BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of: California State Water Resources Control Board,
Investigation Order WR 2011-0003-EXEC. RESPONSE TO PETITION FOR
RECONSIDERATION OF INVESTIGATION ORDER (WATER CODE
SECTIONS 1058, 1122, and 1123; CALIFORNIA CODE OF
REGULATIONS, TITLE 23 SECTION 769(a)); REQUEST FOR STAY
(WATER CODE SECTION 13321; CALIFORNIA CODE OF
REGULATIONS, TITLE 23, SECTION 2053)

INTRODUCTION

This Response to the Petition for Reconsideration of Investigation Order, WR 2011-0003-EXEC (Investigation Order) is submitted on behalf of PacifiCorp. PacifiCorp owns and operates the Klamath Hydroelectric Project (KHP), Federal Energy Regulatory Commission (FERC) Project No. 2082. The KHP is a single-purpose hydroelectric project, and the water rights for the KHP are used exclusively for hydroelectric project purposes. PacifiCorp initiated the relicensing process with FERC and has submitted an application for a water quality certification to the State Water Resources Control Board (Board). PacifiCorp’s application for certification is currently being held in abeyance. (See SWRCB Resolution Nos. 2010-0024, 2010-0049.)

PacifiCorp has a significant interest in the Board’s orderly and focused implementation of
Clean Water Act section 401, as PacifiCorp's water quality certification for FERC Project No. 2082 is but one of myriad regulatory and restoration processes currently underway in the Klamath River watershed. PacifiCorp is concerned that the Investigation Order would establish a precedent that oversteps the limits of the Board's authority to regulate hydroelectric projects subject to FERC jurisdiction, and which attempts to unlawfully broaden the state's authority under section 401 of the Clean Water Act.

Petitioner Merced Irrigation District (Petitioner) owns and operates the Merced River Hydroelectric Project (Project), FERC Project No. 2179. The Project is licensed by FERC, and the license will expire on February 28, 2014. Petitioner has initiated the relicensing process with FERC, but has not yet submitted an application for water quality certification to the Board. The Board issued the Investigation Order to Petitioner on January 28, 2011. The Investigation Order and transmittal correspondence were prepared pursuant to Water Code section 13383, and state that failure to comply with the Investigation Order could result in civil liability as described in Water Code section 13385. (Letter to Bryan Kelly from Barbara L. Evoy, Deputy Director, dated January 28, 2011; Investigation Order, at pp. 1, 15.) The Investigation Order also states that the Board is authorized to provide water quality certification for the Project under section 401 of the Clean Water Act (33 U.S.C. § 1341), as provided in Water Code section 13160, and that the information ordered is necessary to develop conditions for the section 401 water quality certification.¹ (Id.)

ARGUMENT

I. The Board should act on the Petition for Reconsideration because Petitioner raised substantial issues related to the causes for reconsideration.

Petitioner argues that there was an irregularity in the proceedings, or a ruling, or abuse of discretion, by which it was denied a fair hearing. In addition, Petitioner argues that the Investigation Order is not supported by substantial evidence and there was an error in law.

¹ The Board issued this Investigation Order pursuant to Water Code sections 13383 and section 13385, and purportedly pursuant to its delegated powers under section 401 of the federal Clean Water Act. The Investigation Order cites several other Water Code sections that purportedly provide the Board authority to require the submission of monitoring and technical reports (Investigation Order, at p. 1), but the Investigation Order does not appear to be issued on the basis of those other statutes.
Petitioner has raised substantial issues related to the causes for reconsideration provided in the
Board’s regulations. (See 23 CCR § 768.) For example, Petitioner has questioned the legal
authority of the Board to issue this Investigation Order and also the timeliness of the
Investigation Order, inasmuch as the Petitioner has not submitted an application for water quality
certification. Petitioner also raises the issue of the need for the information required by the
Investigation Order, given that most of the studies and information required by the Investigation
Order address water quality impacts not caused by the Project and which cannot possibly inform
a water quality certification decision for the Project. Finally, as addressed in more detail below,
Petitioner alleges that the Investigation Order is based on an error in law, in that the Board’s
authority to issue the Investigation Order is preempted by the Federal Power Act (FPA). (16
U.S.C. §§ 791a, et seq.)

