



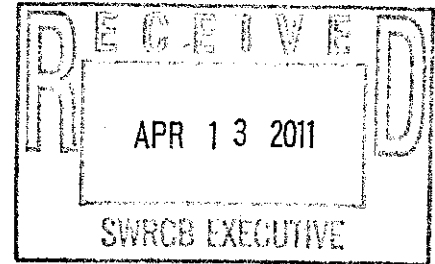
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VIA ELECTRONIC MAIL ([commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov))

April 13, 2011

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



Re: **Comment Letter – MID Draft Order**

Dear Members of the Board:

On behalf of the Modesto Irrigation District ("Modesto ID"), we request issuance of a stay State Water Resources Control Board ("SWRCB") Order WR 2011-0003-EXEC. Not issuing a stay will prejudice Merced ID and the public. Furthermore, substantial issues of fact and regarding Order WR-2011-0003-EXEC have been raised.

**1. Denying the stay will harm Merced ID**

First, the interim period between now and issuance of even a draft order on the merits of Merced ID's petition or reconsideration would cause substantial harm to Merced ID. As the Ninth Circuit stated in *Sayles Hydro*:

The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change. Undue process may impose cost and uncertainty sufficient to thwart the federal determination that a power project should proceed.

(*Sayle Hydro Associates v. Maughan*, 140 P.U.R.4<sup>th</sup> 461, 453 (Ninth Cir. 1993).)

Furthermore, several studies must begin in 2011 while a draft order on the merits of the petition for reconsideration is pending. If Merced ID begins the studies and the

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final order decides they are not required, then Merced ID will have needlessly wasted time and money, the very prejudice described by the Ninth Circuit. In the alternative, it could wait until the final order is issued, but even if Order WR-2011-00XX is amended to require a draft order on the merits within a year, the draft order still could not be issued until 2012, after Merced ID would be required to begin the studies.

## **2. Denying the stay will prejudice the public**

Denying the stay will also prejudice the public. First, it sets bad precedent for hydropower projects. Draft Order WR 2011-00XX voices concern that if studies are not ordered early that the relicensing process could be delayed and hydropower projects would seek one-year licenses. At some point, rather than apply for relicensing, hydropower projects could decide the process entails too much hardship, seek one-year licenses, and avoid the 401 certification process altogether. Furthermore, requiring Merced ID to proceed while questions as to the legality of Order WR-2011-0003-EXEC remain are, by themselves, sufficient to impose a “palpable and considerable hardship on the utilities”, as well as ultimately working harm to the citizens of California. (Sayle Hydro Associates, *supra* 140 P.U.R.4<sup>th</sup> at 453.)

## **3. Substantial issues of fact and law have been raised**

Finally, substantial questions of fact and law exist as to the disputed action. Such questions of fact and law have been submitted by Merced ID in its Petition for Reconsideration and Request for Stay, as well as in comments submitted by PacifiCorp and Modesto ID in support of Merced.<sup>1</sup> Questions of fact and law that have been raised include –

1. What authority the SWRCB is issuing Order WR-2011-0003-EXEC, since the Draft Order is unclear;
2. What studies are required in addition to those already occurring;
3. What the cost of additional studies would be;
4. Whether the SWRCB has the authority to order studies that the FERC study dispute decision concluded were unnecessary;
5. Whether the SWRCB has the authority to order the studies before Merced ID applies for water quality certification; and
6. Whether Merced ID would be reimbursed for the costs of some or all of the studies ordered.

## **4. Conclusion**

Substantial issues of fact and regarding Order WR-2011-0003-EXEC have been raised and, as the Supreme Court has stated, in the FERC relicensing context, merely requiring Merced ID to proceed in the midst of such unresolved issues is prejudicial to Merced ID and to the people of California. Process and uncertainty are prejudice. Merced ID's request for a stay should therefore be granted.

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<sup>1</sup> Modesto ID incorporates the prior comments submitted by Merced ID, PacifiCorp, and itself by reference.

In the interim, the SWRCB can pursue the development of information for flow and water quality objectives for the San Joaquin River and tributaries in a more integrated and less contentious process. Modesto ID is now beginning its FERC relicensing process and, in the next few years, will likely encounter the same issues arising now, as well as Bay-Delta Plan amendments and potentially Endangered Species Act biological opinions. This continued and fragmented approach will be redundant, contentious, waste time and resources, and in the end, may not protect fish and may not protect reasonable and beneficial uses because each process has a slightly different focus, regulatory application, law, policy, and process.

Very truly yours,  
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By:



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