

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

**In the matter of:
Water Quality Certification for Federal Permit or License
for Turlock Irrigation District and Modesto Irrigation District
Don Pedro Hydroelectric Project (FERC No. 2299) and
La Grange Hydroelectric Project (FERC No. 14581)**

**RESPONSE OF TUOLUMNE RIVER TRUST ET AL.
IN SUPPORT OF THE
PETITION FOR RECONSIDERATION OF TUOLUMNE RIVER TRUST ET AL.
AND IN OPPOSITION TO RESPECTIVE PETITIONS FOR RECONSIDERATION OF
TURLOCK IRRIGATION DISTRICT AND MODESTO IRRIGATION DISTRICT,
CITY AND COUNTY OF SAN FRANCISCO, AND
BAY AREA WATER SUPPLY AND CONSERVATION AGENCY**

I. Introduction and Background

The Tuolumne River Trust, Friends of the River, California Sportfishing Protection Alliance, American Whitewater, Sierra Club Mother Lode Chapter, American Rivers, Trout Unlimited, Tuolumne River Conservancy, Golden West Women Flyfishers, Central Sierra Environmental Resource Center, and the Merced River Conservation Committee (collectively, Tuolumne River Trust et al. or TRT et al.) respectfully comment on the petitions for reconsideration submitted to the State Water Resources Control Board (State Water Board or Board) for the Water Quality Certification (WQC) for the relicensing of the Don Pedro Hydroelectric Project (FERC no. 2299) and the original licensing of the La Grange Hydroelectric Project (FERC no. 14581). The State Water Board issued the final WQC on January 15, 2021. TRT et al.'s comments respond to the State Water Board's December 3, 2021 "Notice of Opportunity to Respond to Petitions for Reconsideration of Water Quality Certification for Don Pedro Hydroelectric Project and La Grange Hydroelectric Project Federal Energy Regulatory Commission Project Nos. 2299 And 14581" (Notice).

TRT et al. commented on the draft WQC on December 21, 2020 (under the collective descriptor, "Conservation Groups").¹ TRT et al. petitioned the State Water Board for reconsideration of the final WQC on February 16, 2021.² TRT et al.'s Petition identified two distinct issues: an insufficient June flow requirement in the lower Tuolumne River downstream of River Mile 25.9 (Condition 1.B), and an unclear and unenforceable requirement for augmentation of an undefined quantity of large wood in the lower Tuolumne River (Condition 9).

¹ TRT et al., 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; FERC eLibrary no. 20210108-5209) (Conservation Groups' Comments on Draft WQC).

² TRT et al.'s petition for reconsideration is available to the Board and the public on the Board's ftp site indicated in the Notice. We refer to it herein as TRT et al.'s Petition.

Turlock Irrigation District and Modesto Irrigation District (collectively, Districts) petitioned for reconsideration of the WQC on February 16, 2021. The City and County of San Francisco (CCSF) petitioned for reconsideration of the WQC on February 16, 2021. The Bay Area Water Supply and Conservation Agency (BAWSCA) petitioned for reconsideration of the WQC on February 16, 2021.³

The petitions for reconsideration of the Districts and CCSF contain wide-ranging legal and allegedly factual arguments attacking the WQC and the State Water Board's authority under Clean Water Act (CWA) § 401 generally. These comments address many, but not all, of them. Virtually all of the Districts' and CCSF's arguments are meritless. BAWSCA's Petition for Reconsideration is an inappropriate effort to relitigate "Phase 1" of the Bay-Delta Plan (Lower San Joaquin River flows and Southern Delta Salinity), adopted by the Board in December 2018, but not yet implemented.

During the FERC licensing and WQC proceedings, TRT et al. have raised many legal arguments that rebut the contentions of the Districts, CCSF and BAWSCA in their respective petitions for reconsideration. Many of those rebuttals are contained in the Conservation Groups' Comments in Response to FERC's Notice of Ready for Environmental Analysis and in Conservation Groups' Comments on FERC's Draft Environmental Impact Statement (DEIS).⁴ The instant comments do not attempt an encyclopedic reprise of those comments and arguments. To the degree the instant comments do not explicitly repeat them, we incorporate by reference the legal and factual arguments in these two documents.

At its discretion and on its own motion, the State Water Board may elect to revise portions of the WQC to make them clearer and more straightforward to implement and enforce. In this regard, TRT et al. recommends that the State Water Board review the December 21, 2020 comments of Conservation Groups on the draft WQC. Some of the suggested improvements described in those comments are similar to arguments raised in the petitions for reconsideration of the Districts, CCSF, and BAWSCA. The direction, however is diametrically opposed: Conservation Groups sought to improve the WQC; the Districts, CCSF, and BAWSCA seek to destroy the WQC.

The State Water Board should grant reconsideration of TRT et al.'s issues and revise the WQC consistent with TRT et al.'s Petition.

These comments are structured as follows. First, we respond to common legal issues raised in the petitions for reconsideration of the Districts, CCSF, and BAWSCA. Next, we discuss legal issues raised solely by the Districts. Finally, we discuss some aspects of the substantive issues raised in the WQC's conditions.

³ The petitions for reconsideration of the Districts, CCSF and BAWSCA are available to the Board and the public on the Board's ftp site indicated in the Notice. We refer to them herein as Districts' Petition, CCSF Petition, and BAWSCA Petition, respectively.

⁴ See Conservation Groups' Comments and Recommendations Ready for Environmental Analysis (Jan. 29, 2018; eLibrary no. 20180129-5200) (Conservation Groups' REA Comments) and 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 (Apr. 12, 2019; eLibrary no. 20190412-5156) (Conservation Groups' DEIS Comments).

TRT et al. believes that the Petition of TRT et al. sufficiently explains its requests and its rationale. Thus, TRT et al. does not elaborate on its Petition in these comments. TRT et al. is prepared to respond, in an appropriate forum that does not violate *ex parte* restrictions, to any questions the State Water Board or its staff may have regarding TRT et al.'s Petition.

II. Comments on Legal Issues Raised in Two or All of the Petitions for Reconsideration of the Districts, CCSF and BAWSCA

A. The State Water Board Must Not Rely on Arguments that Are Founded in the 2020 EPA Rule on the Implementation of CWA § 401.

Reliance on the Environmental Protection Agency's (EPA) 2020 Rule on the Implementation of CWA § 401⁵ forms the basis for a series of arguments by both the Districts and CCSF that the WQC is beyond the scope of CWA § 401.⁶ Both the Districts and CCSF rely on the 2020 Rule to seek to invalidate more than two dozen mandatory conditions on the basis that these conditions address activities, not impacts of a discharge, among other objections.

The unlawful and now vacated 2020 Rule marked a radical departure from decades of Supreme Court and other precedents, as well as prior interpretations of Clean Water Act requirements by the EPA and FERC. The Districts' and CCSF's arguments grievously⁷ fail to cite to controlling Supreme Court precedent, *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994) (*Jefferson*), in which the Supreme Court held that "§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." While the Districts and CCSF, like the EPA under the Trump administration, prefer Justice Thomas' dissenting view of the scope of § 401 as embodied in the 2020 Rule, dissents are not controlling law. In the WQC, the Board appropriately followed Supreme Court precedent in requiring that the Districts operations address the activity as a whole and not merely the direct effects of the discharge.

The Districts' and CCSF's efforts to limit the Board's conditioning authority to requirements that address the direct effects of a discharge is not supported by any case law or regulation. The State Water Board should reject these arguments founded in the 2020 Rule on the implementation of CWA § 401.

⁵ The "2020 Rule" refers to: *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020; took effect September 11, 2020).

⁶ *See esp.* Districts' Petition, pdf pp. 31-46 and CCSF's Petition, pdf pp. 10-14. However, reliance on the 2020 Rule infects many additional portions of both petitions.

⁷ Rule 3.3 Candor Toward the Tribunal (Rule Approved by the California Supreme Court, Effective November 1, 2018):

(a) A lawyer shall not:

...

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority...

1. The 2020 Rule on CWA § 401 Took Effect on September 11, 2020 and Does Not Apply to this Certification.

The Districts submitted their first request for certification on January 26, 2018. The Districts submitted their most recent request for certification on July 20, 2020, 51 days before the Rule took effect on September 11, 2020. Therefore, the Board should reject the Districts' and CCSF's arguments that are based on application of the EPA 2020 Rule.

Neither the Districts nor CCSF directly address this temporal disconnect, and simply assume retroactive effect of the 2020 Rule to the WQC.

The Supreme Court addresses retroactivity in *Bowen v. Georgetown Univ. Hosp.*:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. E.g., *Greene v. United States*, 376 U. S. 149, 376 U. S. 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 323 U. S. 164 (1944); *Miller v. United States*, 294 U. S. 435, 294 U. S. 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 276 U. S. 162-163 (1928). By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See *Brimstone R. Co. v. United States*, 276 U. S. 104, 276 U. S. 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. 204, 208 (1988). Likewise, the federal Administrative Procedure Act (APA) makes clear that newly promulgated rules should be applied prospectively. The APA defines "rule" as a "statement of general or particular applicability and **future effect** designed to implement, interpret, or prescribe law or policy...."⁸

An EPA fact sheet answering "Frequently Asked Questions on Clean Water Act Section 401 Certification Final Rule" provides guidance that directly addresses the temporal application of the 2020 Rule, stating:

The final rule becomes effective 60 days after it is published in the federal register. Certification requests that have been submitted or that are currently being processed by states, authorized tribes, or EPA, should continue to be processed in accordance with existing law. Certification requests submitted after the effective date of the final rule should be processed consistent with the final rule.⁹

⁸ 5 U.S.C. § 551(4) (emphasis added).

