pieces. The Final Certification contains no such reference.

- That the State Water Board amend Condition 1.B of the Certification to require June minimum instream flows downstream of La Grange Dam of 300 cfs in all water year types and 200 cfs downstream of RM 25.9 in all water year types.
- That the State Water Board amend Condition 9 to require placement of a minimum of 1600 pieces of large woody material throughout the 52-mile length of the lower Tuolumne River.

## VI. Conclusion

The State Water Board should amend the Certification for the relicensing of the Don Pedro and La Grange Hydroelectric Projects and provide the necessary rationale consistent with the remedies requested above.

Respectfully submitted this 16th day of February, 2021.

**STATE OF CALIFORNIA**
**STATE WATER RESOURCES CONTROL BOARD**

**In the matter of:**
**January 15, 2021 Water Quality Certification for Federal Permit Or License for Turlock Irrigation District and Modesto Irrigation District's Don Pedro and La Grange Hydroelectric Projects (FERC Nos. 2299 & 14581)**

**Request for Preparation of the Administrative Record**

**in Support of**

**PETITION FOR RECONSIDERATION OF TUOLUMNE RIVER TRUST, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, 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 OF JANUARY 15, 2021 WATER QUALITY CERTIFICATION FOR FEDERAL PERMIT OR LICENSE**

**Attachment B**

February 16, 2021

Eileen Sobeck, Executive Director
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000
*Via electronic filing*

Re: Don Pedro and LA Grange Hydroelectric Projects, FERC Project Nos. 2299 Petition for Reconsideration of Section 401 Water Quality Certification Request for Preparation of the Administrative Record

Dear Ms. Sobeck:

Tuolumne River Trust, California Sportfishing Protection Alliance, 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, "**TRT et al.**") respectfully submit a timely request of the Executive Director to prepare the administrative record in support of the petition for reconsideration of the Clean Water Act Section 401 water quality certification ("**Certification**") issued by the California State Water Resources Control Board for the Don Pedro and La Grange Hydroelectric Projects on November 30, 2020 and finalized on January 15, 2021.

Please feel free to contact me if you have any questions.

Respectfully submitted,

Patrick Koepele
Executive Director
Tuolumne River Trust
67 Linoberg Street
Sonora, CA 95370
209-588-8636
patrick@tuolumne.org

**STATE OF CALIFORNIA**
**STATE WATER RESOURCES CONTROL BOARD**

**In the matter of:**
**January 15, 2021 Water Quality Certification for Federal Permit Or License for Turlock Irrigation District and Modesto Irrigation District's Don Pedro and La Grange Hydroelectric Projects (FERC Nos. 2299 & 14581)**

**PETITION FOR RECONSIDERATION OF TUOLUMNE RIVER TRUST, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, 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 OF JANUARY 15, 2021 WATER QUALITY CERTIFICATION FOR FEDERAL PERMIT OR LICENSE**

**Exhibit 1:**

**Pages D-1, D-2, D-9 and D-10 from Turlock Irrigation District & Modesto Irrigation District's Lower Tuolumne River Instream Flow Study—Evaluation of Effective Usable Habitat Area for over-summering *O. mykiss*, September 2017**

**(Submitted to FERC October 11, 2017 as part of Turlock Irrigation District & Modesto Irrigation District's Amended Final License Application for the Don Pedro Project)**

