



**COMMENTS OF CONSERVATION GROUPS ON MERCED IRRIGATION DISTRICT'S NOTICE OF INTENT TO RELY ON FERC FINAL ENVIRONMENTAL IMPACT STATEMENT, WITH MANDATORY CONDITIONS, IN COMBINATION WITH A SUPPLEMENTAL ANALYSIS, TO SATISFY CEQA FOR THE MERCED RIVER HYDROELECTRIC PROJECT AND MERCED FALLS HYDROELECTRIC PROJECT RELICENSINGS**

June 27, 2024

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*Via electronic filing*

Dear Mr. Kelly:

American Rivers, American Whitewater, California Sportfishing Protection Alliance (CSPA), Friends of the River (FOR), Golden West Women Flyfishers, and Merced River Conservation Committee, (hereinafter "Conservation Groups") respectfully offer the following comments and recommendations on Merced Irrigation District's "Notice of Intent to Rely on FERC Final Environmental Impact Statement, with Mandatory Conditions, in Combination with a Supplemental Analysis, to Satisfy CEQA for the Merced River Hydroelectric Project and Merced Falls Hydroelectric Project Relicensings" (Notice) Merced Irrigation District (Merced ID) issued the notice of intent on May 28, 2024.

This response was jointly developed and signed by Conservation Group organizations who have been active relicensing participants in the relicensing of the Merced River Hydroelectric Project (P-2179) and the Merced Falls Hydroelectric Project (P-2467) (Projects) since before the formal commencement of the Integrated Licensing Process for each proceeding. The Conservation Groups have participated in dozens of face-to face relicensing meetings since 2008.

The Conservation Groups appreciate the fact that Merced ID is moving ahead with its responsibilities under the California Environmental Quality Act (CEQA) for the relicensing of the Projects. CEQA is necessary to inform Merced ID's internal decision making as an entity of the state of California and the State Water Resources Control Board's (State Water Board) water quality certification (WQC), required pursuant to § 401 of the federal Clean Water Act (CWA), for relicensing the Projects.

**However, the Notice is fatally flawed and must be recirculated for another 30-day review for several reasons.** First, the Notice misidentifies on p. 11 the document in the "eLibrary" of the Federal Energy Regulatory Commission (FERC or Commission) on which Merced ID intends to rely. In an obvious cutting and pasting error, Merced ID cites to the 2019 Final Environmental Impact Statement (FEIS) *for the Yuba River Development Project* (FERC no. 2265, eLibrary no. 20190102-3000) rather than to the 2015 FEIS for the *Merced River Project and the Merced Falls Project* (FERC nos. 2179 and 2467, eLibrary no. 20151204-4003).<sup>1</sup>

Second, the deadline to provide comments on the Notice is unclear due to errors in the Notice of Availability<sup>2</sup> distributed directly to some signatories of this letter on May 28, 2024. The Notice includes conflicting information regarding the appropriate deadline for comment submittal, at the outset describing the comment period as "May 29 to 5:00 p.m., June 27, 2024," and elsewhere stating, "Submission of comments are invited from all interested parties until 5:00 p.m. PDT on June 22, 2024."<sup>3</sup> Conservation Groups noticed this error and requested clarification from Merced ID on June 5, 2024, and to date have not received a response. The Notice posted on the Governor's Office of Planning and Research CEQAnet Web Portal echoes the June 27 date, and therefore, the Conservation Groups are submitting this comment pursuant to that information.<sup>4</sup> Importantly, this confusion, exacerbated by Merced ID's unresponsiveness, reduces transparency and has ultimately impacted the public's ability to participate.

Finally, Attachment A of the Notice is a "Notice of Intent Distribution List."<sup>5</sup> However, some representatives of Conservation Groups on that distribution list did not receive notification.<sup>6</sup>

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<sup>1</sup> See Notice, p. 11: "The FERC FEIS is available on FERC's ELibrary... Docket No. P-2246 at accession no. 20190102-3000."

<sup>2</sup> Notice of Availability for Notice of Intent to Rely on FERC Final Environmental Impact Statement with Mandatory Conditions, in Combination with a Supplemental Analysis, to Satisfy CEQA for the Merced River Hydroelectric Project and Merced Falls Hydroelectric Project Relicensings, May 28, 2024 (Notice of Availability).

<sup>3</sup> Compare Notice of Availability, p. 1 with Notice of Availability, p. 3.

<sup>4</sup> The second version of the Notice of Availability can be found on the CEQAnet Web Portal, SCH Number 2024051222, Merced Irrigation District, Merced River Hydroelectric Project and Merced Falls Hydroelectric Project, FERC Relicensing, 29 May 2024. URL: [https://files.ceqanet.opr.ca.gov/300717-1/attachment/HrB-Nmi1KfD1pQsrXHlrBLynFCyhCJ\\_wEBYjlWpFEoDSzQ6OrraEwcpAHq9QAp37ZKPjoG-msBUQjiVMO](https://files.ceqanet.opr.ca.gov/300717-1/attachment/HrB-Nmi1KfD1pQsrXHlrBLynFCyhCJ_wEBYjlWpFEoDSzQ6OrraEwcpAHq9QAp37ZKPjoG-msBUQjiVMO)

<sup>5</sup> See Notice p. 26.