PacifiCorp supports each of the arguments for reconsideration raised by Petitioner, and
concurs that there is more than adequate grounds for reconsideration. Moreover, important
policy considerations compel reconsideration of the Investigation Order. The critical question of
the Board’s jurisdiction and authority to require such studies and information from FERC-
licensed applicants must be resolved, as there are numerous large hydroelectric project
relicensings currently underway in California. It is imperative that the Board act consistent with
the rationale set forth in California v. Federal Energy Regulatory Commission, viz., that the state
may not impose burdensome regulatory and informational requirements on FERC licensees and
license applicants pursuant to state laws, because FERC occupies the field of regulation of such
projects under the FPA. (California v. Federal Energy Regulatory Comm’n, 495 U.S. 490, 506
(1990) (California v. FERC); See also Sayles Hydro Ass’n v. Maughan, 985 F.2d 451, 456 (9th
Cir. 1993) (Sayles Hydro).)

Accordingly, under the Board’s regulations contained in Title 23 of the California Code
of Regulations, Petitioner has shown cause for reconsideration under section 768, and the Board
should act on the Petition under section 770(a)(2). (23 CCR §§ 768, 770.)

II. The Board should set aside the Investigation Order because it is preempted by the
Federal Power Act.
The Board should set aside the Investigation Order because the Board is not authorized to regulate a federally licensed hydropower project under state law. The FPA preempts any authority the Board may have under state law to order studies of a FERC licensee, and the Board cannot avoid the preemptive effect of the FPA on the basis that Petitioner may ultimately submit an application for water quality certification pursuant to section 401 of the federal Clean Water Act. Moreover, even if Petitioner eventually files an application seeking water quality certification, the Investigation Order is outside the scope of the Clean Water Act and is issued solely pursuant to the Board’s authority under state law. Thus, the Board may not require Petitioner to conduct the studies and provide the information ordered by the Investigation Order because section 13383 and other requirements of the Water Code are preempted by the FPA.


The FPA preempts state regulatory authority as it applies to federally licensed hydropower projects. The federal courts have conclusively established that the FPA occupies the field of regulation for hydropower projects subject to the FPA, except for state authority to regulate proprietary rights to water associated with those projects. (California v. FERC, 495 U.S. at 499, citing First Iowa Hydro-Electric Coop. v. Power Comm’n, 328 U.S. 152 (1946) (First Iowa); Sayles Hydro, 985 F.2d at 456.) In field preemption, “the federal role is so pervasive that no room is left for the states to supplement it.” (Sayles Hydro, 985 F.2d at 455.) And if a state attempts to supplement the federal role with state requirements, it would “interfere with the Commission’s balancing of competing considerations in licensing,” and “disturb and conflict with the balance embodied in that considered federal agency determination.” (California v. FERC, 495 U.S. at 506.)

State laws authorizing state agencies to impose studies and costs for studies likewise are preempted by the FPA because they add additional burdens to the federally licensed project. The California First District Court of Appeal recently held that the FPA preempts the application of waste discharge requirements to FERC licensed projects. (Karuk Tribe of Northern California v. California Regional Water Quality Control Bd. (2010) 183 Cal.App.4th 330 (Karuk).) The Court cited a similar Wisconsin case involving FPA preemption: “Although the Wisconsin
statute is directed only to the payment of the cost of studies... it adds another requirement and an additional cost to the securing of a license” and to the extent it is an economic deterrent, it “can be construed as an implicit ‘veto power’ by the state similar to laws requiring applicants to meet more stringent state requirements than those provided by the federal licensing scheme.” (Karuk, 183 Cal.App.4th at 358, quoting Wisconsin Valley Improvement Co. v. Meyer (W.D.Wis. 1996) 910 F.Supp. 1375, 1382-1383.) Likewise, in Sayles Hydro, a case involving the Board, the Ninth Circuit Court of Appeal held that federal preemption prohibits the Board from requiring environmental studies from a federally licensed hydropower project, explaining: “The hardship is the process itself. Process costs money.” (985 F.2d at 454-456.)