FINAL REPORT ◦ SEPTEMBER 2017

# Lower Tuolumne River Instream Flow Study—Evaluation of Effective Usable Habitat Area for over-summering *O. mykiss*

PREPARED FOR

Turlock Irrigation District
333 East Canal Drive
Turlock, CA 95380

*and*

Modesto Irrigation District
1231 11th St.
Modesto, CA 95354

PREPARED BY

Stillwater Sciences
279 Cousteau Place, Suite 400
Davis, CA 95618

Stillwater Sciences

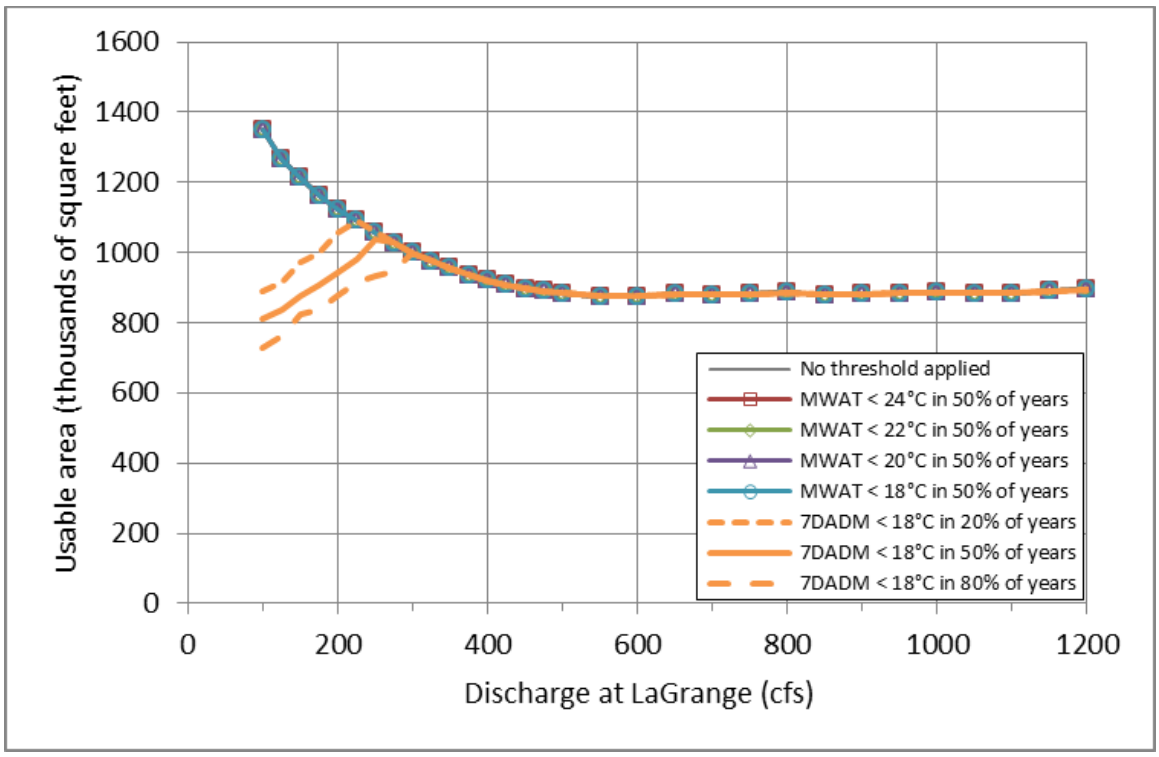


**Figure D-1.** Effective habitat for *O. mykiss* fry in June for habitats in sub-reach 1 (RM 51.9 to RM 46.9) meeting selected temperature thresholds.