<sup>6</sup> For example, Keiko Mertz, Friends of the River, did not receive the email notice sent on May 28, 2024 to some individuals on the distribution list, by Mary Mahoney, Project Coordinator at HDR.

Conservation Groups comment on the assumption that Merced ID's intent is to rely on the 2015 FEIS for the Merced River Project and the Merced Falls Project, and that June 27, 2024 is the correct deadline for comment receipt.

**I. CEQA is necessary to support the State Water Board's decision making and WQC for the relicensing of the Projects.**

On August 4, 2022, the US Court of Appeals Ninth Circuit vacated the Federal Energy Regulatory Commission's (FERC) finding that the State Water Board had waived its authority to issue a WQC for the relicensing of the Projects. The Ninth Circuit denied Merced ID's petition for panel rehearing on October 7, 2022. The U.S. Supreme Court denied Merced ID's petition of certiorari on May 15, 2023. In other words, the Ninth Circuit's decision that the State Water Board retains authority to issue WQC for the Projects' relicensing remains binding.

The State Water Board had issued a WQC for the Projects, absent a request for such certification, on July 31, 2020 to facilitate timely licensing of the Projects. However, due to USEPA clarifications regarding appropriate procedure for WQC issuance, the State Water Board issued, on March 11, 2024, a proposed order to set aside the WQCs for the Projects. On Tuesday, April 9, 2024, Conservation Groups and additional organizations<sup>7</sup> filed comments in support of the March 11 proposed order. On May 7, 2024, the State Water Board set aside the WQCs for the Projects. On April 15, 2024, Merced ID submitted to the State Water Board requests for WQCs for the Projects.

In California, the State Water Board and Regional Water Quality Control Boards are the state "certification authority," or the entity responsible for implementing Clean Water Act § 401. Pursuant to this authority, the State Water Board has adopted regulations describing WQC process and related requirements in California. One such regulation describes the contents of a complete WQC request. (*See* 23 CCR 3856.) Section 3856 states that the contents of a complete application or request "shall" include,

"[a] copy of any draft or final CEQA document(s), if available, prepared for the activity. 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."

According to USEPA, "certification authorities," such as the State Water Board, may require materials in addition to the minimum requirements set forth in the Code of Federal Regulations, as part of a complete request for certification.<sup>8</sup> Therefore, Merced ID will need to produce a CEQA document to support the WQC for the Projects.

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<sup>7</sup> Additional signatories of the April 9 letter include American Rivers, Central Sierra Environmental Resource Center, Gold Country Fly Fishers, Northern California Council of Fly Fishers International, Sierra Club Mother Lode Chapter, South Yuba River Citizens League, Trout Unlimited, and Tuolumne River Trust.

<sup>8</sup> 40 CFR 121.5(c).

## II. Merced ID's CEQA analysis must supplement FERC's FEIS to address the Clean Water Act's legal standards and requirements, which differ from the Federal Power Act.

The Notice states that Merced ID proposes to substantially rely on FERC's Final Environmental Impact Statement (FEIS) for the relicensing of the Projects.<sup>9</sup> As noted above, the Notice, in error, directs the public to the FERC FEIS for the Yuba River Development Project (Project No. 2246). Despite this error, all discussion of an FEIS in these comments accurately refers to the FEIS for the Merced River and Merced Falls projects.

The Notice identifies subjects required for analysis required under CEQA that are not required under NEPA: "1) air quality effects; 2) noise effects; 3) climate change; 4) a separate discussion on mitigation measures, including a program for monitoring or reporting on mitigation measures; 5) Native American tribe consultation, including outreach requirements required by Public Resources Code section 21080.3.1 (adopted by Assembly Bill 52); 6) growth-inducing impacts of the proposed projects; and 7) assessing and incorporating into the proposed Project any revisions to FWS conservation measures that have occurred post-FEIS, as well as BLM plan development measures that were defined post-FEIS."<sup>10</sup> Otherwise, the Notice argues: "MID determined that the FEIS complies with the CEQA requirements, except for the information to be included in the CEQA Supplemental Analysis, which will follow an Initial Study(IS) format for ease of review, and will be prepared pursuant to publication of this [] NOI."<sup>11</sup>

In addition to supplementing "information" missing from the FEIS, Merced ID's CEQA review must also provide *analysis* that addresses the State Water Board's legal responsibilities. The FEIS describes its general approach to rejecting certain recommended license conditions as follows:

Staff finds that some of the measures recommended by other interested parties would not contribute to the best comprehensive use of the Merced River water resources, do not exhibit sufficient nexus to project environmental effects, or would not result in benefits to non-power resources that would be worth their cost. The following discusses the basis for staff's conclusion not to recommend those measures.<sup>12</sup>

Below we address these stated rationales for rejecting license conditions, and why the rationales create gaps under the CWA 401 that must be supplemented in Merced ID's CEQA analysis.

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<sup>9</sup> Final Environmental Impact Statement for Hydropower Licenses, Merced River Hydroelectric Project, Project No. 2179-043, Merced Falls Hydroelectric Project, Project No. 2467-020, California (December 4, 2015), eLibrary no. 20151204-4003.

<sup>10</sup> Notice, p. 11-12.

<sup>11</sup> *Id.*, p. 11.

<sup>12</sup> See FEIS, p. 5-76.