B. Section 401 of the Clean Water Act Does Not Save the Application of Preempted State Laws.

The Investigation Order suggests that because Petitioner ultimately may apply to the Board for a water quality certification for the Project pursuant to section 401 of the Clean Water Act, the Investigation Order is an exercise of the Board’s water quality certification authority and thus is not preempted by the FPA. This is not correct for the obvious reason that the Petitioner has not submitted an application for water quality certification, and therefore that process has not commenced. Clean Water Act section 401(a) provides that an applicant for a federal license “shall provide the licensing or permitting agency a certification from the State in which the discharge originates.” (33 U.S.C. § 1341(a).) FERC regulations require that an application for water quality certification be submitted no later than 60 days after FERC determines that the application for license meets its requirements and the application is ready for environmental analysis. (18 CFR §§ 5.22, 5.23). The FERC licensing process drives the timing of the section 401 water quality certification, and until the Board receives an application for water quality certification, it has no authority over FERC-licensed projects under Clean Water Act section 401. The Board’s own regulations confirm that the trigger for review and action under section 401 arises “[u]pon receipt of the application” by the Board. (23 CCR § 3835(a); See also 23 CCR §§ 3836, 3859, 3860(b).)

Even if Petitioner had a pending application for water quality certification, the requested
studies and monitoring are still preempted because the Board’s water quality certification
authority must be exercised within and consistent with the FERC licensing process. (Karuk, 183
Cal.App.4th at 360.) The Board recognized this limitation in the recent Karuk case, where it
argued that while the state has authority to apply its water quality certification requirements in a
FERC relicensing proceeding, the initiation of the relicensing “does not lift the Federal Power
Act preemption that applies to independent state law.” (Karuk, 183 Cal.App.4th at 340, fn 6.)
Even if the Board were acting on an application for water quality certification, it could not order
the studies under independent state law procedures such as Water Code section 13838.

The FPA sets forth requirements for an application, and FERC may require the applicant
to perform certain studies, the results of which will be included in the license application. FERC
provides an opportunity for the Board to participate in the Study Plan Determination process,
through which it might obtain information concerning the certification before receiving an
application. (18 CFR §§ 5.9-5.14.) In this case, many of the studies ordered in the Investigation
Order were already requested by the Board in a notice of study dispute, which requested
additional studies the Board claimed pertain “directly to the exercise of their authorities under…
section 401 of the Clean Water Act.” (18 CFR § 5.14.) FERC determined the requested studies
to be unnecessary because they lacked a nexus with project operations and/or would not be
useful in developing license conditions or supporting section 401 certification conditions. (See
Study Plan Determination (September 14, 2009); See also Director’s Formal Study Dispute
Resolution Determination (December 22, 2009).) The Board cannot rely on state law authority
to circumvent this determination and order Petitioner to conduct these studies now.

The Board is limited in its authority to obtain information by Clean Water Act section
401 and state implementing regulations. Section 401 of the Clean Water Act does not prescribe
any informational or study requirements of a water quality certification applicant, nor does it
expressly authorize the state to order such information or studies. Under the Clean Water Act,

2 Congress has set forth the contents of an application for federal license in section 9 of the Federal Power Act. Section 9(c) permits FERC to secure from the applicant “[s]uch additional information as the commission may require.” (16 U.S.C. § 802(c).) As the court in First Iowa explained: “This enables [FERC] to secure, in so far as it
dems it material, such parts or all of the information that the respective States may have prescribed in state statutes
as a basis for state action.” (328 U.S. at 169.)
the state’s authority to impose measures or requirements on a water quality certification applicant is limited to the water quality certification itself. (33 U.S.C. § 1341(d).) The Board has promulgated procedural regulations describing the informational requirements for applications for certification. Those regulations authorize the Board, upon receipt of an application, to review the application for completeness pursuant to the requirements set forth in the Board’s regulations. (23 CCR §§ 3835, 3856.) If the application is not complete, the Board may notify the applicant within 30 days of any additional information necessary. (23 CCR § 3835(a).) If the application is deemed complete, the Board may request further information, but only to supplement the contents of the application. (23 CCR § 3836.) Water Code section 13383 does not represent federal authority delegated to the state pursuant to section 401 of the Clean Water Act. Rather, Water Code section 13383 is an independent state law which provides that monitoring and inspection may be requested of a discharger as authorized by one of the following Water Code sections: 13160, 13376, or 13377. If authorized by one of these statutes, the Board may then require monitoring, reporting and other information from any person who discharges or proposes to discharge to navigable waters. (Water Code § 13383.) Water Code sections 13376 and 13377 are clearly inapplicable in this case, as those sections authorize the Board to issue National Pollutant Discharge Elimination System (NPDES) permits and dredge and fill material permits, which are not required for the hydroelectric facilities at issue. Water Code section 13160 authorizes the Board to perform functions delegated to the state by the federal Clean Water Act, including issuance of water quality certifications. As discussed above, however, the Clean Water Act does not authorize the state to impose a broad array of studies on the applicant prior to the issuance of a water quality certification decision, as the Board attempts to do here. As such, the Board is not acting pursuant to Clean Water Act authority delegated through Water Code section 13160, but is acting solely under state water quality laws which are preempted by the FPA.3