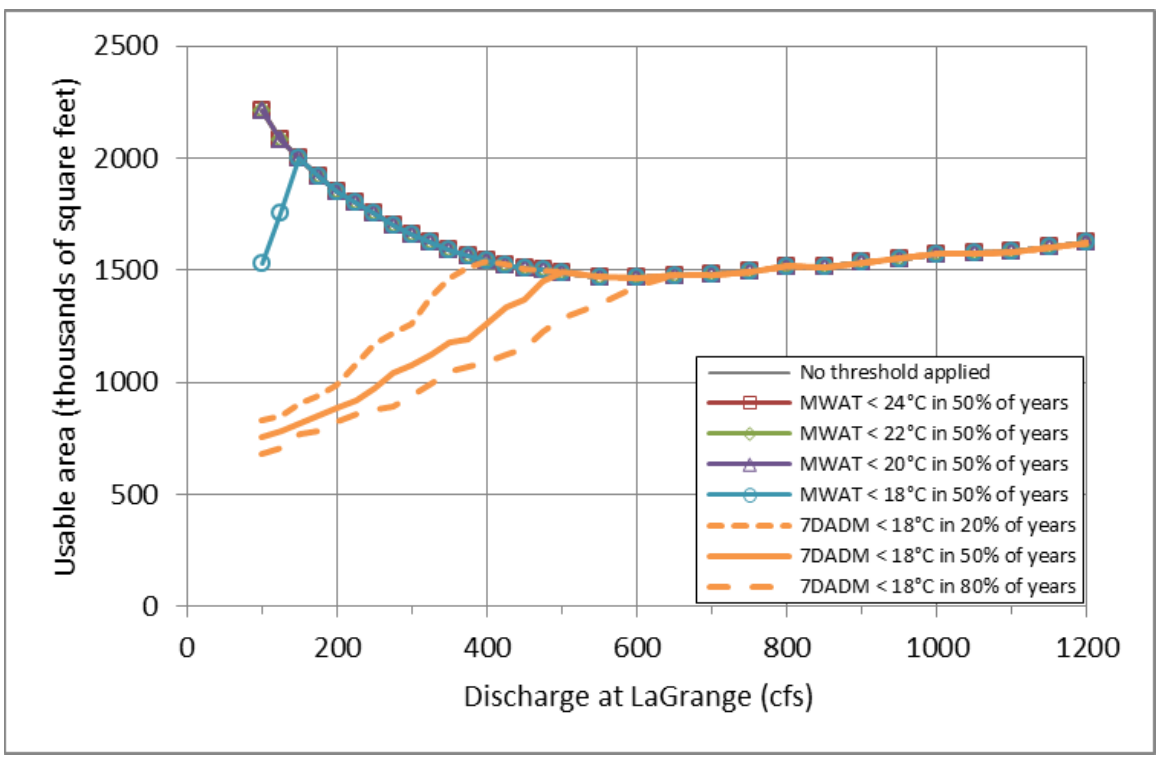


**Figure D-2.** Effective habitat for *O. mykiss* fry in June for habitats in sub-reaches 1-2 (RM 51.9 to RM 43.1) meeting selected temperature thresholds.