**III. The CEQA document to support the WQC must evaluate the extent to which the activity as a whole impacts compliance with state water quality standards rather than relying on the FEIS' Federal Power Act § 10(a) analysis.**

The Federal Power Act (FPA) § 10(a)(1) requires that FERC balance uses of impacted waters when issuing license conditions for hydropower projects in order:

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

In addition to the Commission's balancing of uses under this section, the Commission must include in a new license mandatory license conditions required by other federal agencies pursuant to FPA §§ 4(e) and 18, and by state agencies acting pursuant to CWA § 401. *See, eg., American Rivers, Inc. v. FERC*, 129 F3d 99, 111 (2<sup>nd</sup> Cir. 1997) (*American Rivers*).

Certification authorities are held to a higher standard when issuing WQC. According to the CWA, the certification authority must certify that any activity authorized by a new hydropower license (or any federal permit), which may impact water quality, complies with state water quality standards, including those set forth in local law. This evaluation extends to ensuring that federally authorized activities protect "designated uses" and supporting water quality objectives adopted pursuant to the CWA.<sup>13</sup> *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 713 (1994) (*Jefferson*) ("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 of the water does not comply with the applicable water quality standards.")

The State Water Board's obligation to protect designated uses and water quality standards pursuant to the CWA is not a "balancing" analogous to the FPA analysis FERC staff engage in; it is a water quality protection standard. While the Water Quality Control Plan for the Sacramento and San Joaquin River Basins ("Central Valley Basin Plan") does somewhat limit the protection requirement with caveats regarding what is "feasible," this is more stringent than the exercise of FERC "judgment" as an agency. In fact, the Central Valley Basin Plan's feasibility requirement for achieving a revised water quality objective is confined to merely feasible compliance **time frames** due to the CWA's antidegradation standards.<sup>14</sup> In time, all such

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<sup>13</sup> In this case, the "beneficial uses" set in the Central Valley Basin Plan.

<sup>14</sup> *See* Central Valley Basin Plan, p. 3-2; State Water Board Resolution 68-16. ("[T]he Regional Water Board recognizes that immediate compliance with water quality objectives adopted by the Regional Water Board or the

standards must be achieved to ensure the high quality of California waters are preserved and beneficial uses protected.

For instance, FERC most often considers FPA § 10(a) measures and justifies its balancing decisions from the perspective of cost. *See, e.g.*, FEIS p. 5-60: “Merced ID estimates the annual cost of conducting carcass and otolith surveys to be about \$350,000, and we consider this to be a reasonable estimate of expected costs. Therefore, we do not consider the benefits of gathering this additional information to warrant the likely substantial cost of doing so.”

In contrast to the FEIS, Merced ID’s CEQA analysis must analyze the information in the FEIS, and supplemental information, through the lens of the CWA’s requirement for the protection of beneficial uses and water quality standards that support such uses, as codified in the Central Valley Basin Plan.

#### **IV. Merced ID’s CEQA document must analyze a reasonable range of alternatives for the conditions that may be contained in the new WQC.**

The Notice states on p. 10: “Staff also recognized that the FERC license must include: 1) any mandatory conditions submitted by the BLM pursuant to FPA section 4(e) that meet the FPA requirements; and 2) any conditions included in a final, valid, and timely WQC issued by the SWRCB under CWA section 401. Since the State Water Board set aside the WQC on May 7, 2024, it would be pre-decisional to opine in the CEQA document regarding conditions that may be in the new WQC, and these unknown conditions are not assessed in this CEQA process.”

As described above, the CEQA analysis must be adequate to support the analysis of the State Water Board as a responsible agency in issuing a WQC for the Projects. The fact that the WQC has not yet issued is in large measure the point: a CEQA document is supposed to be “pre-decisional” in the sense that it is supposed to precede and inform an agency decision. The CEQA document must analyze a reasonable range of alternatives to support the action agency, in this case the State Water Board in issuing a WQC.

A reasonable analysis should begin from the 2020 WQC for the Projects that the State Water Board set aside in May 2024 largely on *procedural* grounds. It is reasonably foreseeable that a new WQC will be substantially similar to the 2020 WQC, with perhaps some changes that reflect differences between the USEPA’s rules for CWA Section 401 in effect in 2020 and 2024.

The fact that Merced ID disfavored many elements of the 2020 WQC is inadequate grounds to exclude analysis of WQC conditions similar those issued in 2020. Merced ID’s apparent strategy is to exclude undesired conditions from analysis in the hope that if not analyzed, conditions could not possibly exist. The Notice’s wag-the-dog approach of limiting the scope of CEQA analysis to the scope of FERC’s FEIS with a few subject matter additions will

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State Water Board, or with water quality criteria adopted by the USEPA, may not be feasible in all circumstances. Where the Regional Water Board determines it is infeasible for a discharger to comply immediately with such objectives or criteria, compliance shall be achieved in the shortest practicable period of time (determined by the Regional Water Board), not to exceed ten years after the adoption of applicable objectives or criteria.”)

not limit the reach of CWA Section 401. It will simply lead to a facially inadequate CEQA document.

Throughout the Merced River relicensing, Merced ID sought to radically limit the reach of FERC, as well as the State Water Board, denying for example that fishery resources downstream of Crocker-Huffman Diversion Dam were subject to conditioning by FERC. The State Water Board appropriately cut Merced ID's Gordian knot in Water Rights Investigative Order 2011-003-EXEC.