⁹ See https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf (accessed December 24, 2021).

The Districts and CCSF do not argue that the Districts applied for WQC after September 11, 2020. Therefore, under EPA guidance, the rules in effect prior to September 11, 2020 are applicable to these projects.¹⁰

2. The Board Should Not Apply the CWA § 401 Rule in Effect after September 11, 2020.

First, the September 2020 Rule on CWA section 401 is unlawful, and the State Water Board should not apply it to the projects. The State of California is currently litigating to overturn the 2020 Rule. Rather than summarize the arguments in that litigation, CSPA et al. refer the State Water Board to the California Attorney General's arguments on the Board's behalf: *see State of California et al. v. Wheeler*, Case 3:20-cv-04869 Filed 07/21/20; see also *American Rivers et al. v. Wheeler*, Case 3:20-cv-04636 Filed 07/13/20, both in United States District Court, Northern District of California, San Francisco Division.

The State Water Board should reject BAWSCA's arguments that are based on the EPA 2020 Rule because the Rule is unlawful.

Additionally, on October 21, 2021, Judge William Alsup of the United States District Court, North District of California vacated the September 2020 Rule on CWA § 401.¹¹ On December 12, 2021, Judge Alsup denied stay of his October 21, 2021 Order.¹²

Thus, the 2020 Rule on CWA § 401 no longer has effect.

B. The State Water Board has the Authority to Manage its Own Process in Issuing Water Quality Certifications.

Both the Districts and CCSF argue that the Certification is unlawful because there was no pending request for certification before the State Water Board at the time of issuance in January 2021. This procedural argument is incorrect and ignores the State's authority to manage its own process in issuing water quality certifications. It is also particularly brazen because the Districts withdrew their request for certification on November 19, 2020, to subvert the State Water Board's CWA § 401 authority that included a petition to the Federal Energy Regulatory Commission (FERC) for waiver of certification.¹³

¹⁰ See also *Kankamalage v. I.N.S.*, 335 F.3d 858, 862 (9th Cir. 2003), which states:

Under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), determination of whether a regulation or statute is impermissibly retroactive requires a two-step analysis. First, we must determine whether the statute or regulation clearly expresses that the law is to be applied retroactively. *Landgraf*, 511 U.S. at 280. If it does, then the statute or regulation may be applied as such. *Id.* However, if the statute or regulation does not contain an express command that it be applied retroactively, we must go to the second step which requires us to determine whether the statute or regulation would have a retroactive effect. *Id.*

The 2020 Rule on CWA § 401 fails the *Landgraf* test as well.

¹¹ Case 3:20-cv-04636-WHA, Document 173.

¹² Case 3:20-cv-04636-WHA, Document 191.

¹³ See 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); see also 174 FERC ¶ 61,042, Declaratory Order on

In a filing with FERC in February 2021, the State Water Board rejected the argument that a pending request for certification was a necessary precedent to issuance:

Nothing in Clean Water Act Section 401 establishes procedures for states in this regard. Section 401 does not require that a request for certification be pending at any time before certification is issued, let alone bar issuance of certification if request has been filed, and then withdrawn, before the State completes certification. The filing of a request for certification is a prerequisite for a finding of waiver, but the requirement for a request only initiates the reasonable period of time in which a state must act or waive certification. There is no requirement that the State be subject to the potential for waiver before it can issue or deny certification. By its express terms, Section 401(a)(1) only requires that the applicant provide the federal permitting or licensing agency with the certification. There is no requirement that a request be pending when certification is issued.¹⁴

The State Water Board should deny the arguments of the Districts and CCSF on this issue. It is critical the State Water Board defend its authority to issue a certification and establish its own procedures to implement Clean Water Act § 401. This is particularly essential when, as here, an applicant proactively seeks to subvert the certification process by establishing procedural roadblocks to the State Water Board's exercise of its authority.

C. The WQC Does Not Violate CEQA.

The Districts, CCSF, and BAWSCA all argue that the WQC violates CEQA.¹⁵

The California Code of Regulations (CCR) 23 section 3856 states the requirements for a complete application for water quality certification. Subsection (f) states: "Although CEQA documentation is not required for a complete application, the certifying agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action." Since the Districts have insisted that the Water Board must act on a certification in one year without fail, the Districts without question failed to complete their requirements as applicants for certification under State law. The Districts do not dispute that they did not complete CEQA for the certification for the projects. The Districts do not dispute that they failed to initiate such a CEQA process.

Despite this legal failure as lead agencies under CEQA, the Districts brazenly claim that the Certification itself violates CEQA. CCSF joins the Districts in many parallel arguments. BAWSCA argues that the Board relies on its CEQA analysis in the 2018 Substitute

Waiver of Water Quality Certification, Project Nos. P-2299-082 and P-14581-002 (Jan. 19, 2021); *see also Turlock Irrigation District et al. v. FERC*, No. 21-1121; *Turlock Irrigation District et al. v. FERC*, No. 21-1120, and *Turlock Irrigation District & Modesto Irrigation District v. State Water Resources Control Board & Eileen Sobeck*, No. CV63819 (Cal. Super. Ct. for Tuolumne Cnty., filed May 11, 2021)

¹⁴ *See* State Water Board, Motion to Intervene and Answer to Conservation Group's Motion For Directive in the Matter of Turlock Irrigation District and Modesto Irrigation District's Application for 401 Certification of Don Pedro and La Grange Projects (Project Nos. 2299-082 and 14581-002), FERC eLibrary no. 20210212-5183, p. 12.

¹⁵ Districts' Petition, pp. 63-65; CCSF Petition, p. 9; BAWSCA Petition, pp. 9-11.

Environmental Document (SED) for the Board's update of the Bay-Delta Plan's Lower San Joaquin River flow objectives,¹⁶ and that since the SED is unlawful, reliance on it is unlawful.

1. The State Water Board Appropriately Relied on Water Code § 13160 (b)(2) in Issuing the WQC Prior to Completion of CEQA.

Water Code § 13160 (b)(2) allows the State Water Board to issue a water quality certification in advance of the completion of CEQA “if the state board determines that waiting until completion of that environmental review to issue the certificate or statement poses a substantial risk of waiver of the state board’s certification authority under the Federal Water Pollution Control Act or any other federal water quality control law.”

The Districts and CCSF both acknowledge that the Districts have petitioned for legal review of FERC’s Order denying waiver of certification.¹⁷ However, they argue that since the Districts argue in their pleadings before FERC and the D.C. Court of Appeals that the State Water Board had *already* waived certification, there is no “substantial risk” of *future* waiver. Thus, they argue that the State Water Board acted improperly in not waiting so that the WQC could rely on the CEQA document that the Districts promised but failed to produce and have no evident intention of producing.

First and foremost, a substantial facial threat of waiver exists. The Districts are actively pursuing waiver before the D.C. Circuit.

Notwithstanding the Districts’ and CCSF’s confidence in the Districts’ legal pleadings before the D.C. Circuit, there are surely other potential substantial risks that, at minimum, the Districts will mount a renewed effort to seek waiver, from FERC or from a court, should the Districts’ ongoing waiver case before the D.C. Circuit fail on specific factual or otherwise narrow grounds. It is not possible to predict what legal turn of events might occasion a renewed effort. However, the Districts’ persistence in the face of denial of waiver by FERC is clear evidence that the Districts will exhaustively seek waiver in the future even with long odds at prevailing.

CCSF, in a peculiar line of reasoning, argues that because the Districts had no request for certification pending before the Board when the Board issues the WQC, there was no risk of

¹⁶ *FINAL Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary San Joaquin River Flows and Southern Delta Water Quality*. The changes to the Bay-Delta Plan are included as Appendix K. Adopted by the State Water Board December 12, 2018. See https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf

¹⁷ See 174 FERC ¶ 61,042, Declaratory Order on Waiver of Water Quality Certification, Project Nos. P-2299-082 and P-14581-002 (Jan. 19, 2021); *Turlock Irrigation District et al. v. FERC*, No. 21-1121; *Turlock Irrigation District et al. v. FERC*, No. 21-1120. *Turlock Irrigation District & Modesto Irrigation District v. State Water Resources Control Board & Eileen Sobeck*, No. CV63819 (Cal. Super. Ct. for Tuolumne Cnty., filed May 11, 2021) is a related case.

waiver. This thread ignores the fact that the Districts withdrew their request for certification as part of their efforts to seek waiver.¹⁸

The legislature enacted Water Code § 13160 (b)(2) specifically to address the type of gamesmanship displayed by the Districts and other state agencies who are also FERC licensees. The application of this code section to entities such as the Districts, who willfully delay CEQA and then claim waiver due to delay by the State Water Board in the absence of the CEQA document antecedent to certification, could not be more appropriate.

