STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
APRIL 19, 2011

ITEM 8

SUBJECT

CONSIDERATION OF A PROPOSED DRAFT ORDER REGARDING MERCED IRRIGATION DISTRICT'S REQUEST TO STAY INVESTIGATION ORDER WR 2011-0003-EXEC

DISCUSSION

Merced Irrigation District (Merced ID) owns and operates the Merced River Hydroelectric Project (Project) which is licensed by the Federal Energy Regulatory Commission (FERC) as Project No. 2179. Merced ID filed a Notice of Intent to File an Application for a New License for the Project with the FERC on November 3, 2008, and has been proceeding under the FERC's Integrated Licensing Process to renew its license since that time. State Water Resources Control Board (State Water Board) staff has participated in the FERC proceeding from the beginning and took part in a formal study dispute process in November 2009. The study dispute arose due to the limited geographic scope for the studies contained in the study plan and the lack of studies in the original FERC-approved study plan to address impacts downstream of the Project on fisheries resources and fisheries habitat. FERC approved a final study plan in December 2009 that did not include studies requested by the State Water Board. State Water Board staff has determined that the information to be provided by the FERC approved study plan will be insufficient to adequately assess the impacts of Merced ID's Project on water quality and beneficial uses in the Merced River. Additional information is needed to develop appropriate conditions for the Section 401 water quality certification required as part of the FERC proceeding, which will, if adequately conditioned, assure that Merced ID's Project operations under a new FERC license comply with the Clean Water Act. This lack of adequate available information is the reason the State Water Board issued Investigation Order WR 2011-0003-EXEC on January 28, 2011.

Merced ID filed a petition for reconsideration of Investigation Order WR 2011-0003-EXEC on February 28, 2011, and requested that the Investigation Order be stayed while the State Water Board is processing the petition. The draft order under consideration by the State Water Board today only addresses the request for stay. Other issues raised in Merced ID's petition will be addressed in the future in an order on the petition for reconsideration.

POLICY ISSUE

Should the State Water Board adopt the draft order?

FISCAL IMPACT

None

REGIONAL BOARD IMPACT

None

STAFF RECOMMENDATION

The State Water Board should adopt the draft order.

State Water Board action on this item will assist the Water Boards in reaching Goal 4 of the Water Board's Strategic Plan: to comprehensively address water quality protection and restoration, and the relationship between water supply and water quality, and describe the connections between water quality, water quantity, and climate change, throughout California's water planning processes.

D R A F T

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-00XX

In the Matter of the Request for Stay

MERCED IRRIGATION DISTRICT

Regarding Investigation Order WR 2011-0003-EXEC

ORDER DENYING STAY

1.0 INTRODUCTION

On January 28, 2011, the Executive Director of the State Water Resources Control Board (State Water Board or Board) issued Investigation Order WR 2011-0003-EXEC, ordering Merced Irrigation District (Merced ID) to provide the State Water Board the information described in the order within the specified timeframes. The State Water Board's Division of Water Rights (Division) had determined the information requested to be necessary for the State Water Board to develop conditions for inclusion in the water quality certification for Merced ID's Merced River Hydroelectric Project (Project), Federal Energy Regulatory Commission (FERC or Commission) Project No. 2179, as well as for purposes of water right administration, to inform the review of and potential amendments to the Bay-Delta Plan, and for the preparation of Total Maximum Daily Load (TMDL) amendments to the Water Quality Control Plan for the Sacramento and San Joaquin River Basins (Basin Plan). Merced ID filed a petition for reconsideration dated February 28, 2011. Merced ID's petition also requested the State Water Board stay the provisions of Order WR 2011-0003-EXEC pending adoption of an order on the petition for reconsideration. This order addresses only Merced ID's request for stay. A subsequent order will address the merits of Merced ID's petition for reconsideration.