If Merced ID wishes to better understand which suites or ranges of potential WQC conditions would support the State Water Board's decision making, Merced ID should consult with staff from the State Water Board. In fact, both the 2020 and 2024 versions of USEPA's 401 WQC regulations require that the project proponent (here, Merced ID) schedule a meeting **30 days prior to submitting** the WQC request.<sup>15</sup> The 2020 rule specifically noted that this meeting was intended to enhance coordination and information sharing, squarely addressing the precise issue Merced ID raises as an objection to CEQA compliance.

**V. Merced ID's CEQA analysis cannot rely on FERC's FEIS because the FEIS is not in its final form.**

In 2021, FERC informed MID and the public of its intent to prepare a supplemental EIS to "revise staff's preferred licensing alternative and address new information in the projects' record, including: (1) the Water Board's final 401 WQC conditions; (2) potential conflicts/overlap with any 10(j) recommendations and final 4(e) conditions; (3) the BA and EFH Assessment prepared by Merced ID; (4) any updates to the list of species under ESA (aquatic and terrestrial) as well as newly listed special-status species potentially affected by the projects; and (5) any changes/updates to project facilities and operations including project costs and any measures implemented voluntarily."<sup>16</sup>

Merced ID cannot rely on the 2015 EIS because it is incomplete and pending supplementation from FERC.

**VI. Merced ID's CEQA analysis must require mitigation for significant project effects even where FERC's NEPA analysis did not require such mitigation.**

CEQA requires mitigation of significant impacts of a proposed project when "it is feasible to do so." (Pub. Resources Code, § 21002.1, subd. (b).) NEPA requires disclosure of significant effects of a proposed action, but does not require mitigation of all significant effects.

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<sup>15</sup> See e.g. 40 CFR 121.4 ("The project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the requirement for a pre-filing meeting request."). See also 85 Fed. Reg. 42210 at 42285.

<sup>16</sup> Additional Information Request for Project No. 2179-043 and Project No. 2467-020, Federal Energy Regulatory Commission (February 19, 2021), Accession no. 20210219-3035.

The Notice misstates part of a recent court case, *County of Butte v. Department of Water Resources*, Cal. Supreme Court, Aug. 1, 2022, in an effort to limit Merced ID's responsibility under CEQA to mitigate significant impacts. The Notice states:

However, since FERC is a federal agency implementing a federal law (Federal Power Act), the *County of Butte* court also concluded that CEQA is preempted by federal law to the extent that a CEQA requirement or action interferes or is inconsistent with the FERC license, FERC relicensing process under federal law, or FERC's exclusive jurisdiction over the FERC-licensed project. For example, Merced ID may be barred from incorporating mitigation measures under CEQA that would conflict with a term of the FERC license.<sup>17</sup>

This construction in the Notice ignores the fact that, to the degree that a mitigation measure identified in CEQA review can be implemented in a water quality certification issued pursuant to the *federal* Clean Water Act, there is no federal preemption.

The Clean Water Act gives states what appears to be a very substantial role by requiring that an applicant for any federal license comply with state water quality procedures. (See fns. 17, *ante*; *S.D. Warren*, *supra*, 547 U.S. 370, 386; *PUD No. 1*, *supra*, 511 U.S. 700, 707, 713.) But the crucial points are (1) that it is Congress that determines what is the extent of state input, and (2) that input takes place within the context of FERC licensing procedures as specified in the FPA. It is only when states attempt to act outside of this *federal* context and this *federal* statutory scheme under authority of independent state law that such collateral assertions of state power are nullified.

(*Karuk v. Regional Board*, 183 Cal.App.4th 330, 359-360, 2010)

Indeed, the California Supreme Court in *County of Butte* explicitly declined to find that CEQA is preempted as environmental review to support a WQC issued pursuant to CWA § 401, stating:

We granted review of this second decision to address two issues: (1) whether the FPA preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in pursuing relicensing of a hydroelectric dam, and (2) whether the FPA preempts challenges in state court to an EIR prepared under CEQA to comply with section 401 (33 U.S.C. § 1341) of the Clean Water Act. Upon review of the appellate record and the parties' briefs, we conclude that the second issue is not properly presented, and we decline to address it.

*County of Butte* at 11.

More recently, FERC itself has dismissed the argument that CEQA is federally preempted in relation to water quality certifications for hydropower proceedings. In a May 25,

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<sup>17</sup> Notice, p. 9-10. (Emphasis added).



2024 Order on Rehearing denying waiver of certification for Nevada Irrigation District's (NID) Yuba Bear Project, the Commission stated:

NID argues that, to the extent CEQA interferes with the Commission's application of the FPA or the CWA, those statutes preempt CEQA. ...we do not find that CEQA is entirely preempted by either statute. ... we do not find that the purposes of the FPA, which include ensuring that all necessary permits be issued as a condition to licensing, are thwarted by the application of CEQA as part of the CWA permitting process.<sup>18</sup>

In sum, Merced ID must complete CEQA in a fashion that identifies feasible mitigation measures. It is up to the State Water Board, in issuing the WQC for the relicensing of the YRDP, to implement those mitigation measures.