2. The State Water Board Should Reject the Efforts of BAWSCA to Use the WQC to Relitigate the Revised Bay-Delta Plan’s Lower San Joaquin River Flow Objectives as Adopted by the State Water Board December 12, 2018.

The State Water Board adopted an update to Lower San Joaquin River flow objectives, and the supporting Substitute Environmental Document (SED), on December 12, 2018. BAWSCA argues that the State Water Board is relying on the SED for coverage of the WQC under CEQA.¹⁹

BAWSCA has made no showing of any such reliance by the Board. BAWSCA’s arguments are rather an attempt to open a new front in the ongoing litigation of the SED. BAWSCA simply uses its petition for reconsideration of the WQC to present in apposite rehash of its opinions regarding the SED and the Lower San Joaquin River flow objectives.

While the preamble in the WQC discusses the adopted Lower San Joaquin River flow objectives, Condition 1.D requires only that “the Licensees shall operate the Project in a manner consistent with the Bay-Delta Plan and any amendments thereto.” Among the potential amendments are voluntary agreements.

In sum, the WQC does not adopt *as part of the WQC* the Lower San Joaquin River flow objectives in the Bay-Delta Plan. Rather, the WQC requires consistency with those objectives, whatever they may be. Attachment B at the end of the WQC shows the flows in the Lower San Joaquin River flow objectives adopted on December 12, 2018, but this is caveated in Condition 1.D: “Flow requirements from Condition 1.B, 1.C, and 1.D are consolidated into Attachment B – Consolidated Instream Flow Requirements, for convenience and illustrative purposes.”

In short, BAWSCA’s effort to shoehorn the SED and the adopted Lower San Joaquin River flow objectives is inappropriate and misplaced. The State Water Board should dismiss BAWSCA’s arguments in this regard. The legal and substantive resolution of the SED and the Lower San Joaquin River flow objectives is beyond the scope of the proceeding on the WQC.

¹⁸ See 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).

¹⁹ BAWSCA Petition, pdf pp. 9-11. The Districts’ Petition at pdf p. 58 makes similar arguments.

D. The WQC Is Not Federally Preempted.

In addition to meritless arguments based on the vacated 2020 Rule on CWA § 401, the Districts, CCSF, and BAWSCA make a series of arguments centered around the notion that the WQC exceeds the scope of CWA § 401. Much of this argument boils down to the incorrect view that the WQC must, but does not, hew to FERC's evaluations and views of scope in relicensing. These arguments fail.

1. The State Water Board's authority under the CWA is not limited to the geographic or subject matter scope of FERC's authority.

The essence of the argument of CCSF and the Districts is stated in CCSF's malapropism that is the header for its Statement of Reasons, subsection (D): "The WQC Exceeds the SWRCB's Authority Under the Federal Power Act." Of course, the State Water Board has no certification authority under the Federal Power Act (FPA). Its certification authority exists pursuant to the CWA. Under the CWA, the extent of the State Water Board's authority is broad, going to the "whole of the action." *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 713 (1994) (*Jefferson*). In part, the invocation of the FPA is explicitly or implicitly founded in the 2020 Rule on CWA § 401; see discussion, *supra*. But the arguments predate 2020. Many of them were previously raised and rejected more than two decades ago, in foundational case law addressing CWA § 401. The breadth of the states' CWA authority is precisely what the Trump administration and many members of the hydropower industry sought to narrow in the 2020 Rule on CWA § 401 in direct conflict with *Jefferson, S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006) (*SD Warren*), among others, and the plain text of the CWA.

2. CCSF's Argument that the WQC Conflicts with FERC's Comprehensive Planning Authority under the Federal Power Act Was Directly Rejected in *American Rivers v. FERC*.

CCSF argues that the WQC must be set aside because it conflicts with FERC's comprehensive planning authority under FPA § 803(a)(1) and other sections of the FPA.²⁰ CCSF is wrong. In so doing, CCSF ignores basic CWA § 401 jurisprudence. The court in *American Rivers, Inc. v. FERC*, 129 F3d 99, 111 (2nd Cir. 1997) (*American Rivers*) explicitly rejected this same argument. The court dismissed FERC's arguments relating to FPA §§ 803(a)(1), which addresses comprehensive planning. The court also explicitly dismissed FERC's arguments relating to FPA § 797(e), which addresses FERC's role in balancing uses. And the court also explicitly rejected arguments relating to FPA § 799, which addresses modifications of a FERC license. The court explained: "[T]he preemptive reach of the FPA may be narrowed at the will of the states ... The Commission fails to acknowledge appropriately its ability to protect its mandate from incursion by exercising the authority to refuse to issue a hydropower license altogether..." citing to *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual,...*, 466 U.S. 765 (1984) (*Escondido*).

²⁰ CCSF Petition, pdf pp. 15-18.

In short, CCSF's arguments regarding preemption by the FPA are incorrect and twenty years out of date. The State Water Board should ignore them.

3. The FPA's Savings Clause Has No Bearing on the Board's Ability to Establish Carryover Storage Requirements in the WQC.

The Districts argue that the savings clause of the FPA prevents FERC from requiring carryover storage requirements because that would interfere with the Districts' water rights.²¹ This argument ignores the fact that the FERC license for Merced Irrigation District's Merced River Project (P-2179) places exactly such a requirement at Lake McClure, about twenty miles away from Don Pedro Reservoir. Article 44 of the P-2179 license forbids the licensee from making releases from Lake McClure except to meet minimum instream flow requirements whenever the reservoir's storage is less than 115,000 acre-feet.²² FPA § 821 clearly makes no prohibition on FERC from requiring carryover storage in a project reservoir.

Regardless, the State Water Board, in protecting designated uses in a CWA water quality certification, would not be bound by such a limitation of the FPA if it in fact existed. If necessary to protect designated uses (for instance, to maintain flows or water temperatures protective of fish and wildlife), the CWA affords California or any state the right to set conditions whose result is a *de facto* limitation on water available for diversion under a state water right. The FPA does not limit the states' exercise of their CWA authority. It is well-settled law that a state may impose a more stringent requirement than FERC in order to exercise the state's authority under CWA § 401. *Jefferson* at 705.

4. The State Water Board Can Enforce and Modify the WQC.

Both the Districts and CCSF argue that only FERC can implement or modify the WQC.²³ In so doing, they cite to § 799 of the Federal Power Act. This is nothing more or less than a variation on the theme that CWA § 401 is subordinate to the FPA. It is wrong. It is one of the issues decided in *American Rivers* (at 111), in which the court held that granting exclusive authority to FERC to enforce a WQC would be tantamount to allowing FERC to decide which conditions of a water quality certification to include in a hydropower license. Such allowance is specifically barred by the CWA, which specifies that a federal agency "shall" include in a permit or license the conditions of a certification.

E. The WQC is Not Limited Procedurally or Substantively to the Imposition of Previously Articulated Numeric Standards.

Both the Districts and CCSF argue that the Board exceeds its authority by setting conditions in the WQC beyond established numeric water quality requirements.²⁴ In part, this

²¹ Districts' Petition, pdf pp. 32-33.

²² Merced Irrigation District, Pre-Application Document for the relicensing of the Merced River Project (Nov. 2008), p. 7.2-3.

²³ Districts' Petition, pdf pp. 62-63, 73; CCSF Petition pdf. pp. 13-14.

²⁴ Districts' Petition, pdf pp. 22-31; CCSF Petition pdf. p. 22.

line of argument relies on the vacated 2020 Rule, as discussed *supra*, seeking to limit the scope of a WQC to the subject matter and procedures governing discharges.

The Districts extend the argument to a circuitous journey through the Porter-Cologne Act and the Water Code. The Districts allege a backdoor standard-setting process in violation of established state procedures.²⁵

The U.S. Supreme Court has rejected the arguments of the Districts and CCSF. In *Jefferson*, the Court directly addressed the ability of states to impose conditions in addition to requiring compliance with numeric standards. First, at 704, the Court cited to the CWA: “A state water quality standard ‘shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.’ 33 U. S. C. §1313(c)(2)(A).” Having established that for purposes of CWA § 401 a “standard” includes designated uses as well as numeric “water quality criteria,” the Court went on to find at 713: “We think the language of §303 is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use if the water does not comply with the applicable water quality standards.”

Contrary to the arguments of the Districts, the State Water Board is empowered, first, to set specific conditions in the WQC for the waters affected by the Don Pedro and La Grange projects in order to protect “designated uses,” in this case the “beneficial uses” set by the Board in the Central Valley Basin Plan. Second, such setting of conditions in the WQC is not a general standard setting and is not subject to the procedures required for more general standard setting.

