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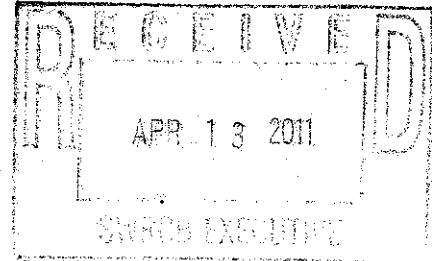
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April 13, 2011

Via electronic mail

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov



**Re: Draft Order Regarding Merced Irrigation District's Petition for
Reconsideration and Request for Stay of Investigation Order WR 2011-0003-
EXEC**

Dear Ms. Townsend:

This comment letter is submitted on behalf of PacifiCorp in response to the letter and Draft Order Denying Stay (Draft Order) issued by the State Water Resources Control Board (Board) on April 6, 2011. PacifiCorp submitted a response to Merced Irrigation District's (Petitioner's) Petition for Reconsideration of Investigation Order WR 2011-0003-EXEC (Investigation Order) on March 24, 2011, and remains interested in the outcome of this matter. As PacifiCorp explained in its response, the Board should reconsider and set aside the Investigation Order because the Board is preempted from ordering the studies pursuant to Water Code section 13383, and the Investigation Order is overbroad. The authority for this position is provided and discussed in PacifiCorp's response, and is not reiterated here.

The Draft Order states that it does not address the merits of the Petition for Reconsideration, and the notice letter requests comments regarding process, including whether the Board should hold a technical workshop. However, as addressed further below, certain analysis set forth in the Draft Order appear to presume that the studies will be ordered. Regarding the technical workshop, it is similarly premature to deal with technical issues, such as whether there is adequate time to complete the studies, prior to determining whether the Board has the authority to order the studies. Regardless, PacifiCorp does not object to a technical workshop, if Petitioner and other interested persons believe that it would be productive.

Although the Draft Order is purportedly limited to the request for stay, PacifiCorp disagrees with certain analysis in the Draft Order as it may relate to the ultimate outcome on the merits. For example, the Draft Order states that the 401 certification process is initiated when the Federal

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Energy Regulatory Commission (FERC) relicensing process is initiated. That statement is incorrect; while the Board may participate in the FERC process because it is a certification agency, the Board cannot initiate the certification process and does not have authority to act independently under section 401 until an applicant submits an application for a water quality certification. As explained below, the regulations cited by the Draft Order do not support the assertion made.

The FERC regulations cited in the Draft Order require a potential license applicant to distribute the notice of intent "to appropriate Federal, state and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding." (18 CFR § 5.5(c).) The FERC regulations also require a public scoping meeting and site visit to be held within 30 days of the notice of intent, the purpose of which is to "[r]eview, discuss, and finalize the process plan and schedule for pre-filing activity", including the study plan determination process, "and, to the extent reasonably possible, maximizes coordination of Federal, state, and tribal permitting and certification processes." (18 CFR § 5.8(d)(4) (emphasis added).) Neither of these federal regulations provide the Board authority to initiate the certification process or independently require studies prior to the submission of an application for water quality certification. The regulations simply require notice to the certification agency and coordination to the extent reasonable possible, including coordinating study requests within FERC's study plan determination process, which already occurred in Petitioner's case.

The Board regulation cited in the Draft Order provides that an application for a water quality certification be accompanied by a fee deposit for processing the application, which may include the Board's "reasonable costs incurred in anticipation of the filing of an application, including participation in pre-filing consultation and any investigations or studies to evaluate the impacts of the proposed activity, to the extent that these costs are reasonably necessary to process the subsequently filed application." (23 CCR § 3833(b)(2)(D).) The Board can seek reimbursement of costs "only after the applicant has submitted an application to the state board." (*Id.*) Board regulations also provide that "review in anticipation of consideration of certification" is initiated when a notice of intent is filed. (23 CCR § 3833.1(b)(2).)

"Review in anticipation of consideration of certification" is not the same as the initiation of the certification process. Pre-filing consultation is part of and driven by the FERC process, and the Board does not have authority to independently impose study requirements on applicants in this process. Moreover, a regulation promulgated by the Board clearly cannot broaden the Board's authority to act under Clean Water Act section 401, and does not initiate the certification process merely because the Board may recover costs of studies it determines to undertake itself and costs of its participation in the FERC relicensing process. Indeed, the validity of the anticipatory certification fee is suspect, as the federal courts have struck down similar state laws that impose fees and additional process on federally-licensed hydropower projects. (*See Sayles Hydro Ass'n v. Maughan* (9th Cir. 1993) 985 F.2d 451; *Wisconsin Valley Improvement Co. v. Meyer* (W.D. Wis. 1995) 910 F.Supp. 1375.)

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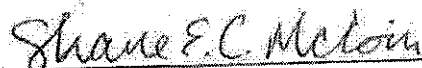
Even if the Board had received an application for water quality certification from Petitioner, the Investigation Order remains preempted because it was issued under independent state law and not pursuant to the Board's section 401 certification authority. The Draft Order does not discuss the substantial questions of law and fact raised in the Petition for Reconsideration regarding the Board's authority to order the studies and instead denies the stay by finding lack of harm to Petitioner and harm to others and the public interest. These findings, however, are based on the assumption that the studies were properly ordered in the first place and will eventually be required to be performed to completion.

The Draft Order concludes there will be a lack of harm to Petitioner if the stay is not granted by limiting Petitioner's costs to those solely attributable to the Investigation Order and those costs that will be incurred in the interim, pending resolution of the merits. The Draft Order requires a showing that the costs are extraordinarily high for a project of this magnitude. Requiring this showing in order to grant the stay assumes that the studies are properly ordered, without discussing the substantial questions regarding the Board's authority to order the studies at all which were raised by the Petition for Reconsideration. The Draft Order should have discussed all three factors.

The Draft Order argues that the Investigation Order should not be stayed, concluding there will be harm to others and the public interest by staying the Investigation Order because water quality in the Merced River is impaired. The Draft Order does not explain how the studies ordered would address or remedy the impairment *in the interim*. The Draft Order also argues that the Board needs the information in a timely fashion to avoid delay in the issuance of the certification which, in turn, can delay the issuance of the license. Although delay in the issuance of certifications and licenses can be problematic, potential delay is not an adequate justification to ignore the law. This justification for denying the requested stay also makes unsubstantiated assumptions in order to conclude that there will be harmful delay, to wit: (1) that the studies are necessary for the certification; and (2) that the studies will eventually be ordered on consideration of the merits of the Petition.

In conclusion, PacifiCorp remains interested in the outcome of this matter as it relates to the merits of the Board's authority to issue the Investigation Order. Thank you for your time and attention.

Sincerely,



Robert E. Donlan
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Attorneys for PacifiCorp