**VII. The CEQA document must add fish passage and Bay-Delta Plan alternatives to those analyzed in the FEIS.**

**A. The CEQA document must evaluate a fish passage alternative.**

CEQA requires that a CEQA document evaluate a reasonable range of alternatives to the proposed project. *See* Cal. Code Regs. Tit. 14, § 15126.6(a). An EIR "shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives."

The preferred alternative in the 2015 FEIS excluded a fish passage or habitat restoration plan "due to cost and project nexus considerations."<sup>19</sup> However, the FEIS acknowledged that the State Water Board, at that time, was seriously contemplating a fish passage plan that would result in passage over Crocker-Huffman, McSwain, and New Exchequer dams, with a three year timeline of implementation.<sup>20</sup> In fact, Crocker-Huffman dam does feature fish ladders, which are currently blocked. Federal and State agencies have repeatedly sought restoration of fish passage in this reach of the Merced River, in compliance with state law.<sup>21</sup> Of perhaps even greater significance, the State Water Board included Condition 21 in its 2020 Water Quality Certification that contemplated potential fish passage past Crocker-Huffman Dam or a more complete fish passage plan, and allowed the State Water Board to revisit WQC conditions in the event that fish passage became reasonably foreseeable.

Part of the reason that the State Water Board will require additional CEQA documentation and analysis for this project is because FERC staff ducked this issue in the 2015 FEIS. Additional analysis pursuant to CEQA would not be duplicative; it would supplement analysis the Commission declined to complete.

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<sup>18</sup> FERC Order on Rehearing P-2266, 20240523-3041, pp. 14-15.

<sup>19</sup> See FEIS p. xxxii.

<sup>20</sup> *Id.* p. 2-23, E-3, and E4.

<sup>21</sup> Fish and Game Code §§ 5935, 5936.

With the likely development of a fish passage plan at Crocker-Huffman Dam pursuant to the Water Quality Certification, and the repair and opening of the fishway in accordance with state law<sup>22</sup>, it is reasonably foreseeable that anadromous fish will gain access upstream to Merced Falls Dam during the term of the new license. Therefore, Merced ID has an obligation to analyze the effects of the relicensing when added to the restoration of access of anadromous fish to Project waters. Such an analysis would support the State Water Board's decision making and WQC for the relicensing of the Projects.

To that end, the Conservation Groups recommend that any CEQA document prepared by Merced ID evaluate the following fish passage recommendation: (1) open the Crocker-Huffman fish ladder on a temporary basis for seasonal use by *O. mykiss* and other anadromous species and develop monitoring and reporting protocols to quantify fish passage at this dam; (2) develop a plan for infrastructure needed for long-term upstream and downstream fish passage at Crocker-Huffman Dam; and (3) develop a plan for transporting adult anadromous fish from the lower Merced River to upstream of Lake McClure and juvenile anadromous fish from upstream of Lake McClure to downstream of Crocker-Huffman Dam.

**B. The CEQA document must evaluate a Bay-Delta Plan Alternative for lower Merced River flows.**

In Comments and Recommendations in response to the Notice of Ready for Environmental Analysis for the Merced River relicensing, Conservation Groups recommended that the DEIS include a "Bay-Delta Water Quality Control Plan Alternative" that includes analysis of State Water Board actions under Phase I of the update of the Bay-Delta Water Quality Control Plan, the Conservation Groups' flow recommendations with similar actions on the Tuolumne and Stanislaus rivers, and a reduced exports alternative consistent with such action under Phase II of the update.<sup>23</sup>

In comments on the DEIS for the Merced River relicensing, Conservation Groups repeated this recommendation, and criticized FERC staff for failing to include such an alternative.

In the April 30, 2015 DEIS evening meeting, Merced ID's General Manager Sweigard stated to Commission staff:

I have an outstanding major concern with the State Water Resources Control Board, which as you know, Matt, has Clean Water Act authority to issue the 401 water quality certification for the project and mandatory conditioning authority. We want to ensure that you guys understand that there are limits to that authority that they have. It is only supposed to be related to water quality as it relates to the hydro project.<sup>24</sup>

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<sup>22</sup> See supra note 22.

<sup>23</sup> See eLibrary no. 20140722-5058. Hereinafter, "Conservation Groups' REA Comments."

<sup>24</sup> Transcript of FERC-sponsored April 30, 2015 evening meeting to take comments on the DEIS, op cit, p. 93.

Contrary to Mr. Sweigard’s misplaced admonition to FERC staff concerning the authority of the State Water Board, and contrary to the absence of the Water Quality Control Plan and analysis of specific draft proposals for the Water Quality Certification in the FEIS, the State Water Board has broad authority to place “conditions and limitations on the activity as a whole” as decided by the US Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994). Over the course of the FERC proceeding for the Merced River Project, Merced ID made multiple efforts to keep information that would inform the State Water Board’s exercise of its certification authority out of the record, and Commission staff on multiple occasions erred in acceding to these efforts. Staff’s failure to analyze the issues related to the State Water Board’s exercise of its Clean Water Act authority compounded these errors.

In response to Conservation Groups’ DEIS comments, FERC’s Response to Comments in the FEIS stated: “Given the current incomplete status of the final Bay-Delta SED, we do not consider potential flows that may be specified in a revised Basin Plan to be defined enough yet to include in a stand-alone licensing alternative.”<sup>25</sup>

Conservation Groups believe that this avoidance was unlawful in 2015. It is even more unlawful today. In 2018, the State Water Board adopted an update of the Bay-Delta Plan for Lower San Joaquin River flow objectives and South Delta Salinity.<sup>26</sup> This update was upheld in Superior Court in 2024. The “potential flows” for the lower Merced River that the State Water Board may adopt in the Bay-Delta Plan, and with which it will require consistency in the WQC, are very clearly defined and not at all speculative.