Many of the Districts’ secondary arguments relating to procedure stem from their dual error of limiting the substantive scope of CWA § 401 to waste discharge requirements (WDRs) consistent with the vacated 2020 Rule and with their failure to acknowledge the role of CWA § 401 in protecting beneficial uses consistent with *Jefferson*. The Districts’ argument that the State Water Board cannot tell the Districts how to comply with the WQC makes an inapposite application to the WQC of rules governing WDRs.²⁶ Similarly, the Districts’ argument that the WQC improperly sets a TMDL for dissolved oxygen (DO) ignores the very purpose of CWA § 401, which is to protect water quality in waters controlled by a federal license in circumstances that otherwise preclude the state from setting water quality standards.²⁷ *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330. In a similar vein, the Districts argue that the WQC’s condition that requires gravel augmentation in the lower Tuolumne River is an unwarranted application of waste discharge law and procedures, rather than a measure to protect fish and wildlife beneficial uses.²⁸

²⁵ Districts’ Petition, pdf. pp. 45-46.

²⁶ Districts’ Petition, pdf pp. 70-72.

²⁷ Districts’ Petition, pdf pp. 68-70.

²⁸ Districts’ Petition, pdf pp. 58-61.

F. The WQC Does Not Violate the Requirements for Balancing Uses under the Porter-Cologne Act.

The Districts, CCSF and BAWSCA all argue that the WQC fails to balance uses pursuant to Water Code §§ 13000 et seq, otherwise known as the Porter-Cologne Act. CCSF, supported by BAWSCA, argues that the WQC, in requiring the Lower San Joaquin River flow objectives adopted by the Board in 2018, will cause severe water shortages with “unfathomable” impacts in the San Francisco Bay Area during “periods of drought.”²⁹ The Districts argue that the WQC takes water away from agriculture, and that the State Water Board fails to balance the potential loss of 9000 agricultural jobs against fishery benefits the Districts characterize as minimal.³⁰

BAWSCA cites to the FERC Final EIS to argue that the WQC does not appropriately balance uses, and water supply in particular.³¹ However, consistent with comments by the Districts and CCSF, FERC’s NEPA review explicitly excluded consideration of measures to mitigate water supply impacts of any proposed flow requirements. In spite of Conservation Groups’ repeated comments, beginning with comments on Scoping, FERC dismissed analysis of any such potential measures, 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 recommended alternatives do not satisfy the NEPA purpose and need for the proposed project and are not reasonable alternatives for the NEPA analysis.³²

The Districts, of course, could have analyzed such mitigation opportunities in the CEQA document they declined to produce. On the contrary, the Districts’ Amended Final License Application (AFLA) repeated the above-cited quotation from FERC’s Scoping Document 2, arguing explicitly against any such analysis.³³ Neither CCSF nor BAWSCA was any more forthcoming. Having denied the validity of any regulatory analysis of alternative water supply or demand reduction opportunities, and having placed no such analysis in the record themselves, the Districts, CCSF and BAWSCA had little choice but to offer a smorgasbord of synonyms for adjectives to describe water supply impacts that, generally speaking, mean “very bad.”³⁴

²⁹ CCSF Petition, pdf. p. 8. BAWSCA Petition, pdf p. 7.

³⁰ Districts’ Petition, pdf pp. 53-58.

³¹ BAWSCA Petition, pdf p. 8.

³² FERC, Scoping Document 2 (Jul. 25, 2011, FERC eLibrary no. 20110725-3020), p. 16. *See also* Conservation Group’s Comments Regarding Pre-Application Document and Scoping Document 1, and Study Requests for the Don Pedro Project (Jun. 10, 2011, eLibrary no. 20110610-5198), pp. 15-17. In these comments, Conservation Groups cited to Daniel R. Mandelker, *NEPA Law and Litigation* (Thompson West 2003), § 9:18, p. 9-43, describing the difference between “primary” and “secondary” NEPA alternatives: “Agency opponents presenting a secondary alternative [are] concerned that the agency action is necessary but suggest that it be carried out in a different manner. They may offer a secondary alternative that requires a different location for a project, or project changes that mitigate harmful environmental impacts.” *Id.*, p. 17.

³³ AFLA Exhibit E, Environmental Report, at 3-1 (September 2017, FERC eLibrary no. 20171011-5064, *et al.*).

³⁴ For example: “catastrophic” (pdf p. 2) and “devastating” (pdf p. 6) in CCSF Petition (the latter a recurring CCSF favorite); “significant,” “severe,” “unacceptable,” and “drastic” in BAWSCA Petition, pdf p. 8.

The record is already replete with Conservation Groups' responses to these allegedly very bad impacts and constructive suggestions about how to mitigate them.³⁵ Attachment A to these comments reviews and updates many of them.

The Districts take the legal argument a step further, claiming a violation of the Water Code's "overriding reasonableness standard," stating: "The State Board violated this reasonableness standard, both in the 2018 amendments and the Order, when it chose fish over people."³⁶ The Districts invoke Water Code § 106 ("It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.") produced at a time that the concept of the "public trust" was scarcely articulated. Subsequently, the State Court of Appeals has found in *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1485 (2014) (*Light*) that the public trust overrides the § 106 principle, citing to three further cases:³⁷

As the Supreme Court held in *Audubon Society*, no party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has "an affirmative duty" to take the public trust into account in regulating water use by protecting public trust uses whenever feasible. ... (United States, *supra*, 182 Cal.App.3d at p. 106 [in *Audubon Society*, "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado*, *supra*, 142 Cal.App.4th at p. 966 ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].)

As further specified in *Light*, "the function of the Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of *comprehensive* planning and allocation of waters." *Id at 1481*. (emphasis added).

In sum, the arguments of the Districts, CCSF and BAWSCA fail because they overstate water supply impacts, ignore and deny potential mitigations for any such impacts, and misapply the rule of priority to public trust resources. More generally, they simply object to any "balancing" that would upset their water supply in any way. As Conservation Groups stated in regard to the balancing in FERC's draft NEPA document: "

In fact, the *only* alternatives the DEIS considers are "within these constraints" of "continu[ing] to meet both the Districts' irrigation demands and CCSF's domestic water supply needs," [DEIS at 3-146] as those demands have been defined by the Districts and CCSF. ... This is not "an equitable compromise." It is a continuation of the previous 50 years of project operation in which water supply and power generation have thrived while fisheries and other instream resources have drastically declined, relegated to what is left over once water supply needs are met.³⁸

³⁵ See *esp.* Conservation Groups' REA Comments, pp. 16-18, 21-30; and Conservation Groups' DEIS Comments, pp. 61-71.

³⁶ Districts' Petition, pdf. p. 55.

³⁷ *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82 (*Racanelli*); *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937;

³⁸ Conservation Groups' DEIS Comments, pdf p. 20.

See also discussion of dry years and dry year sequences and of the Districts’ and CCSF’s arguments on violation of the rule of water rights priority, *infra*.

G. The WQC Does Not Violate the Rule of Priority under California Water Rights, with the Possible Exception of Condition 5.

Both the Districts and CCSF argue that the WQC violates the rule of priority under California water rights.³⁹

Both the Districts and CCSF argue that assignment of responsibility for meeting the Lower San Joaquin River flow objectives requires a water rights adjudication, and that use of the WQC to assign responsibility to the Districts and CCSF violates due process and abridges their water rights. CCSF claims that because its water rights are “vested property rights,” and citing to *Racanelli, supra* 182 Cal.App.3d the suggests that the Board must hold an adjudicative hearing if its rights are “infringed by others” or “taken by government action.” The Districts argue that the Board must hold a water rights hearing to assure that the Districts are not curtailed in the exercise of their water rights when junior diverters are not curtailed first.

The WQC does not change the water rights of either the Districts or the City. It places limitations on those rights, consistent with water rights law, to assure that the exercise of those rights is consistent with requirements for reasonable use of water and protection of the public trust. The Board “can weigh the use of water for certain public purposes, notably the protection of wildlife habitat, against the commercial use of water” by those holding rights of priority to the water. *Light, supra*, at 1473. These limitations the WQC places on the water rights of the Districts and CCSF assume that diverters in the affected watersheds that are junior to the Districts and CCSF will be required to cease diversions prior to any cessation by CCSF or the Districts. As stated in WQC Condition 5:

This condition is not intended to relieve any other diverter of responsibility to contribute to achievement of the southern Delta salinity objective. If the Licensees are aware of any person or entity with a junior priority diverting or threatening to divert significant quantities of water at a time when the Licensees are required to bypass or release water under this condition, the Licensees should report that diversion or threatened diversion to the Deputy Director, who may initiate appropriate actions to address that diverter’s responsibility to contribute to achievement of the southern Delta salinity objective, as appropriate.

TRT et al. agree that it would be cleaner and more transparent if the Board were to spell out in a water rights adjudication how the Board will establish compliance mechanisms and enforce the rule of priority to the degree feasible in implementing the WQC in general and the Lower San Joaquin River flow objectives in particular. However, the Board must also weigh the public interest in speedy implementation of measures to protect an ecosystem in crisis. The use of complaints as a mechanism to enforce the rule of priority to the degree reasonably possible is a reasonable place to start. It has the salutary effect of giving senior and relatively senior

³⁹ Districts’ Petition, pp. 65-69; CCSF Petition, pdf pp. 23-24.

diverters a stake in protecting instream flows. To the degree that it allows junior diverters to at times skate under the surface, this may be a temporary necessity required to protect public trust resources. In any event, the Board does not owe Districts and CCSF a water rights adjudication solely for the stated reasons that any application to water rights of the Board's authorities under the reasonable use and public trust doctrines warrants such procedure.