3 The Legislature’s placement of section 13383 within Chapter 5.5 of Division 7 of the Water Code, providing the Board’s authority to issue NPDES and dredge and fill material discharge permits, further supports the conclusion that Water Code section 13383 is inapplicable to water quality certifications for facilities that do not need to obtain

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III. The Investigation Order is Overbroad

Even if the Investigation Order was not premature, the information requested by the Board is overbroad. Accordingly, in addition to setting aside the Investigation Order, the Board should limit the scope of any future informational requirements that may be requested under the Board’s water quality certification authority. The information requested of a water quality certification applicant must be limited to the scope of the application, and must relate to water quality impacts caused by the hydroelectric facilities being licensed. The Board’s own regulations state that additional information requested after receipt of a complete application is limited to information to “clarify, amplify, correct, or otherwise supplement the contents of a complete application in order for the certifying agency to determine whether a certification should be issued.” (23 CCR § 3836.)

After reviewing, analyzing and considering a section 401 water quality certification application, and any required environmental documentation, the Board may then take action to issue or deny certification for the project. If certification is issued, the Board may include measures to ensure compliance with applicable water quality standards. The Board does not define the scope of the application, and may not unilaterally expand the scope of the activity examined under the application. (23 CCR § 3859.)

The information requested by the Investigation Order is overbroad. The Investigation Order seeks to obtain information on water quality and water quantity issues that are unrelated to water quality impacts from the Project. For example, the Investigation Order requires studies of irrigation return flow, sampling fish for mercury concentrations, and sampling for pesticides in the San Joaquin River. The Investigation Order is particularly focused on water quality impacts

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4 The application of the California Environmental Quality Act (CEQA) to water quality certifications for FERC-licensed projects is uncertain after the court’s holding in Sayles Hydro, that CEQA is preempted by the FPA in a water rights proceeding for a FERC-licensed project. (229 F.2d at 454-456.) CEQA is a state law and not necessarily rescued from preemption when performed in conjunction with a water quality certification. If CEQA is not wholly preempted and is required for water quality certifications, then its application should be limited to the environmental impacts relevant to the certification and the potential effects of the project proposed for licensing as compared to existing environmental conditions. (See 14 CCR § 15125(a).)

5 An application for water quality certification may be denied when “the activity requiring a federal license or permit will result in a discharge which will not comply with applicable water quality standards and other appropriate requirements” (23 CCR § 3837(b)(1)).
related to fisheries resources. (Investigation Order, at p. 5.) However, the pollutants affecting the
fisheries are not introduced by the Project, but rather by agricultural run-off during rain events
and irrigation return flows. (Investigation Order, at p. 4.) The Investigation Order attempts to
expand the relicensing proceeding for the Project to address anadromous fisheries resources and
instream flow in the Merced River and downstream, which are affected by a much broader set of
factors than the operation of the Project.

In conclusion, PacifiCorp concurs with Petitioner that the Board should act on the
Petition for Reconsideration, that sufficient grounds for reconsideration have been stated, and
that the Board should set aside Investigation Order, WR 2011-0003-EXEC.

DATED: March 24, 2011

Respectfully submitted,

By:  

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PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On March 24, 2011, I served the attached RESPONSE TO PETITION FOR RECONSIDERATION OF INVESTIGATION ORDER by electronic mail to each of the following:

Jennifer Watts, State Water Resources Control Board
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Barbara L. Evoy, Deputy Director, Division of Water Rights,
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 24, 2011, at Sacramento, California.

Patty Slomski

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