
State Water Resources Control Board

October 16, 2024

Michael Cooke, Director of Water Resources and Regulatory Affairs
Turlock Irrigation District
PO Box 949
Tuolumne, CA 95381
Sent via email: micooke@tid.org

**Don Pedro Hydroelectric Project and La Grange Hydroelectric Project
Federal Energy Regulatory Commission Project Nos. 2299 and 14581
Stanislaus and Tuolumne Counties
Tuolumne River and Tributaries**

Comments on Turlock Irrigation District's and Modesto Irrigation District's Notice of Intent to Rely on Federal Energy Regulatory Commission Final Environmental Impact Statement with Mandatory Conditions, in Combination with a Supplemental Analysis, to Satisfy CEQA for the Don Pedro Hydroelectric Project Relicensing and La Grange Hydroelectric Project Licensing

Dear Mr. Cooke,

On September 16, 2024, Turlock Irrigation District (TID) issued a Notice of Intent (NOI) to rely on the Federal Energy Regulatory Commission's (FERC) Final Environmental Impact Statement (FEIS) with Mandatory Conditions, in combination with a Supplemental Analysis, to satisfy the California Environmental Quality Act (CEQA) for the relicensing of the Don Pedro Hydroelectric Project (Don Pedro Project) and original licensing of the La Grange Hydroelectric Project (La Grange Project) (collectively, Projects). Enclosed are State Water Resources Control Board (State Water Board) staff comments on TID's NOI.

Background on Project Application

TID and Modesto Irrigation District (collectively, Districts) own and operate the Projects and are seeking to relicense the Don Pedro Project and license the La Grange Project with FERC. Section 401 of the Clean Water Act (33 U.S.C. § 1341) requires any applicant for a federal license or permit for an activity that may result in any discharge to navigable waters to obtain water quality certification (certification) from the State that the activity will comply with applicable water quality requirements, including the requirements of section 303 of the Clean Water Act (33 U.S.C. § 1313) for water quality standards and implementation plans. Clean Water Act section 401 directs that certifications shall prescribe effluent limitations and other conditions necessary to ensure compliance with the Clean Water Act and with any other appropriate

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

requirements of state law, such as the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.). Section 401 also provides that conditions of a certification shall become a condition of any federal license or permit subject to the certification. The Projects will result in discharges to navigable waters and must obtain certification from the State Water Board as part of FERC licensing for continued operation.

A certification issued by the State Water Board for the Projects must ensure compliance with the water quality standards in the Central Valley Regional Water Quality Control Board's (Central Valley Regional Water Board) *Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin* (SR/SJR Basin Plan) (Central Valley Regional Water Board, 2019) and the *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan) (State Water Board, 2018). Water quality control plans designate the beneficial uses of water that are to be protected, water quality objectives for the reasonable protection of the beneficial uses and the prevention of nuisance, and a program of implementation to achieve the water quality objectives. (Wat. Code, §§ 13241, 13050, subds. (h), (j)). The beneficial uses, together with the water quality objectives contained in the water quality control plans, and applicable antidegradation requirements, constitute California's water quality standards for purposes of the Clean Water Act. The San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta) is a critically important natural resource that is both the hub of California's water supply system and the most valuable estuary and wetlands system on the West Coast. Because diversions of water within and upstream of the Bay-Delta are a driver of water quality in the Bay-Delta watershed, implementation of the Bay-Delta Plan relies on the combined water quality and water right authority of the State Water Board. In issuing water quality certification for a project, the State Water Board must ensure consistency with the designated beneficial uses of waters affected by the project, the water quality objectives developed to protect those uses, and antidegradation requirements. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 714, 719.)

The Projects' facilities are located on the Tuolumne River in Tuolumne and Stanislaus Counties. The SR/SJR Basin Plan designates the beneficial uses of water to be protected along with the water quality objectives necessary to protect those uses. The SR/SJR Basin Plan identifies beneficial uses for the Tuolumne River from New Don Pedro Reservoir to the San Joaquin River as: irrigation; stock watering; contact recreation; canoeing and rafting; other non-contact recreation; warm freshwater habitat; cold freshwater habitat; cold migration; warm spawning; cold spawning; and wildlife habitat. Additionally, municipal and domestic supply is designated as a potential beneficial use.