2.0 GROUNDS FOR STAY

Merced ID requested that the State Water Board immediately stay Investigation Order WR 2011-0003-EXEC, pending the outcome of Merced ID's petition for reconsideration, pursuant to Water Code Section 13321 and California Code of Regulations, title 23, section 2053. [3] Merced ID alleges its request for stay is based on substantial harm to Merced ID, the lack of substantial harm to others and the public and substantial questions of fact or law, as supported by a Declaration of Arthur F. Godwin and a Declaration of James Lynch.

Water Code section 13321 and California Code of Regulations, title 23, section 2053 do not apply to this particular matter. Both of these sections apply to the State Water Board's review of an action by a Regional Water Quality Control Board. That is not the case here. Nonetheless, Merced ID's request is proper pursuant to section 3869 of the Board's regulations. Section 3869, subdivision (d) of the Board's regulations provides that an aggrieved person may petition the State Water Board or executive director, when acting as the Board's designee, for a stay of the effect of an action under Chapter 28 of the regulations. A stay shall be granted only if the petitioner alleges facts and produces proof of (a) substantial harm to the petitioner or to the public interest if the stay is not granted; (b) lack of substantial harm to other interested persons and the public interest if a stay is granted, or the harm which would result from the stay being granted is substantially outweighed by the harm which would occur if no stay is granted; and (c) substantial questions of fact or law regarding the disputed action. This section requires alleged facts and proof as to all three of the above-listed factors in order for a stay to be granted.

3.0 LEGAL AND FACTUAL BACKGROUND

The relevant facts have previously been outlined in detail in Order WR 2011-0003-EXEC. Briefly, Merced ID owns and operates the Project, which is comprised of McSwain Dam (River Mile (RM) 56), which impounds McSwain Reservoir, and New Exchequer Dam (RM 62), which impounds Lake McClure. Merced ID also owns and operates Crocker-Huffman Diversion Dam (RM 52) situated downstream of Pacific Gas and Electric Company's (PG&E) Merced Falls Dam

[3] All further references to regulations are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

(RM 55), a run-of-the-river hydroelectric power generation facility located immediately downstream of McSwain Dam. The Project is currently undergoing relicensing with the Commission, and the Project's current license expires on February 28, 2014.

McSwain Dam, New Exchequer Dam, and the Crocker-Huffman Diversion Dam are part of a multi-purpose water project operated for consumptive uses in addition to hydroelectric power purposes and flood control. Appropriation for irrigation, domestic use and other non-hydropower uses is authorized under Licenses 2865, 6047, and 11395 (Applications 1274, 10572 and 16186, respectively). Merced ID holds License 2684 (Application 1222), License 990 (Application 1221) and License 11396 (Application 16187) that authorize the use of water for power production. Merced ID also has filed Statements of Water Diversion and Use Nos. 15475 and 15476 for riparian claims for use of the natural flow of the Merced River at McSwain and New Exchequer powerhouses.

Merced ID's Project operations influence water quantity and water quality throughout the lower Merced River extending downstream into the San Joaquin River. Specifically, the Project controls the amount of water released into the Merced River below New Exchequer Dam, and is therefore capable of influencing both water quality and freshwater habitat conditions downstream of the Project to the Sacramento-San Joaquin Delta. Merced ID also operates its Project facilities to facilitate all of the above-enumerated uses, not just hydropower uses. Hydrology data provided in the Pre-Application Document prepared for the Commission proceeding indicates that return flows from Merced ID's Livingston, Garibaldi, and Main canals may at times comprise a significant proportion (greater than 25 percent) of total flow in the Merced River below Crocker-Huffman Diversion Dam.

Renewal of the Commission license for the Merced River Hydroelectric Project is a federal action that requires water quality certification. (33 U.S.C. § 1341.) Before the Commission can issue a new license for the Project, a Section 401 water quality certification issued by the State Water Board or a waiver of Section 401 authority is required. In order to issue a water quality certification, the State Water Board must have sufficient information to show that operation of the Project under a new Commission license is consistent with both water quality objectives and the protection of the beneficial uses designated for the Merced River and the San Joaquin River, and those designated in the Water Quality Control Plan for the San Francisco

Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). Any certification issued by the State Water Board must include conditions that implement these requirements, and any other appropriate requirement of state law. (33 U.S.C. § 1341 (d).)