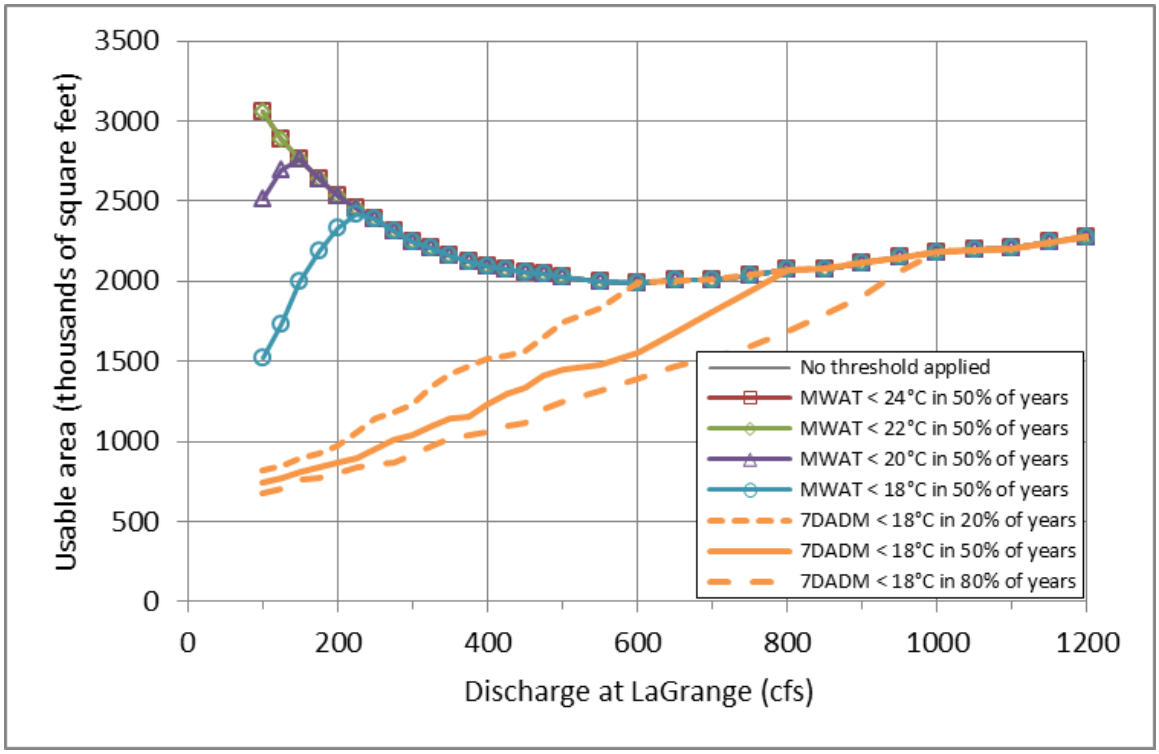


**Figure D-3.** Effective habitat for *O. mykiss* fry in June for habitats in sub-reaches 1-3 (RM 51.9 to RM 39.5) meeting selected temperature thresholds.

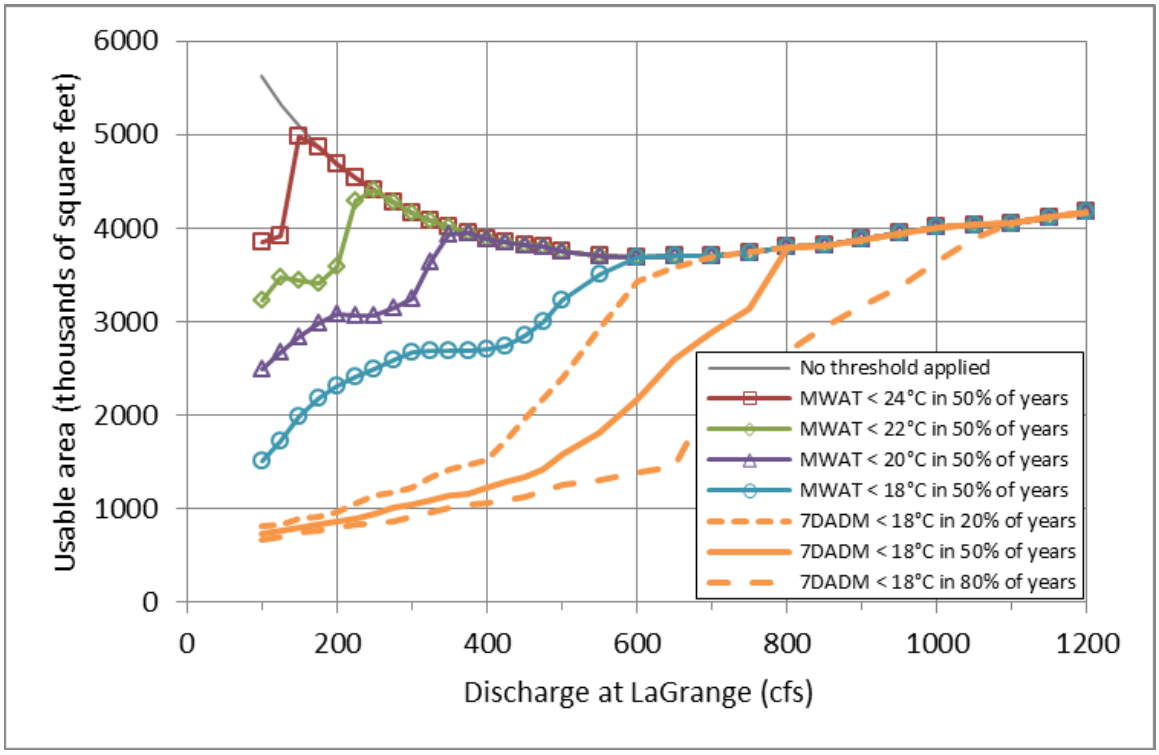


**Figure D-4.** Effective habitat for *O. mykiss* fry in June for habitats in sub-reaches 1-4 (RM 51.9 to RM 29.1) meeting selected temperature thresholds.