The Districts and CCSF have a stronger argument when it comes to WQC Condition 5 (Southern Delta Salinity).⁴⁰ The WQC does not articulate a clear reasonable use or public trust rationale for Condition 5's requirement that the Districts and CCSF must cease their diversions when the Bureau of Reclamation is releasing water from New Melones Reservoir to meet salinity requirements in the southern Delta. As Conservation Groups state in comments on the draft WQC:

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.⁴¹

At minimum, the State Water Board needs to supplement its rationale in the WQC in support of Condition 5.

⁴⁰ Districts' Petition pdf pp. 67-68; CCSF Petition pdf p. 23, incl. fn. 23.

⁴¹ Conservation Groups' Comments on Draft WQC pp. 18-19.

H. The State Water Board’s Delegation of Authority to Issue and Amend the WQC Is Lawful.

CCSF complain that the Board cannot delegate to its Executive Director the authority to issue the WQC.⁴² The Districts complain that the Board cannot delegate to its Executive Director the authority to modify the WQC.⁴³

The State Water Board’s December 22, 2021 letter from Parker Thaler to the Districts’ counsel Lawrence Bazel, captioned “Re: December 13, 2021 Letter Regarding Notice of Opportunity to Respond to Petitions for Reconsideration of Water Quality Certification for Don Pedro Hydroelectric Project and La Grange Hydroelectric Project” clarifies the regulatory authorization for the Board’s delegation of authority to issue the WQC.⁴⁴ In petitioning for reconsideration, the Districts and CCSF will in any event have the opportunity to present their cases directly to the Board.

Equally, Condition 26 of the WQC provides: “The State Water Board shall provide notice and an opportunity to be heard in exercising its authority to add to or modify the conditions of this certification.” Any modification to the WQC is thus also subject to petition for reconsideration and thus presentation of objections directly to the Board.

It is utterly impractical for all issues of adoption, modification, or enforcement of a certification to go before the full State Water Board itself and not be delegated to staff. Such a requirement would also deny the State Water Board the right to determine its own procedures. There are opportunities for recourse short of an adjudicative hearing before the Board in the event of decisions by State Water Board staff with which the Districts or CCSF disagree.

I. The State Water Board Should Ignore Requests to Analyze or Accept the Purported Tuolumne River Voluntary Agreement.

Since the Brown administration initiated negotiations on Tuolumne River flows in 2012, the only consensus remotely achieved has been among water purveyors. Despite the lack of consensus with anyone else, BAWSCA, CCSF, and the Districts each uphold a voluntary agreement as the keystone to the acceptable resolution of the WQC.

The BAWSCA Petition laments the fact that the Water Board has “arbitrarily” declined to explicitly analyze the Tuolumne River Voluntary Agreement (TRVA) as it stands today, notwithstanding the fact that it is not the “executed voluntary agreement” that it quotes the Board as having committed to analyze.⁴⁵ This is in spite of the fact that FERC substantially analyzed this agreement in the FEIS as the new staff-recommended alternative. The BAWSCA Petition

⁴² CCSF Petition, p. 24.

⁴³ Districts’ Petition, p. 73.

⁴⁴ Letter from Parker Thaler on behalf of Ann Marie Ore, State Water Board staff, to Lawrence Bazel, counsel for the Districts (Dec. 22, 2021), served on the parties to the petitions for reconsideration.

⁴⁵ BAWSCA petition, pdf. pp. 14 and 18.

also does not consider that the Districts had many years to do their own analysis in their promised CEQA document. The BAWSCA Petition recommends the incomplete TRVA as the remedy to the alleged failures of the existing WQC.

The CCSF Petition argues that the WQC “undermines ongoing negotiations for a ‘voluntary agreement’ to implement the Bay Delta Plan. ... We urge the Board to rescind and withdraw the WQC, and hold the WQC in abeyance pending the outcome of the TRVA negotiations. If those negotiations are successful, the SWRCB should redraft the WQC to reflect the terms of the TRVA.”⁴⁶ The CCSF Petition thus recommends the future TRVA as the remedy to the alleged failures of the existing WQC.

The Districts’ Petition quotes two San Joaquin Valley legislators to argue for stay of the WQC. The Districts paraphrase one legislator, saying he “warned that efforts to reach a voluntary agreement over the Tuolumne—a central goal of the Bay-Delta Plan—would be poisoned by mandatory requirements imposed on the Districts.”⁴⁷ The Districts’ Petition directly quotes the same legislator’s claim that the State Water Board’s SED for the Bay-Delta Plan was a “gun to the head” that has prevented conclusion of a voluntary agreement for the Tuolumne.

The TRVA died on the vine without any help from the State Water Board. Further attempts to delay to provide time for negotiations beyond the past decade are unwarranted requests for discretionary dispensation from the Board considering:

- The Districts’ pleadings before FERC and the D.C. Circuit that the State Water Board waived its CWA § 401 authority by allegedly failing to act on certification within one year;
- The posture of the Districts and CCSF, and to a lesser degree BAWSCA, in simultaneously attacking the scope of the Board’s authority and requesting that the Board grant discretionary dispensation; and
- The attacks on the Board’s failure to exercise its discretion as arbitrary and unlawful.

The State Water Board should cut bait. There is no voluntary agreement to analyze. The TRVA as it stands is facially inadequate. There is no excuse for further delay.

III. Comments on Additional Legal Issues Raised in the Districts’ Petition for Reconsideration

A. The Arguments in the Districts’ Petition that the WQC Violates Due Process Are without Merit.

The Districts frame many of their substantive arguments about the WQC in terms of alleged violation of due process.⁴⁸ For example, the Districts object that the water temperature requirements in Condition 3 are not achievable, and that the WQC violates due process by

⁴⁶ CCSF Petition, pdf p. 3.

⁴⁷ Districts’ Petition, pdf p. 84.

⁴⁸ Districts’ Petition, pdf p. 46.

requiring an unachievable condition.⁴⁹ Such issues are more productively addressed in a discussion of the substantive issues themselves, below.

The Districts allege that the WQC violates due process because it covers both the Don Pedro and La Grange projects. The decision to cover both projects in one certification is within the discretion of the Board. It is consistent with the requirement under *Jefferson* to address the whole of the action.

B. The Argument that the WQC Causes Unconstitutional Takings Is without Merit.

The Districts claim that implementation of the WQC will constitute a physical taking under the Fifth Amendment.⁵⁰ The Districts are mistaken: 80 years of case law underscores that such regulatory action by the State Water Board (e.g., minimum reservoir carryover storage targets and flow release requirements) does not constitute a compensable physical taking.

The Districts will not be deprived of a protected property interest because water rights in California are not absolute. Water rights are usufructuary and limited by the reasonable use and public trust doctrines. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 103-105 (1986) (“*Racanelli Decision*”). Water rights are not exempt from reasonable regulation; on the contrary, they are frequently subject to regulation in the public interest. *See, e.g., People v. Murrison* 101 Cal. App. 4th 349, 360 (2002) (“Legislation with respect to water affects the public welfare and the right to legislate in regard to its use and conservation is referable to the police power of the state.”); *People ex rel. State Water Res. Control Bd. v. Forni* 54 Cal. App. 3d 743, 753 (1976) (“[T]here is a well-recognized distinction between a ‘taking’ or ‘damaging’ for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, the latter within the sphere of the police power.”). This means that no owner of California water can acquire a protected right to use water in an unreasonable manner or in a manner that harms the public trust.

In this case, the Districts have not acquired a protected right to divert, store or release water in a manner that the State Water Board judiciously deems unreasonable, or that may harm the public trust. In short, the Districts’ takings claim is premised on a type of protected property right that does not exist under California law.

Nor does the Districts’ argument that they are being singled out by the state avail. The Districts control millions of acre-feet of water in the Tuolumne River watershed. Their citation to a single property owner who was exclusively held accountable for butterfly habitat is a wildly different fact set. What the WQC requires of the Districts is not out of proportion to the impacts they have and have had on the Tuolumne River or to the benefits they derive from it.

⁴⁹ Districts’ Petition, pdf p. 46.

⁵⁰ Districts’ Petition, pp. 47-50. The analysis in this section of these comments is from Conservation Groups’ REA Comments, pp. 97-98.

IV. Comments on Substantive Issues in the WQC Raised by the Districts and CCSF.

A. Substantial Evidence Supports the Requirement in Condition 1.B for a 200 cfs July 1 – October 15 Flow in the Lower Tuolumne River Downstream of RM 25.9, and for Extending the 200 cfs Requirement to June.

The WQC requires a minimum flow from July 1 – October 15 of 200 cfs in all water year types downstream of River Mile (RM) 25.9. This notably includes the reach of the river that passes through the Modesto urban area. When it has suited their arguments, the Districts have been vocal in describing the greater Modesto area as home to a large number of economically disadvantaged residents. Despite the importance and accessibility of the river to these residents, both the Districts and CCSF object to the 200 cfs flow value.