The CEQA document must analyze the adopted Bay-Delta Plan flow objectives for the Merced River as an alternative under CEQA.

## **VIII. The CEQA document must consider new information and significant events that have occurred since the release of the 2015 FEIS.**

### **A. Discovery of Merced River headwater population of California Central Valley Steelhead Trout Distinct Population Segment (DPS), Southern Sierra Nevada Diversity Group.**

Prior to the construction of the Projects, the complete life cycle for California Central Valley steelhead (*Oncorhynchus mykiss*)<sup>27</sup> was to swim from the ocean to the snowmelt-fed upper reaches of Merced River, spawn, and for juveniles to swim downstream to the ocean, unimpeded by man-made barriers. More than 20 steelhead generations (4-6 years) have passed since the dam blockages occurred (1926), and obviously no fish that may have been trapped above dam barriers can now return to sea.

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<sup>25</sup> FEIS, p. G-44.

<sup>26</sup> See [2018 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary](#).

<sup>27</sup> California Central Valley (CCV) steelhead trout distinct population segment, Southern Sierra Nevada Diversity group.

Other human activities have affected trout in the Merced River watershed above and below New Exchequer Dam and Lake McClure. Local settlers transplanted local-captured *O. mykiss* into previously fishless areas in the 1870s. By 1895, a fish hatchery (Wawona 1895-1928) operated on Big Creek, tributary of South Fork, Merced River.<sup>28 29</sup> This hatchery, Yosemite Experimental Hatchery (Happy Isles 1918-1920), and Yosemite Hatchery (Happy Isles 1927-1956), propagated both indigenous and introduced *O. mykiss* from California.<sup>30</sup> In early 1991, the Yosemite National Park (Yosemite), terminated fish stocking in the park, ending more than 100 years of this practice.<sup>31</sup>

In total (1877-1990), more than 33 million fish were stocked into Yosemite lakes and streams.<sup>32</sup> Many of those plantings,<sup>33</sup> came from non-indigenous Californian stocks.<sup>34</sup> Since 2013, most rainbows stocked in California are triploid, sterile individuals. Over the many years of stocking, the Merced River became a melting-pot of introduced, non-native trout, including many strains of rainbow trout, from California and other places. Not all of the effects and impacts of the widespread introduction of these invasive, non-native fishes have been evaluated, but in studies of other areas of the western US, it has caused detrimental impacts to native trout populations. In Yosemite, where native populations of wildlife are being adversely affected by invasive trout species, specific fisheries management actions are being taken to protect and restore native populations (removal of invasive species).

A recent study by the National Marine Fisheries Service and UC Santa Cruz revealed, even after a century and a half, the ocean-run legacy of Yosemite's rainbow trout (Southern Sierra Nevada Diversity Group) lives on in *O. mykiss* DNA. Several populations have primarily native ancestry despite the extensive stocking of hatchery trout in the area. Unlike the *O. mykiss* of San Francisco Bay, the upper Merced River rainbow steelhead trout population does not have a history of interbreeding with hatchery-raised individuals, and there has not been a complete replacement of native genetics like that observed in other heavily stocked regions of California.

Even better news is that many of the above-dam populations of the Merced and Tuolumne River watersheds exhibited genetic markers on the Omy5 chromosome that are associated with anadromy (e.g., migration to and from the ocean). This finding has conservation implications - these genetics indicate that these rainbow trout populations have retained the ability to migrate, and therefore reconnecting *O. mykiss* above barriers with their downstream

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<sup>28</sup> Bingaman JW, 1961. Guardians of the Yosemite. Chapter XI. Fish Planting-Hatchery-Wildlife. Accessed at (3/30/2021): [http://www.yosemite.ca.us/library/guardians\\_of\\_the\\_yosemite/](http://www.yosemite.ca.us/library/guardians_of_the_yosemite/).

<sup>29</sup> Leitritz, E. 1970. A history of California's fish hatcheries, 1870-1960. California Department of Fish and Game Fish Bulletin 150:1-125.

<sup>30</sup> Along with other non-Californian species, such as grayling from Montana, brook and brown trout from eastern US and Europe.

<sup>31</sup> Yosemite National Park. 2021. Fish. Stocking of Non-native fish in Yosemite. Accessed at (3/20/2021): <https://www.nps.gov/yose/learn/nature/fish.htm>.

<sup>32</sup> *Id.*

<sup>33</sup> Pearce, DE and MA Campbell. 2018. Ancestry and Adaptation of Rainbow Trout in Yosemite National Park. Fisheries 43(10):472-484.

<sup>34</sup> Hubbs CL and OL Wallis. 1948. The native fish fauna of Yosemite National Park and its Preservation. Yosemite Nature Notes 27(12):131-144.

relatives could potentially help bolster the diversity and recovery of Central Valley steelhead populations.