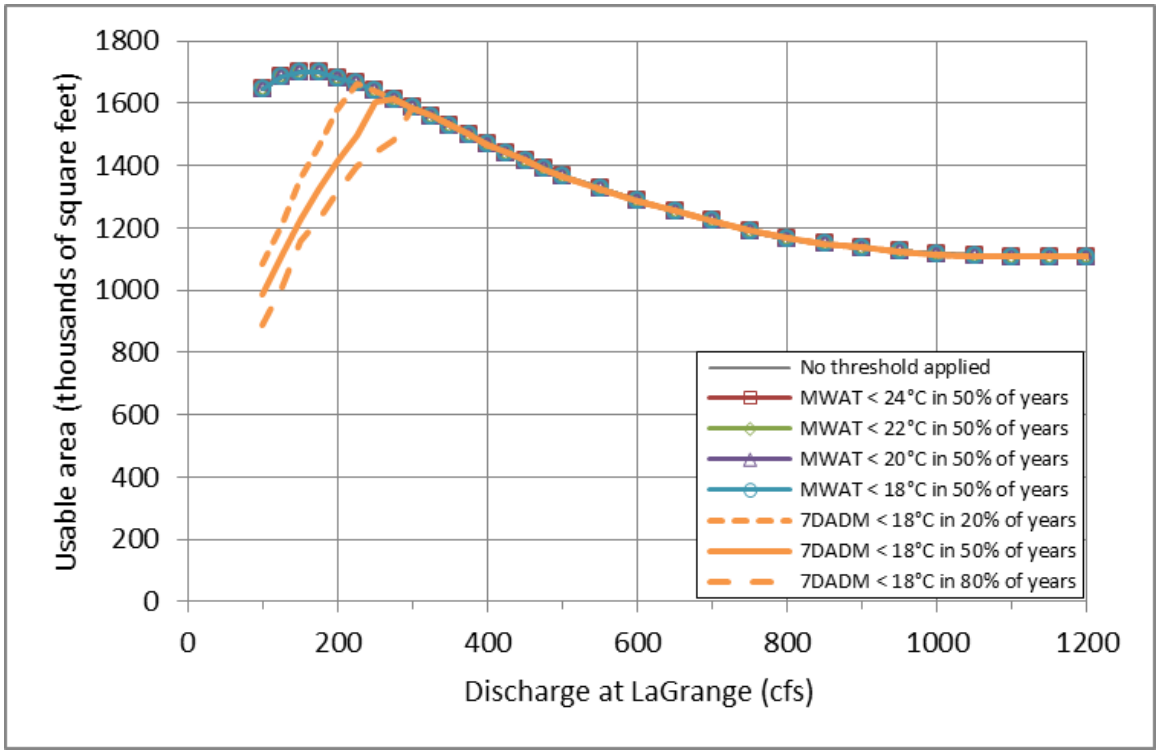


**Figure D-17.** Effective habitat for *O. mykiss* juvenile in June for habitats in sub-reach 1 (RM 51.9 to RM 46.9) meeting selected temperature thresholds.