The WQC at pp. 21-23 provides a complete rationale for this condition, relying heavily on the Districts' own "Minimum Boatable Flow" Study. Unlike FERC, the State Water Board chose not to "balance" away recreational beneficial uses in the lower Tuolumne River downstream of RM 25.9 by limiting its availability to 12 summer days. For its part, the Tuolumne River Trust sought to enhance the usability of the lower Tuolumne River by removing the abandoned Dennett Dam just upstream of Modesto, which had become a hazard to boaters and swimmers.⁵¹

The State Water Board got this one right, and supported its condition with a complete though brief rationale. TRT et al. does not feel compelled to add to the Board's justification.

B. Conditions 1.C and 1.D Overlap and Potentially Conflict, and the State Water Board Should Align Them.

In comments on the draft WQC, Conservation Groups extensively discussed the potential conflicts between Condition 1.C and Condition 1.D.⁵² TRT et al. refers the Board to those comments.⁵³ TRT et al. recommends maintaining the flows in Condition 1.B as a floor, retaining only the fall pulse flows in Condition 1.C, and striking the spring fall pulse flows in Condition 1.C in favor of compliance with the Bay-Delta Plan per Condition 1.D.

C. The WQC Should Revise Conditions 1.K and 4 to Establish Flow Requirements during Dry Years and Dry Sequences Now, and Not Defer them to a Plan Developed by the Districts.

Conditions 1.K (Dry Year Management Operations Plan) requires the Districts to develop strategies to reduce the effects to beneficial uses of conditions in dry years and sequences of dry years. Condition 4 (Extremely Dry Conditions) establishes requirements for the Districts should

⁵¹ See <https://www.tuolumne.org/dennet-dam>.

⁵² 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 ("Conservation Groups WQC Comments").

⁵³ *Id.*

they request variances from flow requirements. The WQC states that the Districts should develop Condition 1.K so as to minimize the frequency of variance requests pursuant to Condition 4.

Effectively, Condition 1.K asks the Districts to self-police their diversions and operations in order to protect instream beneficial uses. This does not make sense if one considers that an essential element of management to avoid adverse instream effects is carryover storage. The Districts' Petition argues that a carryover storage requirement is unlawful and constitutes a taking.

The Board should revise the WQC to set numeric carryover storage requirements and to delineate guidelines or specific criteria for determining when diversions cross the line into unreasonable use. The Board should not cede to the Districts the responsibility for compliance with the reasonable use and public trust doctrines.

Please see Conservation Groups' DEIS Comments, Attachment 1 ("Draft Drought Measure") as one potential approach to a drought plan for the WQC.⁵⁴

D. The Board Should Revise Condition 3 to Make it a Monitoring and Evaluation Requirement Rather than a Compliance Requirement.

1. Condition 3 Overlaps and Potentially Conflicts with Conditions 1.D.

As Conservation Groups described in comments on the draft WQC, the WQC contains too many organizing principles for spring flows.⁵⁵ Conditions 1.C, 1.D, and 3 organize flows in different ways: Condition 1.C with a base flow and pulse flow approach; Condition 1.D (under adopted Bay-Delta Plan) with a percent of unimpaired flow approach; and Condition 3 with a temperature-driven approach. Each has its arguments, but an attempt to comply with all of them creates a "mess" in which the "tail wags the dog."⁵⁶

Consistent with Conservation Groups' comments on the draft WQC, TRT et al. recommend that the Board recast Condition 3 as a monitoring and evaluation requirement to see how often the flows required pursuant to the Bay-Delta Plan achieve desired temperature targets. Such monitoring and evaluation could also inform "adaptive implementation" pursuant to the Bay-Delta Plan.

2. The Water Temperature Targets in Condition 3 Are in Some Cases Unachievable as Compliance Requirements.

Both the Districts and CCSF argue that the temperature targets in Condition 3 cannot, in some cases, be achieved, no matter how much water the Districts might devote to achieving them. Notwithstanding the partisan nature of these arguments, and based on independent analysis and experience, TRT et al. agree.

⁵⁴ Conservation Groups' DEIS Comments, pdf pp. 84-87.

⁵⁵ Conservation Groups WQC Comments, pdf p.6, pp. 9-10.

⁵⁶ Conservation Groups WQC Comments, pdf p. 5.

Condition 3 as written requires development of a Temperature Management and Monitoring Plan. Conceivably, that plan could include a series of contingencies or decision points in which the Districts could fall back from the temperature targets the Plan articulated. However, a better approach would be to set a flow requirement, as in the adopted Bay-Delta Plan, that is designed to achieve temperature targets as much of the time as possible, and to create a Plan that requires evaluation based on monitoring. Such a plan could and should include a process for adjustment of the temperature targets after a defined time period.

V. The Board Should Grant TRT et al.’s Petition for Reconsideration.

As described in TRT et al.’s Petition, TRT et al. believes that the Board should apply its rationale for July 1 – October 15 for Condition 1.B to June as well. For further analysis, *please see* TRT et al.’s Petition for Reconsideration.

As also described in TRT et al.’s Petition, TRT et al. believes that the Board should set quantitative parameters for the amount of large wood that the Districts must install in the lower Tuolumne River. As written, Condition 9 of the WQC provides no guidance on the required level of effort. Since the Districts have opposed altogether any inclusion of a large wood augmentation in the lower Tuolumne River, it is particularly unreasonable to expect that the Districts will define a level of effort commensurate with their responsibility. For further analysis, *please see* TRT et al.’s Petition for Reconsideration.

VI. Conclusion

Thank you for the opportunity to comment on the petitions for reconsideration of the Water Quality Certification for the licensing proceedings of the Don Pedro and La Grange hydroelectric projects. Tuolumne River Trust et al. requests that the State Water Board deny reconsideration as requested by the Districts, CCSF, and BAWSCA, improve the WQC as described on the Board’s own motion, and grant reconsideration as requested by TRT et al.

Dated this 7th day of January, 2022.

Respectfully submitted,



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Merced River
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A handwritten signature in black ink, appearing to read "Michael Martin".

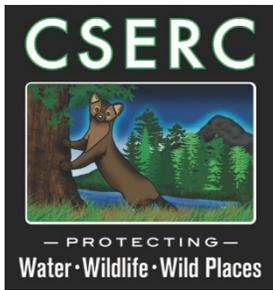
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Enclosure: Attachment A – “Alleged Impacts of the Water Quality Certification on the Bay Area Economy Are Highly Inflated”

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Mr. Jared Blumenfeld, Secretary, California Environmental Protection Agency
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Ms. Kimberly Bose, Secretary, Federal Energy Regulatory Commission (via e-filing)
FERC Service list, P-2299 and P-14581

Attachment A

Alleged Impacts of the Water Quality Certification on the Bay Area Economy Are Highly Inflated

A lot has happened since San Francisco and the Bay Area Water Supply and Conservation Agency (BAWSCA) filed their Petitions for Reconsideration of the Water Quality Certification. The 2020 Urban Water Management Plans (UWMP) were finalized, a series of SFPUC workshops were held, and the SFPUC’s Long Term Vulnerability Assessment looking at potential impacts of climate change on future water supply was completed. Information from these sources make it clear the socioeconomic impacts cited by San Francisco and BAWSCA in their Petitions are extremely inflated.

San Francisco’s Petition states:

Table 1 models impacts to water supplies using, inter alia, SFPUC’s design drought sequence under (1) Base Case (2010 NEPA base case demand), (2) the proposed Tuolumne River Voluntary Agreement, and (3) the WQC using normalized demand levels within San Francisco’s service area of 238 mgd (present-day demand), as well as 265 mgd and 287 mgd (projected future demand). Table 1 shows each rationing level under two scenarios: with a continuation of the existing “Side Agreement” and without such an agreement.⁵⁷

Table 1: Summary of SFPUC Water Supply Rationing⁷

SFPUC Service Area Demand (MGD)	Base Case	Voluntary Agreement for the Tuolumne River (T-VA)	401 Water Quality Certification
Water Supply Rationing Required During Droughts Assuming Existing Side Agreement			
238	10%	10% to 20%	75% to 90%
265	10% to 20%	10% to 25%	80% to 90%
287	15% to 30%	20% to 35%	90%
Water Supply Rationing Required During Droughts Assuming No Side Agreement			
238	10% to 20%	20% to 30%	greater than 95%
265	10% to 25%	20% to 35%	greater than 95%
287	20% to 35%	30% to 45%	greater than 95%

The claim that present-day demand is 238 mgd is factually incorrect. Furthermore, there are no current studies projecting demand will increase to 265 or 287 mgd. In fact, demand appears to be remaining flat.

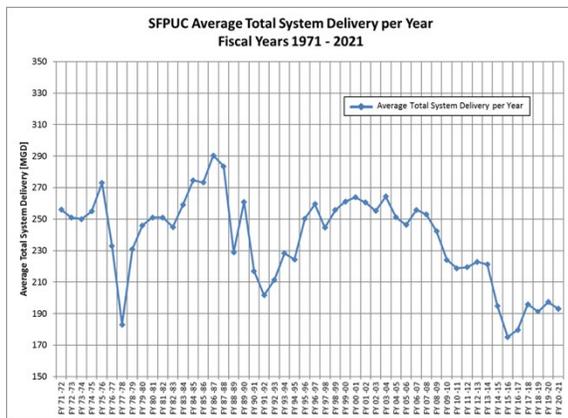
⁵⁷ City and County of San Francisco’s Petition for Reconsideration of Water Quality Certification, p. 7.