Portions of the Merced River within and downstream of the Project and the San Joaquin River downstream of the confluence with the Merced River are currently listed under Section 303(d) of the Clean Water Act as impaired for a variety of pollutants and stressors, and water quality objectives are not being met both in the Merced River and in the San Joaquin River downstream of the confluence with the Merced River. The Merced River is designated as critical habitat for the Central Valley Steelhead Distinct Population Segment, which is currently listed as Threatened under the Federal Endangered Species Act. Poor water quality, which can act as a sub-lethal stressor, may be affecting survival or the physiological condition of anadromous fish in the Merced River. The combined effects of elevated water temperature and exposure to pesticides (present in agricultural run-off during rain events and/or irrigation return flows) have the potential to reduce fish survival or physiological performance in out-migrating juvenile salmonids. Anadromous fish populations in the San Joaquin River watershed have been in decline in recent years.

The 401 certification process for FERC relicensing is initiated when the FERC relicensing process is initiated. (See 18 C.F.R. §§ 5.5 (c), 5.8 (d)(4); Cal. Code Regs., tit. 23, § 3833, subd. (b)(2).) Division staff has participated in the Commission relicensing proceeding and has provided input regarding the information that will be needed to develop the water quality certification. On April 1, 2011, the Commission ordered the implementation of four studies in addition to those required pursuant to its December 22, 2009, Study Dispute Resolution Determination. The newly ordered studies include an instream flow study downstream of Crocker-Huffman, a Chinook salmon egg viability study, a lower river salmonid spawning habitat study and a reservoir water temperature management feasibility study.

Currently, the Commission-required instream flows contained in Merced ID's existing Project license are the only flow requirements in effect in the Merced River between April 1 and

September 30. After 2017, when the Davis-Grunsky contract expires,[4] no flow requirements will exist for the Merced River other than those required in a new Commission license, except for a requirement for additional flow in the month of October.

In 1992, Merced ID petitioned the State Water Board to expand the place of use for water rights Licenses 2685, 6047, and 11395 to include the service area of the El Nido Irrigation District. The California Department of Fish and Game (CDFG) filed a protest to the petition due to concerns that the requested action could adversely impact anadromous fisheries resources. The protest was eventually resolved in 2002 through the execution of a Memorandum of Understanding (MOU) between Merced ID and CDFG, which provides the State Water Board with jurisdiction to review the implementation of the MOU. The MOU acknowledges that "through its operations, Merced's Project, as licensed by the Commission, can materially affect the quality, timing and quantity of instream flow available below Crocker-Huffman Diversion Dam (lower Merced River), thereby potentially affecting the welfare of salmon stocks and other fisheries resources in that stretch of the Merced and San Joaquin Rivers." The MOU defines a set of studies that were meant to occur over a 10-year period and were designed to provide information necessary to identify instream flow requirements and establish cold-water management alternatives for the Merced River. Although not originally intended for this purpose, the MOU study results will also provide information needed to establish conditions for the water quality certification for the Merced ID Project and will aid the State Water Board in potentially amending the Bay-Delta Plan's San Joaquin River flow objectives.

Merced ID agreed to fund specific elements of the 10-year study program, with additional funding expected from other sources including the CDFG and the Central Valley Project Improvement Act. Certain elements of the MOU studies are either ongoing or have been completed, although not all of the data have been analyzed nor have final reports been completed. State Water Board staff consulted with CDFG to prioritize the remaining MOU study plan elements prior to issuing Order WR 2011-0003-EXEC.

[4] The Department of Water Resources and Merced Irrigation District entered into Contract D-GGR17 for recreation and fish enhancement grants under the Davis-Grunsky Act on October 31, 1967.