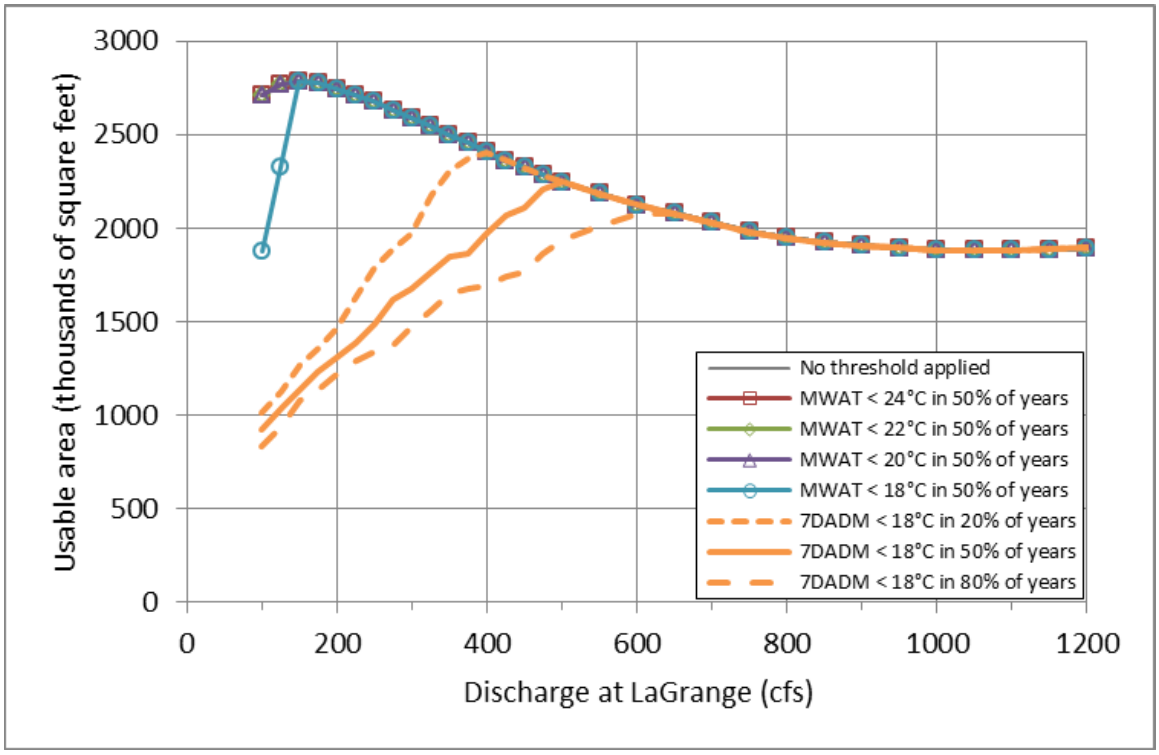


**Figure D-18.** Effective habitat for *O. mykiss* juvenile in June for habitats in sub-reaches 1-2 (RM 51.9 to RM 43.1) meeting selected temperature thresholds.