The design drought used by the SFPUC for planning purposes is arbitrary and does not hold up to scrutiny. It combines the worst drought since record-keeping began – 1987-92 (six years) with the driest two-year period on record (1976/77) to create an extremely unlikely 8.5-year artificial drought. It assumes water demand is 265 million gallons per day (mgd) and that no alternative water supplies are developed.

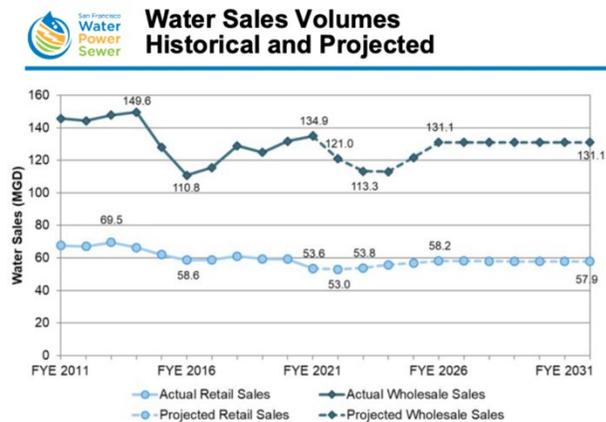
This document examines the three main factors underlying San Francisco’s and BAWSCA’s claim that the Water Quality Certification would result in water shortages and extreme rationing. Those factors are water demand, length of drought planning and alternative water supplies.

Water Demand

The claim that baseline demand is 238 mgd is patently false. At the time the Petitions for Reconsideration were filed, demand in the entire SFPUC Regional Water System (RWS) was 198 mgd.⁵⁸ In FY 2020/21, demand dropped slightly to 195 mgd.⁵⁹ Demand has remained below 200 mgd for the past seven years, and the SFPUC’s 10-Year Financial Plan projects demand will remain flat for the next decade. The 238 mgd demand figure cited in San Francisco’s Petition is 22% higher than current RWS demand.



Source: SFPUC



Source: SFPUC⁶⁰

The SFPUC and BAWSCA have a long history of inflating demand projections to bolster their claim they cannot spare water for instream flows. Most recently, they attempted to use the SFPUC’s sales cap (265 mgd) to represent current and future demand in their UWMPs.

BAWSCA’s Petition for Reconsideration states:

⁵⁸ SFPUC Water Resources Division Annual Report (FY 2019/20), p. 3 – https://sfpuc.org/sites/default/files/programs/local-water/WaterResources-AnnualReport_2020.pdf

⁵⁹ SFPUC Water Resources Division Annual Report (FY 2020/21), p. 3 – https://sfpuc.org/sites/default/files/programs/local-water/WaterResources-AnnualReport_2021.pdf

⁶⁰ SFPUC budget meeting presentation, January 7, 2021, slide 35 – <https://sfpuc.sharefile.com/share/view/saca60c0974b24aa182b6a44d5dc6692c>

BAWSCA Member Agencies are currently in the process of drafting updates to their Urban Water Management Plans ("UWMP") as required by Water Code section 10620 et seq. SFPUC, as the wholesale water supplier, provided projected water supply reliability data that included conditions with the adopted Bay-Delta Plan. (See Declaration of Nicole Sandkulla, Exhibit A.) This data indicates only 45% of average water supply available in the RWS in the third dry year under conditions in 2020, and 50% of average water supply available in a single dry year under 2025 conditions.⁶¹

Exhibit A cited above is a letter from the SFPUC to BAWSCA.⁶² Table 2 lists BAWSCA’s water supply as 184 mgd (contractual obligations from the SFPUC), and total RWS Supply as 265 mgd, which includes San Francisco’s self-imposed cap of 81 mgd. 265 mgd is the sales cap adopted by the SFPUC in 2008 through its Water System Improvement Program.

Table 2: Projected Wholesale Supply from Regional Water System [For Table 6-9]:

Year	2020	2025	2030	2035	2040	2045
RWS Supply (mgd)	265	265	265	265	265	265
Wholesale Supply (mgd)	184	184	184	184	184	184

Table 3 in the document goes on to treat the 265 mgd of “water supply” listed in Table 2 as both current and future demand, artificially reducing water supply to 45% in the third dry year under conditions in 2020, and 50% of average water supply available in a single dry year under 2025 conditions, as cited in BAWSCA’s Petition.

⁶¹ BAWSCA Petition for Reconsideration, p. 15.

⁶² Letter from Paula Kehoe (SFPUC) to Danielle McPherson (BAWSCA), January 22, 2021.

Table 3: Basis of Water Supply Data [For Table 7-1], 2020 Infrastructure Conditions With Bay Delta Plan

Year Type	Base Year	RWS Volume Available (mgd)	% of Average Supply	Wholesale Volume Available (mgd)	Notes on Calculation of Wholesale Supply
Average year	2020	265	100%	184	
Single dry year		238.5	90%	157.5	<ul style="list-style-type: none"> • At 10% shortage, wholesale allocation is 64%, or 152.6 mgd • Retail allocation is 36%, or 85.9 mgd • Retail allocations above 81 mgd are re-allocated to Wholesale Customers, per the 2018 WSA • 4.9 mgd added to wholesale allocation, bringing it to 157.5 mgd
Consecutive 1 st Dry year		238.5	90%	157.5	<ul style="list-style-type: none"> • Same as above
Consecutive 2 nd Dry year		212	80%	132.5	<ul style="list-style-type: none"> • At a 20% shortage, wholesale allocation is 62.5%, or 132.5 mgd • Retail allocation is 37.5%, or 79.5 mgd
Consecutive 3 rd Dry year ¹		119.25	45%	74.5	<ul style="list-style-type: none"> • WSA does not define percentage split above a 20% shortage level • Assume same split as for a 20% shortage level, i.e. Wholesale Customers receive 62.5%
Consecutive 4 th Dry year		119.25	45%	74.5	<ul style="list-style-type: none"> • Same as above
Consecutive 5 th Dry year		119.25	45%	74.5	<ul style="list-style-type: none"> • Same as above

¹ Assuming this year represents 2023, when Bay Delta Plan Amendment would come into effect.

This intentional manipulation of data was called out,⁶³ and the SFPUC was forced to correct the numbers. The final UWMPs used actual demand projections rather than the sales cap to represent demand.⁶⁴

Table 6-1. Regional Water System Normal Year Supplies (mgd)

[Standardized Table 6-9 Retail: Water Supplies – Projected]

[Standardized Table 6-9 Wholesale: Water Supplies – Projected]

RWS Supply ^a	Actual	Projected				
	2020	2025	2030	2035	2040	2045
Retail Customers ^{b, c}	66.5	67.2	67.5	68.6	70.5	73.7
Wholesale Customers ^{d, e, f}	132.1	146.0	147.9	151.9	156.3	162.8
Total RWS Supplies	198.6	213.2	215.4	220.5	226.8	236.5

Using actual demand projections increased average water supply available in the RWS to 60% in the third dry year under conditions in 2020, and 70% in a single dry year under 2025 conditions.⁶⁵ This simple correction reduced potential rationing in the first scenario from 55% to 40%, and in the second scenario from 50% to 30%.

⁶³ Tuolumne River Trust letter to the SFPUC, March 1, 2021 – <https://static1.squarespace.com/static/5eebc0039b04b54b2fb0ce52/t/60abe77ad9608f70f26da536/1621878651501/RT+Letter+to+SFPUC+Re-UWMPs.pdf>

⁶⁴ 2020 Urban Water Management Plan for the City and County of San Francisco, Table 6-1, p. 6-4, June 2021 – https://sfpuc.org/sites/default/files/programs/local-water/SFPUC_2020_UWMP2020_%20FINAL.pdf

⁶⁵ Ibid, Table 8-3, p. 8-4.

Table 8-3. Regional Water System Supply Availability During Normal and Dry Years for Base Years 2025 through 2045 – With and Without Bay-Delta Plan Amendment

Base Year	Normal Year ^a	Single Dry Year	Multiple Dry Years				
			Year 1	Year 2	Year 3	Year 4	Year 5
With Bay-Delta Plan Amendment							
2020 ^b	100%	100%	100%	100%	60%	60%	60%
2025	100%	70%	70%	60%	60%	60%	60%
2030	100%	70%	70%	60%	60%	60%	60%
2035	100%	70%	70%	60%	60%	60%	55%
2040	100%	70%	70%	60%	60%	53%	53%
2045	100%	60%	60%	60%	60%	51%	51%
Without Bay-Delta Plan Amendment							
2020	100%	100%	100%	100%	100%	100%	100%
2025	100%	100%	100%	100%	100%	100%	100%
2030	100%	100%	100%	100%	100%	100%	100%
2035	100%	100%	100%	100%	100%	100%	100%
2040	100%	100%	100%	100%	100%	100%	100%
2045	100%	100%	100%	100%	100%	90%	90%

While the correction improved water supply availability, projected rationing is still inflated. The UWMPs used population growth projections from Plan Bay Area (prepared by the Association of Bay Area Governments and Metropolitan Transportation Commission), which are highly controversial. For San Francisco, the population growth projections included in their UWMP are four times greater than those forecasted by the CA Dept. of Finance, and assume the City’s population will grow by twice as many people in the next 15 years as in the previous 15 years, which is highly unlikely.