4.0 DISCUSSION

Pursuant to the State Water Board's regulations, a stay of the effect of an action issued under Chapter 28 of the regulations

> shall be granted only if the petitioner alleges facts and produces proof of (A) substantial harm to the petitioner or to the public interest if the stay is not granted; (B) lack of substantial harm to other interested persons and the public interest if a stay is granted, or the harm which would result from the stay being granted substantially outweighed by the harm which would occur if no stay is granted; *and* (C) substantial questions of fact or law regarding the disputed action.

(Cal. Code Regs, tit. 23, § 3869, subd. (d), italics added.) This section requires alleged facts and proof as to all three of the above-listed factors in order for a stay to be granted.

4.1 Merced ID has not shown substantial harm to it or to the public interest if a stay is not granted

Merced ID's affidavits address only the cost of the studies, and only estimate the total cost of performing all studies to completion. Section 3869, subdivision (d), on the other hand, specifies that a petitioner must show "substantial harm to it or to the public interest *if a stay is not granted*." (*Id*., italics added.) The only costs relevant to an analysis for purposes of a stay are those costs that may be incurred pending the Board's decision and order on the merits of Merced ID's petition for reconsideration. Because most of the studies required by Order WR 2011-0003-EXEC cannot be completed before the Board is likely to issue an order on Merced ID's petition, Merced ID's estimates do not reflect the actual costs that may be incurred during this period. Merced ID's estimates also include costs of studies required independent of Order WR 2011-0003-EXEC, including studies required of Merced ID pursuant to the MOU with CDFG. The costs of the MOU studies and any other studies required by Order WR 2011-0003-EXEC that would be incurred independent of that Order are therefore not directly relevant to whether the Board issues a stay of Order WR 2011-0003-EXEC.

Merced ID submitted declarations with its petition for reconsideration suggesting that the total costs of the studies required pursuant to Order WR 2011-0003-EXEC would be somewhere between $3,480,000 and $7,315,000 over the next two or three years.[5] Accepting as true Merced ID cost estimates for the studies required pursuant to the Order, once the estimated costs for the independently-required MOU studies are subtracted, Merced ID's estimate of the total costs of the studies drops by an amount between $1,560,000 and $2,750,000.

On April 1, 2011, the Commission required four additional studies requested by the State Water Board and other participants as part of the FERC relicensing process. According to Merced ID's cost estimates, the estimated cost of these four studies is between $1,525,000 and $2,150,000. Like the MOU studies, the fact that Merced ID is required to perform these studies independent of Order WR 2011-0003-EXEC means that the costs of these studies are not a factor in the determination of whether there will be substantial harm to Merced ID if a stay is not granted.

Furthermore, a number of studies required pursuant to the Order are not scheduled to begin until spring 2012. For purposes of reasonably considering the costs to Merced ID *if a stay is not granted*, this order will require the Division to prepare a draft order on Merced ID's petition for reconsideration for consideration at a Board meeting no later than one year from the Division's receipt of Merced ID's petition. No significant portion of the costs for those studies are therefore likely to come due prior to the Board's issuance of an order on Merced ID's petition, and so those costs are not relevant to the question of whether a stay should be granted.

Merced ID also alleges, "The studies request information that is currently being collected or has been collected by Merced ID and other entities in the watershed and is largely duplicative of those efforts." (Merced ID Petition for Reconsideration, p. 4.) Although Merced ID does not specify what studies are "largely duplicative," Order WR 2011-0003-EXEC already contemplates this possibility, at least as for water quality data, and provides that "If either Merced ID or any

[5] Merced ID submitted estimates of the costs of a number of studies as part of the FERC process. (Merced ID Response to Comments on Initial Study Report, February 2011.) A spreadsheet of Merced ID's estimates for the studies required pursuant to Order WR 2011-0003-EXEC is included as Attachment A. This spreadsheet shows slightly different cost totals for the low and high estimates - $3,875,000 and $6,425,000, respectively, than Merced ID's declarations submitted with its petition for reconsideration. Why these totals differ is not clear, as there are no study-by-study cost breakdowns in the declarations.