The Tuolumne River is a tributary to the San Joaquin River and the Bay-Delta. In addition to the beneficial uses listed in the SR/SJR Basin Plan, the beneficial uses identified in the Bay-Delta Plan for the Bay-Delta are: municipal and domestic supply; industrial service supply; industrial process supply; agricultural supply; groundwater recharge; navigation; water contact recreation; non-contact water recreation; shellfish harvesting; commercial and sport fishing; warm freshwater habitat; cold freshwater habitat; migration of aquatic organisms; spawning, reproduction, and/or early

development; estuarine habitat; wildlife habitat; and rare, threatened, or endangered species.

On January 15, 2021, the Executive Director of the State Water Board issued a certification for licensing the Projects. On May 7, 2024, the State Water Board set that certification aside.¹ In a letter dated June 25, 2024, the Districts set forth a process plan and schedule for completing the CEQA process and stated their intent to request certification for licensing the Projects in November 2024. (FERC eLibrary Accession No. 20240625-5026.) State Water Board staff look forward to working with the Districts on the certification process for the Projects.

State Water Board staff submit the enclosed comments pertaining to TID's NOI to Rely on FERC's FEIS with Mandatory Conditions, in Combination with a Supplemental Analysis, to satisfy CEQA for the Projects.

If you have questions regarding this letter, please contact Eric Bradbury by email at: Eric.Bradbury@waterboards.ca.gov, or by phone call to: (916) 327-3401. Written correspondence should be directed to:

State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
Attn: Eric Bradbury
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Sincerely,



Eric Bradbury
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Enclosure: Comments on Turlock Irrigation District's Notice of Intent to Rely on Federal Energy Regulatory Commission Final Environmental Impact Statement with Mandatory Conditions, in Combination with a Supplemental Analysis, to Satisfy CEQA for the Don Pedro Hydroelectric Project Relicensing and La Grange Hydroelectric Project Licensing

¹ The State Water Board order setting aside the 2021 certification is available at https://waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2024/wqo2024-0046.pdf. State Water Board staff notified the Districts, FERC, and other interested parties of this order by letter dated May 10, 2024 (FERC eLibrary Accession No. 20240513-5031).

ec: Debbie-Ann Reese, Acting Secretary
Federal Energy Regulatory Commission
Via e-filing to dockets P-2299 and P-14581

California State Clearinghouse
Office of Planning and Research
Via Posting to CEQAnet for SCH Number 2024090634

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SUPPLEMENTAL ANALYSIS, TO SATISFY CEQA FOR THE RELICENSING OF THE
DON PEDRO HYDROELECTRIC PROJECT AND AN ORIGINAL LICENSE FOR THE
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State Water Resources Control Board (State Water Board or Board) staff are providing the following comments on Turlock Irrigation District's (TID) Notice of Intent (NOI) to rely on the Federal Energy Regulatory Commission's (FERC) Final Environmental Impact Statement (FEIS) with Mandatory Conditions, in Combination with a Supplemental Analysis, to Satisfy the California Environmental Quality Act (CEQA) for the Relicensing of the Don Pedro Hydroelectric Project and an Original License for the La Grange Hydroelectric Project (collectively, Projects).

1. Compliance with CEQA (Pub. Resources Code, § 21000 et seq.) is required as part of the water quality certification (certification) process. The CEQA Guidelines define the lead agency as "the public agency which has the principal responsibility for carrying out or approving a project." (Cal. Code Regs., tit. 14, § 15367.) As noted in the NOI, TID intends to act as the lead agency for the purposes of CEQA. The State Water Board will act as a responsible agency for the purposes of CEQA.

CEQA requires the lead agency to evaluate a project's potential impacts to environmental resources as well as identify mitigation measures and alternatives to reduce project impacts. CEQA also requires public input on identified impacts and mitigation measures. CEQA documentation must analyze and evaluate a project's potential impacts to all relevant resources, including aquatic biological resources, special status species, and water quality standards and other provisions of applicable water quality control plans and policies.