Resident *O. mykiss* upstream of major dams use reservoirs like the ocean, and this life history type may maintain a genetic reservoir for steelhead and provide some gene flow to populations below dams. Conclusions regarding the distribution of indigenous Rainbow Trout within the Merced River watershed and their implications for management are unlikely to change in biologically significant ways, unless the adfluvial populations are lost due to climate or habitat catastrophes. Similarly, further characterization of the distribution of adaptive genomic variation on chromosome Omy5 and other parts of the genome will provide insight into the evolutionary processes affecting trout populations above dams. Such information would not necessarily impact conservation planning because the basic principles of conservation genetic management to preserve genetic diversity remain the same.<sup>35</sup> Nonetheless, as more examples of adaptive genomic variation associated with life history traits are identified in *O. mykiss* and other salmonid species,<sup>36,37</sup> fisheries managers will need to carefully consider the most appropriate ways to conserve and protect this important biodiversity,<sup>38</sup> including identification and listing of adfluvial populations, to protect the wild genetic diversity, and prospectively to restore anadromy.

*O. mykiss* captured below Merced Falls Dam in the lower Merced River are primarily descended from invasive, non-native (to the Merced River) hatchery trout, especially the Eagle Lake strain. However, anadromous salmonid life histories can emerge rapidly from formerly adfluvial populations after dam removal, demonstrating that such populations are capable of re-establishing their dormant ability to complete an ocean migration.<sup>39</sup> In this context, migratory adfluvial individuals in the Merced River could be considered as potential contributors to future fish passage programs and reintroduction efforts<sup>40</sup> provided that the logistical issues associated with re-establishing connectivity can be overcome.<sup>41</sup>

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<sup>35</sup> Pearse, D. E. 2016. Saving the spandrels? Adaptive genomic variation in conservation and fisheries management. *Journal of Fish Biology* 89:2697–2716.

<sup>36</sup> Barson, N. J., T. Aykanat, K. Hindar, M. Baranski, G. H. Bolstad, P. Fiske, C. Jacq, A. J. Jensen, S. E. Johnston, S. Karlsson, M. Kent, T. Moen, E. Niemela, T. Nome, T. Naesje, P. Orell, A. Romakkaniemi, H. Saegrov, K. Urdal, J. Erkinaro, S. Lien, and C. Primmer. 2015. Sex-dependent dominance at a single locus maintains variation in age at maturity in salmon. *Nature* 528:405–408.

<sup>37</sup> Hess, J. E., J. S. Zendt, A. R. Matala, and S. R. Narum. 2016. Genetic basis of adult migration timing in anadromous steelhead discovered through multivariate association testing. *Proceedings of the Royal Society B* 283:20153064.

<sup>38</sup> Pearse, *Id.*

<sup>39</sup> Quinn, T. P., M. H. Bond, S. J. Brenkman, R. Paradis, and R. J. Peters. 2017. Re-awakening dormant life history variation: stable isotopes indicate anadromy in Bull Trout following dam removal on the Elwha River, Washington. *Environmental Biology of Fishes* 100:1659–1671. Available: <https://doi.org/10.1007/s10641-017-0676-0>.

<sup>40</sup> Thrower, F. P., J. E. Joyce, A. G. Celewycz, and P. W. Malecha. 2008. The potential importance of reservoirs in the western United States for the recovery of endangered populations of anadromous steelhead. Pages 309–324 in M. S. Allen, S. Sammons, and M. J. Maceina, editors. *Balancing fisheries management and water uses for impounded river systems*. American Fisheries Society, Symposium 62, Bethesda, Maryland.

<sup>41</sup> NMFS (National Marine Fisheries Service). 2014. Recovery plan for the evolutionarily significant units of Sacramento River winter-run Chinook Salmon and Central Valley spring-run Chinook Salmon and

Thus, in considering the potential for passage of migratory fish above Merced Falls and New Exchequer dams, directed studies are needed to determine the potential for trapping downstream migrants, among other considerations, as has been undertaken in similar situations.<sup>42, 43</sup> The presence of a potential migratory adfluvial population (Central Valley, Southern Sierra Nevada Diversity Group) is likely and should be evaluated and mitigated in the Final EIS and CEQA documents. Fisheries management actions, such as stocking, monitoring, tribal cultural resources, passage, habitat restoration, and Project flows, may affect the viability and survival of the Southern Sierra Nevada Diversity Group, in the Merced River watershed.

## **B. Dewatering of the Lower Merced River.**

During the summer of 2022, a section of the lower Merced River was dewatered from bank-to-bank for approximately four months. The public was largely unaware of the extensive dry conditions in the Merced River until national attention was drawn to the issue when the New York Times published an article on the matter in January 2024.<sup>44</sup>

Since October 2022, the National Marine Fisheries Service (NMFS) and California Department of Fish and Wildlife (CDFW) have consistently contacted the State Water Board to ensure the river does not run dry again. In March 2023, NMFS recommended a dry season baseflow target of 66 cubic feet per second (cfs) at the Stevinson gage to protect Pacific salmon Essential Fish Habitat, fish passage, and ecological process in the lower Merced River. The 66 cfs was derived using the California Environmental Flows Framework.

In January 2024, FOR and CSPA found, in a preliminary analysis, that the lower Merced River experienced zero-flow events in four of the last ten years. FOR and CSPA promptly filed a letter to the State Water Board in support of the NMFS recommendations, and encouraged the Board to adopt year-round baseflow regulations.<sup>45</sup>

The Merced River contains migration, holding, spawning, and rearing habitat for State and Federally threatened Central Valley spring-run Chinook salmon and federally threatened California Central Valley steelhead as well as Central Valley fall-run Chinook salmon.