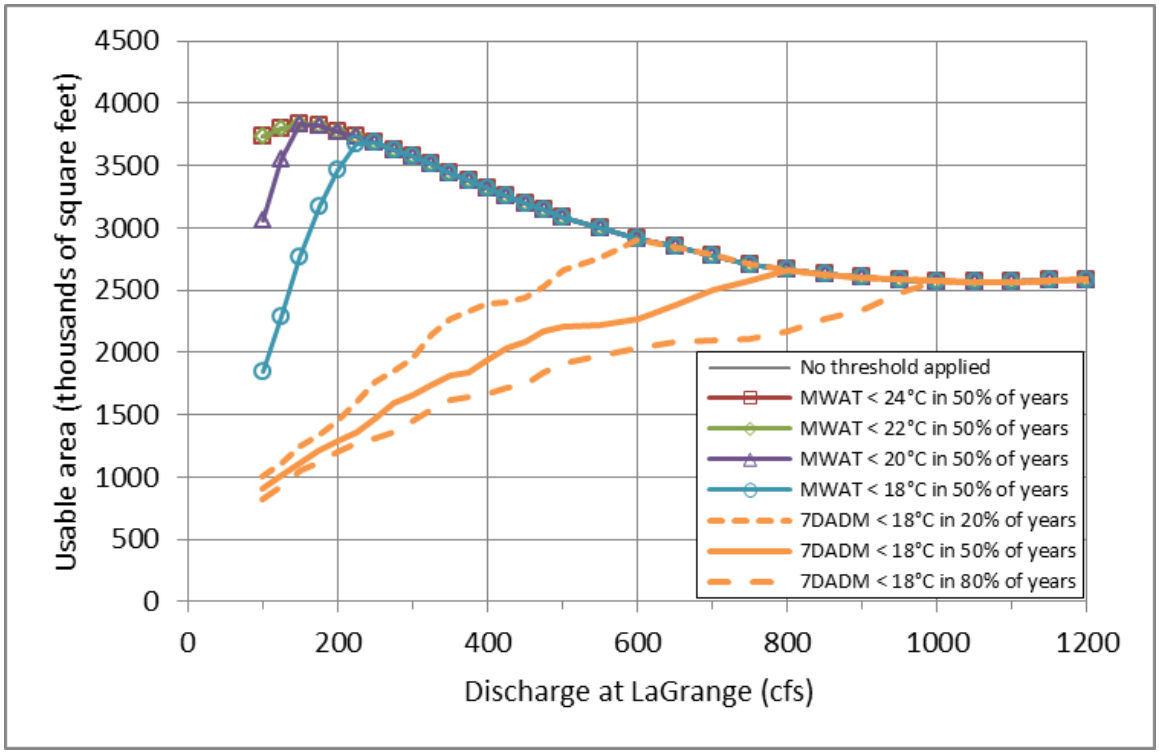


**Figure D-19.** Effective habitat for *O. mykiss* juvenile in June for habitats in sub-reaches 1-3 (RM 51.9 to RM 39.5) meeting selected temperature thresholds.

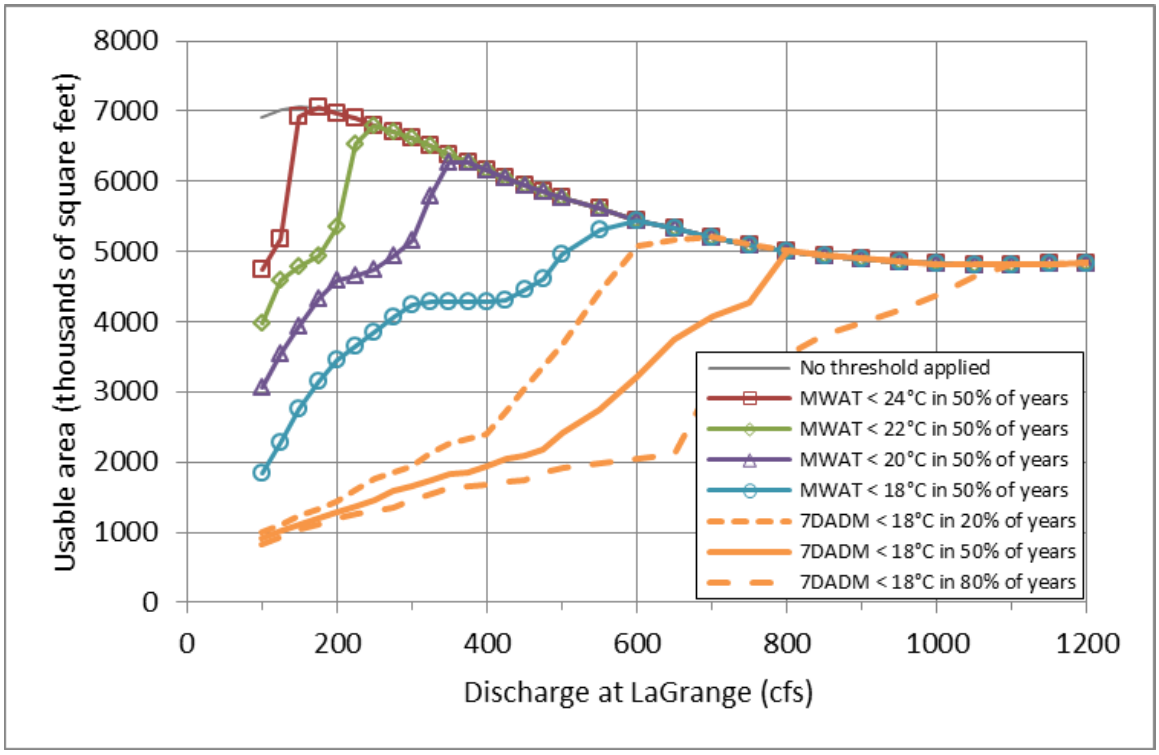


**Figure D-20.** Effective habitat for *O. mykiss* juvenile in June for habitats in sub-reaches 1-4 (RM 51.9 to RM 29.1) meeting selected temperature thresholds.