2. Under the California Supreme Court's decision in *County of Butte v. Department of Water Resources*, 13 Cal.5th 612 (2022) (*County of Butte*), TID must comply with CEQA by evaluating reasonable alternatives and mitigation, and is not preempted from considering mitigation that may conflict with a FERC license. On page four of the NOI, TID states:

The California Supreme Court ruled that a California government agency licensee generally must comply with CEQA in connection with FERC licensing of a project in the state (*County of Butte v. Department of Water Resources*, 13 Cal.5th 612, decided Aug. 1, 2022). The court explained that the CEQA document serves as an informational source for the California agency's own decision-making regarding relicensing. The CEQA document informs the decision about whether to accept the particular license and its terms and conditions, whether to request FERC incorporate other terms into the license or seek reconsideration by FERC, and potential mitigation measures that may fall outside of FERC's jurisdiction.

However, because FERC is a federal agency implementing a federal law (FPA), the County of Butte court also concluded that CEQA is preempted

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by federal law to the extent that a CEQA requirement or action interferes or is inconsistent with FERC license articles, FERC relicensing process under federal law, or FERC's exclusive jurisdiction over a FERC-licensed project. As such, TID may be barred from incorporating those mitigation measures under CEQA that would conflict with the terms of the FERC license.

State Water Board staff note that TID's statement diverges from the California Supreme Court's *County of Butte* opinion in several respects. As an initial matter, TID's characterization of "FERC's exclusive jurisdiction over a FERC-licensed project" is not supported by the California Supreme Court's opinion. In *County of Butte*, the Court acknowledged FERC's exclusive licensing authority (13 Cal.5th 612, 620, 634, 635) as well as its sole jurisdiction over licensing processes (see, e.g., *Id.* at p. 620), but also noted that the Federal Power Act (FPA) and Clean Water Act provide roles for states in FERC-licensed projects through savings clauses and Clean Water Act section 401 water quality certifications. (*Id.* at pp. 623, 631.)

Second, in *County of Butte*, the Court explained that when the FERC licensee is an agency of the state such as TID, the CEQA document "also informs decision-making about potential measures that may be outside of *or compatible with* FERC's jurisdiction." (13 Cal.5th at p. 620, emphasis added.) TID's statement that CEQA informs "mitigation measures that may fall outside of FERC's jurisdiction" ignores consideration of mitigation or other measures that may be compatible with FERC's jurisdiction, such as those compatible with a FERC license's terms and conditions. TID's statement also presumes that mitigation or other measures that exceed the requirements imposed by terms of a FERC license will necessarily conflict with the FERC license and be preempted. State Water Board staff are concerned that TID's characterization of *County of Butte* could result in premature narrowing of the scope of mitigation and alternatives considered through CEQA. State Water Board staff note that CEQA, which the NOI acknowledges TID and Modesto Irrigation District (collectively, Districts) must comply with, requires the consideration of a reasonable range of project alternatives and mitigation measures for each potentially significant environmental impact. (Cal. Code Regs., tit. 14, § 15126.6, subd. (a); Pub. Resources Code, §§ 21002.1, subd. (a), 21061, 21100, subd. (b)(3); Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1).)

At this stage in the CEQA process, the State Water Board is providing input regarding the scope and content of environmental analysis as a Responsible Agency. As FERC has not issued a license, the terms and conditions of such a license are not certain. Thus, TID cannot determine whether a particular mitigation measure "would conflict with a term of the FERC license." In *County of Butte*, the Court held that nothing prohibits or preempts an agency of the state

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such as TID from considering mitigation or other measures that conflict with the terms or conditions of a FERC license. On the contrary, the Court stated, “we are aware of no federal law — and the concurring and dissenting opinion cites none — that limits an applicant's ability to analyze its options or the proposed terms of the license before [amending its license application or seeking reconsideration after FERC has issued a license].” (13 Cal.5th at p. 634.) The Court also concluded that an agency of the state “can undertake CEQA review . . . in order to assess its options going forward. Nothing about such use of CEQA review is incompatible with federal authority.” (*Id.* at pp. 634-635.) Therefore, State Water Board staff believe that it would be premature and improper for TID to choose not to analyze alternatives or mitigation measures solely due to a theoretical conflict. State Water Board staff request that TID fulfill its obligation to comply with CEQA by analyzing a reasonable range of alternatives and mitigation measures for each potentially significant environmental impact, as required by CEQA.