other entity in the vicinity of the Project will be collecting water quality data at the same locations and within the same general time frame as required by this Order, Merced ID may furnish that data to the State Water Board in lieu of collecting additional data." Instead of requiring "duplicative" efforts, the Order requires only that Merced ID provide the specific information requested; not that it perform studies unnecessarily. As such, any work that Merced ID is currently performing, has performed, or where Merced ID has access to the requested information from other entities in the watershed, the costs of that work cannot truly be attributed to Order WR 2011-0003-EXEC. Only those costs not already being incurred, including compiling information gathered for other purposes or by other entities to provide pursuant to the Order, are properly attributable to the Order.

Looking at those studies scheduled to begin prior to Spring 2012 and not independently required by MOU with CDFG or the Commission's most recent Order, and using Merced ID's own cost estimates, the total cost of completing all other studies is estimated to be between $470,000 and $715,000. Taking into account the fact that most of these remaining studies will take longer than one year to conduct to completion, neither of these total cost estimates is likely to be fully realized during the pendency of Merced ID's petition for reconsideration. Considering that Merced ID may already be performing some of these studies or have access to the information from other entities, the estimated costs that may be incurred pending issuance of a Board order on Merced ID's petition for reconsideration do not support Merced ID's contention that substantial harm would occur if a stay is not granted.

In addition to its failure to establish how much of its claimed costs will actually be incurred during the period a stay would be in effect, Merced ID does not provide any information, aside from its estimate of costs, to demonstrate that Merced ID would be substantially harmed if those costs were incurred. Absent any indication that the costs are extraordinarily high for a project of this magnitude – and there is no such indication here -- the Board cannot conclude, based on the costs alone, that costs involved will interfere with its ability to continue operations or otherwise amount to substantial hardship. Merced ID has not provided any information, such as information concerning its hydropower revenues, number of customers, or other factors that would support a conclusion that, taking into account the resources available to Merced ID and the benefits it obtains from hydropower operations, incurring the costs of compliance would amount to a substantial hardship.

Merced ID also does not allege any substantial harm to the public interest if a stay is not granted. Merced ID will be solely responsible for the costs of any studies directly and singularly attributable to Order WR 2011-0003-EXEC and Merced ID has not shown any public interest that would be adversely impacted by denial of a stay in this situation.

4.2 Merced ID has not shown a lack of substantial harm to other interested persons and the public interest if a stay is granted

As stated above, Merced ID declarations only address the total cost of compliance with all studies required by the Order, and do not provide any evidence or discussion of how granting the requested stay would not harm other interested persons or the public interest. The Declaration of Arthur F. Godwin states that "If the stay is granted there will be no substantial harm to other interested persons or the public because Merced ID will still have to comply with Section 401 Clean Water Act water quality certification and all other applicable State and Federal Laws before the Project is granted a new license." This overlooks the fact that, as stated in Order WR 2011-0003-EXEC, the Merced River water quality is impaired and beneficial uses are not being met. The status quo is not adequately protective of the designated beneficial uses of the Merced River.

Merced ID's other contention, that "the Order alleges no immediate harm or threat of immediate harm to persons or the public" suggests that the burden is on the State Water Board to show harm to other persons or the public interest. It is clear, however, from section 3869 that it is incumbent on the party requesting a stay to show that other parties and the public interest will not be substantially harmed. The lack of such information, coupled with the current, impaired water quality in the Merced River, do not support a finding that granting a stay would meet this criterion.

It is necessary that the State Water Board get the requested information in a timely fashion to be able to promptly determine and set appropriate certification conditions and not delay issuance of a new, appropriately conditioned Commission license. This point was highlighted in the comments submitted by the Conservation Groups.[6]

> In the past FERC has attributed delays in license issuance to the often sequential rather than parallel efforts of FERC's licensing process pursuant to the Federal Power Act and the [State Water Board's] water quality certification process pursuant to section 401 of the Clean Water Act and relevant state authorities… ¶… One of the principal causes for this delay in California is FERC's unwillingness to require applicants to perform studies that the Board has determined are needed in order to issue a water quality certification for a given project.