The disparity in population and demand projections was raised at an SFPUC workshop in July 2021. Steve Ritchie, the SFPUC’s Assistant General Manager of the Water Enterprise, explained the situation as follows:

I want to make sure it’s clear that the Urban Water Management Plan is not intended to be an actual projection of demands, because plan developments may or may not occur or may be delayed for a variety of reasons...and the projections presented in the 2020 Urban Water Management Plan are closer to an outside envelope of what the demands may be in 2045 rather than actual demands.⁶⁶

Length of Drought Planning

The SFPUC’s design drought is extremely conservative, producing highly exaggerated potential water supply impacts that might result from increased instream flow requirements. Not only is the design drought based on demand of 265 mgd (36% higher than current demand), it also combines two of the worst droughts on record – 1987-92 and 1976/77.

⁶⁶ SFPUC water demand workshop, July 16, 2021 – https://sanfrancisco.granicus.com/player/clip/38991?view_id=22&redirect=true (see 12:28).

The table below from the SFPUC’s recently-released Long-Term Vulnerability Assessment⁶⁷ suggests how infrequently the 1976/77 and 1987-92 droughts are likely to recur, let alone sequentially.

Table 3-19. Calculated Joint Return Period for Thresholds 269 and 365 TAF.

Drought Event	Threshold: 269 TAF	Threshold: 365 TAF
	Joint Return Period [Year]	Joint Return Period [Year]
1976-1977	98	61
1987-1992	772	537
2012-2015	236	176

Regarding potential impacts of climate change on the SFPUC’s water supply, the report states:

According to climate projections and expert elicitations, there is a central tendency of warming of +2°C and +4°C by 2040 and 2070 (Representative Concentration Pathway [RCP] 8.5), respectively, with no clear direction of change in mean annual precipitation over the planning horizon.⁶⁸

And:

The Upcountry region and East Bay and Peninsula regions are in the positive precipitation domain for the winter season in 2070, and thus are somewhat more likely to see positive than negative precipitation in the near future.⁶⁹

The Tuolumne River Trust modeled how the unimpaired flow requirements adopted in the Bay Delta Water Quality Control Plan would impact the SFPUC’s water supply under current demand, using the design drought. The SFPUC could manage the first six years (recurrence of the 1987-92 drought) without requiring any rationing or developing any alternative water supplies. With 20% rationing beginning in year three, the SFPUC could make it through seven years of the design drought. By developing 25 mgd of alternative water supplies, the SFPUC could manage eight years of the design drought.

Alternative Water Supplies

The SFPUC is lagging far behind other major water agencies when it comes to developing alternative water supplies. The City of San Francisco currently treats 71 mgd of wastewater, but

⁶⁷ Long Term Vulnerability Assessment and Adaption Plan for the San Francisco Public Utilities Commission Water Enterprise - Phase 1 – https://sfpuc.org/sites/default/files/about-us/policies-reports/LTVA_AdaptationPlanSFPUC_Phase1.pdf

⁶⁸ Ibid, p. xxii

⁶⁹ Ibid, p. 26

utilizes only 0.1 mgd of recycled water.⁷⁰ By developing recycled water, the SFPUC could reduce its dependence on the Tuolumne River dramatically.

Table 6-4. Wastewater Operations within Retail Service Area

[Standardized Table 6-2 Retail: Wastewater Collected Within Service Area]

[Standardized Table 6-3 Retail: Wastewater Treatment and Discharge Within Service Area in 2020]

Treatment Plant	Operator	Location	Volume of Wastewater in 2020 (mgd)				Recycled Water Delivered within Retail Service Area in 2020 (mgd)
			Collected	Treated (Level)	Discharged	Recycled	
Southeast WPCP ^{a,b}	SFPUC	San Francisco	56.2	56.2 (secondary, disinfected)	52.1 ^c	0	0
Oceanside WPCP ^b	SFPUC	San Francisco	14.5	14.5 (secondary, undisinfected)	15.0 ^d	0	0
Treasure Island Wastewater Treatment Plant	US Navy and Treasure Island Development Authority	Treasure Island	0.33	0.33 (secondary disinfected)	0.30	0	0
Mel Leong Treatment Plant ^{e,f}	City and County of San Francisco	San Francisco International Airport	0.38	0.38 (secondary, disinfected)	0.38	0	0

The SFPUC has identified a number of alternative water supplies, including local and regional recycled water projects, brackish water desalination, expansion of the Calaveras Reservoir, groundwater banking, and participation in the Bay Area Regional Reliability Shared Water Access Program and Los Vaqueros Expansion.⁷¹ Rather than prioritizing these projects, the SFPUC and BAWSCA continue to bank on tapping the Tuolumne River for 85% of their water supply.

Conclusion

By adopting honest demand projections, a reasonable drought planning horizon, and committing to develop alternative water supplies, the SFPUC could meet the Water Board’s instream flow requirements for the Tuolumne River without risking running out of water or imposing draconian rationing requirements.

At an SFPUC workshop in March 2021, a table was presented at the request of conservation groups that incorporated the Bay-Delta Plan flow regime, removed a year from the design drought, and used the UWMP demand projections (although inflated, as outlined above).⁷² It found that by developing 35 mgd of alternative water supplies by 2045, the SFPUC put itself in a position no run out of water during the revised design drought.

⁷⁰ SFPUC UWMP (n 8), Table 6-4, p. 6-9.

⁷¹ SFPUC Alternative Water Supply Quarterly Report, September 2021 – https://sfpuc.org/sites/default/files/programs/Alt%20Water%20Supply%20Planning%20Quarterly%20Report_14Sep%2021_FINAL.pdf

⁷² SFPUC water supply planning workshop, slides 16, March 26, 2021 – <https://sfpuc.org/sites/default/files/about-us/commission/Water%20Workshop%20Number%203%20Scenarios%20FINAL%20REV%20MAR24.pdf>



VII. Bay-Delta Plan with Alternative Water Supply Projects, Modified Rationing Policy and Modified Design Drought

- Base Conditions
- Includes SFPUC contribution to the Bay-Delta Plan displayed in the graph as a reduction in Firm Yield, assuming the flow requirement is 40% of unimpaired flow at La Grange from February through June. Current FERC flow requirements are assumed for the rest of the year.
- SFPUC contributions are calculated according to the 4th Agreement and assuming continuation of the 1995 side agreement.
- Includes a total of 35 MGD of new water supply projects, as described on slide 12 for scenario V
- Yield values are estimated using a 7.5-year design drought
- Includes 6.5 years of rationing at 20% in the 7.5-year design drought sequence.

SFPUC Water Supply and Demand Worksheet Results
All values are in million gallons per day (MGD)

	FY 2019-20	2025	2030	2035	2040	2045
Total Yield:	299	192	196	196	238	238
RWS Demand:	198	213	215	220	227	236
Lower Tuolumne Contribution:	NA	101	101	101	101	101
Surplus or Deficit:	100	-21	-19	-24	12	2

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

**In the matter of:
Water Quality Certification for Federal Permit or License
for Turlock Irrigation District and Modesto Irrigation District
Don Pedro Hydroelectric Project (FERC No. 2299) and
La Grange Hydroelectric Project (FERC No. 14581)**

**RESPONSE OF TUOLUMNE RIVER TRUST ET AL.
IN SUPPORT OF THE
PETITION FOR RECONSIDERATION OF TUOLUMNE RIVER TRUST ET AL.
AND IN OPPOSITION TO RESPECTIVE PETITIONS FOR RECONSIDERATION OF
TURLOCK IRRIGATION DISTRICT AND MODESTO IRRIGATION DISTRICT,
CITY AND COUNTY OF SAN FRANCISCO, AND
BAY AREA WATER SUPPLY AND CONSERVATION AGENCY**

Proof of Service

I hereby certify that I have this day served by electronic mail the foregoing comments by Tuolumne River Trust, Friends of the River, California Sportfishing Protection Alliance, American Whitewater, Sierra Club Mother Lode Chapter, American Rivers, Trout Unlimited, Tuolumne River Conservancy, Golden West Women Flyfishers, Central Sierra Environmental Resource Center, and the Merced River Conservation Committee (collectively, Tuolumne River Trust et al. or TRT et al.) in support of the Petition for Reconsideration of Tuolumne River Trust et al. and in opposition to respective Petitions for Reconsideration of Turlock Irrigation District and Modesto Irrigation District, City and County of San Francisco, and Bay Area Water Supply and Conservation Agency on the Water Quality Certification for Federal Permit or License for Turlock Irrigation District and Modesto Irrigation District on the Don Pedro Hydroelectric Project (FERC No. 2299) and La Grange Hydroelectric Project (FERC No. 14581) on each person designated on the service list compiled by the State Water Resources Control Board in the above-captioned proceeding.

Executed at Sacramento, California this 7th day of January, 2022.



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