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the distinct population segment of California Central Valley steelhead. NMFS, California Central Valley Area Office, Sacramento.

<sup>42</sup> Clancey, K., L. Saito, K. Hellmann, C. Svoboda, J. Hannon, and R. Beckwith. 2017. Evaluating head-of-reservoir water temperature for juvenile Chinook Salmon and steelhead at Shasta Lake with modeled temperature curtains. *North American Journal of Fisheries Management* 37:1161–1175.

<sup>43</sup> Winans, G. A., M. B. Allen, J. Baker, E. Lesko, F. Shrier, B. Strobel, and J. Myers. 2018. Dam trout: genetic variability in *Oncorhynchus mykiss* above and below barriers in three Columbia River systems prior to restoring migrational access. *PLoS ONE* 13(5): e0197571. Available: <https://doi.org/10.1371/journal.pone.0197571>.

<sup>44</sup> Zhong, Raymond. “They Abducted a River in California. And Nobody Stopped Them.” *The New York Times*, 18 January 2024, <https://www.nytimes.com/2024/01/18/climate/california-merced-river-dry.html>. Accessed 23 June 2024.

<sup>45</sup> Letter to the California State Water Resources Control Board, RE 2022 Merced River Dewatering and Protective Year-Round Regulations, Friends of the River and California Sportfishing Protection Alliance, 8 January 2024, <https://www.friendsoftheriver.org/wp-content/uploads/2024/01/FOR-and-CSPA-letter-to-SWRCB-RE-Merced-River-Dry-in-2022.pdf>.

Additionally, the lower Merced River is designated as Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act. Ensuring adequate flows are present in the lower Merced River during the dry season (and year-round) is critical for salmonid conservation, protection of EFH, and maintenance of ecological processes. Having a bank-to-bank dry river that overlapped with fall-run Chinook salmon migration period likely contributed to very low return numbers for 2022. The Projects must release adequate water downstream to ensure such habitat may be utilized to prevent future declines and jeopardy to protected salmonids.

The lower Merced River is of national interest. In consideration of frequent dry conditions, and legal requirements under Cal. Fish and Game Code §§ 5935, 5936 and 5937, the CEQA document must analyze year-round base flows on the lower Merced River.

**C. Ramping Rates have recently created hostile conditions for fish species and dangerous conditions for the recreating public.**

On March 1, 2024, the California Data Exchange Center (CDEC) gage downstream of Crocker-Huffman Dam showed a drastic decrease in flow of approximately 4,000 cfs over a time period of less than one half of one day (flows went from 4,907 to approximately 1,000 cfs). Other large swings were observed that week, with a major ramp up of approximately 2,250 cfs on March 2, and subsequent ramping down through March 10, in 1,000-1,500 cfs steps. A flow of 190 cfs was reached on March 10.

March is part of the juvenile outmigration period for fall- and spring-run Chinook salmon, and steelhead. Drastic ramping rates can strand and kill fish. Merced ID's CEQA analysis should consider ramping rates that do not harm, injure, harass, or kill listed species, and that maintain fish in good condition. Merced ID should also consider in its analysis coordinating ramping rates with the CDFW staff at the Merced River Hatchery to ensure extreme ramping events do not coincide with release of hatchery juveniles.

Merced ID must also complete an analysis of ramping rate protocols that ensure the safety of the public who engage in Water Contact Recreation (REC-1) and Non-Contact Water Recreation (REC-2) on and along the Merced River below Merced Falls Dam and Crocker Huffman Dam.<sup>46</sup> Boating and swimming as well as onshore activities like fishing, hiking, and picnicking occur primarily during the irrigation season from March through October.

Sudden river stage height changes due to a sudden increase in flows can pose a danger to the public participating in these kinds of recreation. A recent example below Crocker Huffman Dam occurred on April 17, 2024. On this date in Merced County, the temperature hit a high of 81° F. At 3:00 PM the flows in the Merced River increased from 197 cfs to 1427 cfs. The corresponding river stage height reported on the CDEC went from 1.8 ft to 10.21 ft. Scenarios like this, where there is over an 8 ft change in river stage height within a 15-minute period, are

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<sup>46</sup> Water Contact Recreation (REC-1) and Non-contact Water Recreation (REC-2) are identified as beneficial uses critical to water quality management in California. *The Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region, Fifth Edition, The Sacramento River Basin and the San Joaquin River Basin*, Page 2-2.

few but not absent from the hydrological record and if repeated have the potential to put the recreating public in harm's way.

## IX. Conclusion

Merced ID's CEQA document for the relicensing and WQC of the Projects must fulfill the requirements described above. Conservation Groups find it difficult to understand how Merced ID can fulfill its legal requirements short of conducting a full Environmental Impact Report.

Thank you for the opportunity to comment on the Notice of Intent to Rely on FERC Final Environmental Impact Statement, in Combination with a Supplemental Analysis, to Satisfy CEQA for the Merced River Hydroelectric Project and Merced Falls Hydroelectric Project relicensings.

Respectfully submitted,



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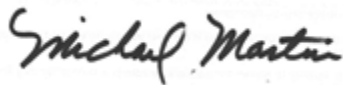
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