The Conservation Groups' comments highlight the harm caused by delaying the initiation of studies the State Water Board will rely on when it issues water quality certification. When the State Water Board's certification is delayed, the Commission issues a series of annual licenses allowing a project to continue operations under the terms and conditions of the existing license, which can be fifty years old or more. (Conservation Groups' Comments, p. 7.) "These outdated licenses often fail to meet contemporary resource protection, mitigation, and enhancement objectives. Thus, any delay in the issuance of a new license decision will have real consequences on the condition of public trust resources." (*Id*.)

The harm to the public interest from delay in the issuance of a new FERC license are not limited to the delay in the effectiveness of any water quality requirements incorporated in the water quality certification. Other conditions imposed to protect public resources, including mandatory conditions imposed by fishery agencies pursuant to section 18 of the Federal Power Act (16 U.S.C. § 811), will not take effect until the new FERC license is issued. In addition, the conditions imposed or agreed to as part of relicensing are not limited to conditions protecting

[6] The Conservation Groups that jointly submitted written comments are Merced River Conservation Committee, Trout Unlimited, California Sportfishing Protection Alliance, friends of the River, Golden West Women Flyfishers, Northern California Council of Federation of Flyfishers and American Rivers.

public trust resources. The licensee may agree to, or FERC may require, conditions in the public interest. (See *id.* § 803.)

For the above reasons, not only has Merced ID not shown that there would be substantial harm to the public interest if a stay is not granted, the public interest would be harmed if the requested stay is granted.

4.3 Substantial questions of fact or law regarding the disputed action

Merced ID argues in its petition for reconsideration that there are substantial questions of law and fact regarding Order WR 2011-0003-EXEC. Because section 3869 requires a showing of all three enumerated facts discussed above, and Merced ID has not shown substantial harm to it or the public interest, or a lack of harm to other interested parties or the public interest if a stay is granted, it is unnecessary to fully address those legal arguments in this order.

4.4 Comments received

On March 4, 2011, the State Water Board posted and sent out notice of Merced ID's petition for reconsideration pursuant to section 3867.1 of the Board's regulations. Merced ID timely submitted comments, raising some new issues and some issues previously raised in the petition for reconsideration. Other than Merced ID's concern about the prohibition on ex parte contacts due to the pendency of the petition for reconsideration, Merced ID's comments do not raise new issues relevant to the question of whether issuance of a stay is warranted. Inasmuch as Merced ID may have difficulties obtaining appropriate authorizations from other agencies, such as necessary incidental take permits, Order WR 2011-0003 specifically allows Merced ID to request the Deputy Director to amend the requirements of the Order. As for the MOU studies, the Order is unambiguous that Merced ID may request an extension of time to complete those studies if warranted.

After fully considering all of Petitioner's contentions, Merced ID has not made the showings required by California Code of Regulations, title 23, section 3869, subdivision (d).

The State Water Board typically acts on petitions for reconsideration involving water quality certification issues within a year after the petition is filed. (See State Water Board Order WQ 2009-0007 [eight months]; Order WR 2009-0039 [nine months, including seven months during which the petition was held in abeyance at petitioner's request].) The regulations do not set any deadline for action, however. To ensure that the costs incurred by Merced ID during the period before the Board issues a final order on the merits are consistent with the analysis in this Order, the Board directs Division staff to prepare a draft order on the merits of Merced ID's petition for reconsideration for consideration by the Board at a regularly-scheduled Board meeting no later than one year from receipt by the Board of Merced ID's petition.

ORDER

IT IS HEREBY ORDERED THAT, for the foregoing reasons, Petitioner's request for stay of Order WR 2011-0003-EXEC is denied.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Board held on April 19, 2011

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Jeanine Townsend
Clerk to the Board