3. Water quality certification issued by the State Water Board for the Projects will include mandatory conditions that must be analyzed as part of the CEQA process. Certification conditions will likely include, but not be limited to: minimum instream flows, pulse flows, Lower San Joaquin River flow objectives, temperature management, and erosion and sediment management. Implementation of such conditions needs to be included in the CEQA analysis. On January 15, 2021, the State Water Board's Executive Director issued a certification for licensing the Projects.¹ This certification was set aside on the Board's own motion for procedural reasons on May 7, 2024 (State Water Board [Order WQ 2024-0046](#)²) and is therefore no longer in effect. Although the 2021 certification for licensing the Projects was set aside, it may still be a helpful resource for TID in identifying potential requirements or alternatives that should be analyzed as part of TID's CEQA analysis. TID's environmental documents should satisfy the legal requirements of CEQA, and support the Board's needs in acting on the Districts' request for certification of the Projects.
4. In issuing certification, the Board must include conditions that ensure the Projects will comply with water quality standards and other applicable requirements of state law. This includes conditions to ensure the Projects comply with the Central Valley Regional Water Quality Control Board's *Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin* (SR/SJR Basin Plan)

¹ The 2021 certification can be accessed at the following address:
https://www.waterboards.ca.gov/docs/dplg_fwqc_complete_20210105.pdf

² State Water Board Order WQ 2024-0046 can be accessed at the following address:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2024/wqo2024-0046.pdf

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(Central Valley Regional Water Board, 2019) and the *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan) (State Water Board, 2018). Accordingly, the Districts must operate the Projects in a manner consistent with applicable provisions of the Bay-Delta Plan and any amendments thereto. TID's CEQA analysis for the Projects must include evaluation of compliance with applicable provisions of the Bay-Delta Plan. Currently, for example, as discussed below, the Bay-Delta Plan includes flow objectives for the Tuolumne River and Lower San Joaquin River for the February through June time period. In addition, in 2022, the State Water Board received a Memorandum of Understanding (MOU) Advancing a Term Sheet for Voluntary Agreements (VAs) proposing voluntary measures to update and implement the Bay-Delta Plan. As the Districts are aware, in November 2022, the Board received a revised MOU that included a proposed Tuolumne River VA; the Board has subsequently started the process to evaluate and consider the Tuolumne River VA, but has not made a final determination. TID's Supplemental Analysis should evaluate the Districts' operation of the Projects in compliance with water quality standards and other requirements of state law, including the existing Bay-Delta Plan and the State Water Board's current efforts to implement the plan, as well as noticed proceedings to evaluate amendments to the plan.

5. In 2018, the Bay-Delta Plan established new and revised Lower San Joaquin River (LSJR) flow objectives and revised southern Delta salinity objectives. The LSJR flow objectives apply from February through June to the Stanislaus, Tuolumne, Merced, and Lower San Joaquin Rivers. The Bay-Delta Plan allows adaptive implementation of the LSJR flow objectives if certain criteria are met. The Bay-Delta Plan also includes a revised southern Delta salinity objective of 1.0 deciSiemens/meter electrical conductivity at Vernalis and at the three interior southern Delta stations for the protection of agricultural beneficial uses. Additionally, the 2018 Bay-Delta Plan states that the State Water Board will reevaluate the assignment of responsibility for meeting the October pulse flow objectives at Vernalis during a water right proceeding, FERC licensing proceeding, or other proceeding, and the recently set aside 2021 certification included provisions relative to this Bay-Delta Plan provision. In addition, subject to acceptance by the State Water Board, the Bay-Delta Plan expressly allows the use of a voluntary agreement that proposes flows within the adopted range (30% to 50% unimpaired flow) as a means of implementing the LSJR flow objectives. With this information in mind, TID's CEQA analysis should consider and evaluate the Projects' operations relative to compliance with the LSJR flow objectives.
6. There are potential cumulative effects of the Projects on water resources, aquatic resources, and threatened and endangered species. The Districts' pending appropriate water right application (A033277) proposes a maximum diversion of

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2,700,000 acre-feet from the Tuolumne River between November 1 and June 14 each year. The diversion of surface waters can have significant cumulative effects on the Projects' reaches including, but not limited to, water quality, including water temperature, and the availability and accessibility of habitat for anadromous fish. These potential cumulative effects may extend downstream of the Projects' facilities and into the San Joaquin River and through the Delta. The cumulative impacts of the Districts' new water right application, other water resource activities of the Districts', implementation of the Sustainable Groundwater Management Act, and other reasonably foreseeable probable future projects should be considered in the CEQA analysis.