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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

1 Clean Water Act section 401, as PacifiCorp's water quality certification for FERC Project No.
2 2082 is but one of myriad regulatory and restoration processes currently underway in the
3 Klamath River watershed. PacifiCorp is concerned that the Investigation Order would establish
4 a precedent that oversteps the limits of the Board's authority to regulate hydroelectric projects
5 subject to FERC jurisdiction, and which attempts to unlawfully broaden the state's authority
6 under section 401 of the Clean Water Act.

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

20 ARGUMENT

21 **I. The Board should act on the Petition for Reconsideration because Petitioner raised** 22 **substantial issues related to the causes for reconsideration.**

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

26 _____
27 ¹ The Board issued this Investigation Order pursuant to Water Code sections 13383 and section 13385, and
28 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.

1 Petitioner has raised substantial issues related to the causes for reconsideration provided in the
2 Board's regulations. (See 23 CCR § 768.) For example, Petitioner has questioned the legal
3 authority of the Board to issue this Investigation Order and also the timeliness of the
4 Investigation Order, inasmuch as the Petitioner has not submitted an application for water quality
5 certification. Petitioner also raises the issue of the need for the information required by the
6 Investigation Order, given that most of the studies and information required by the Investigation
7 Order address water quality impacts not caused by the Project and which cannot possibly inform
8 a water quality certification decision for the Project. Finally, as addressed in more detail below,
9 Petitioner alleges that the Investigation Order is based on an error in law, in that the Board's
10 authority to issue the Investigation Order is preempted by the Federal Power Act (FPA). (16
11 U.S.C. §§ 791a, *et seq.*)

12 PacifiCorp supports each of the arguments for reconsideration raised by Petitioner, and
13 concurs that there is more than adequate grounds for reconsideration. Moreover, important
14 policy considerations compel reconsideration of the Investigation Order. The critical question of
15 the Board's jurisdiction and authority to require such studies and information from FERC-
16 licensed applicants must be resolved, as there are numerous large hydroelectric project
17 relicensings currently underway in California. It is imperative that the Board act consistent with
18 the rationale set forth in *California v. Federal Energy Regulatory Commission*, *viz.*, that the state
19 may not impose burdensome regulatory and informational requirements on FERC licensees and
20 license applicants pursuant to state laws, because FERC occupies the field of regulation of such
21 projects under the FPA. (*California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 506
22 (1990) (*California v. FERC*); *See also Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 456 (9th
23 Cir. 1993) (*Sayles Hydro*).

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

27 **II. The Board should set aside the Investigation Order because it is preempted by the**
28 **Federal Power Act.**

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

11 **A. The Preemptive Effect of the Federal Power Act.**

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

23 State laws authorizing state agencies to impose studies and costs for studies likewise are
24 preempted by the FPA because they add additional burdens to the federally licensed project. The
25 California First District Court of Appeal recently held that the FPA preempts the application of
26 waste discharge requirements to FERC licensed projects. (*Karuk Tribe of Northern California v.*
27 *California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330 (*Karuk*.) The
28 Court cited a similar Wisconsin case involving FPA preemption: "Although the Wisconsin

1 statute is directed only to the payment of the cost of studies... it adds another requirement and an
2 additional cost to the securing of a license” and to the extent it is an economic deterrent, it “can
3 be construed as an implicit ‘veto power’ by the state similar to laws requiring applicants to meet
4 more stringent state requirements than those provided by the federal licensing scheme.” (*Karuk*,
5 183 Cal.App.4th at 358, *quoting Wisconsin Valley Improvement Co. v. Meyer* (W.D.Wis. 1996)
6 910 F.Supp. 1375, 1382-1383.) Likewise, in *Sayles Hydro*, a case involving the Board, the Ninth
7 Circuit Court of Appeal held that federal preemption prohibits the Board from requiring
8 environmental studies from a federally licensed hydropower project, explaining: “The hardship is
9 the process itself. Process costs money.” (985 F.2d at 454-456.)

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

12 The Investigation Order suggests that because Petitioner ultimately may apply to the
13 Board for a water quality certification for the Project pursuant to section 401 of the Clean Water
14 Act, the Investigation Order is an exercise of the Board’s water quality certification authority and
15 thus is not preempted by the FPA. This is not correct for the obvious reason that the Petitioner
16 has not submitted an application for water quality certification, and therefore that process has not
17 commenced. Clean Water Act section 401(a) provides that an applicant for a federal license
18 “shall provide the licensing or permitting agency a certification from the State in which the
19 discharge originates.” (33 U.S.C. § 1341(a).) FERC regulations require that an application for
20 water quality certification be submitted no later than 60 days after FERC determines that the
21 application for license meets its requirements and the application is ready for environmental
22 analysis. (18 CFR §§ 5.22, 5.23). The FERC licensing process drives the timing of the section
23 401 water quality certification, and until the Board receives an application for water quality
24 certification, it has no authority over FERC-licensed projects under Clean Water Act section 401.
25 The Board’s own regulations confirm that the trigger for review and action under section 401
26 arises “[u]pon receipt of the application” by the Board. (23 CCR § 3835(a); *See also* 23 CCR §§
27 3836, 3859, 3860(b).)

28 Even if Petitioner had a pending application for water quality certification, the requested

1 studies and monitoring are still preempted because the Board’s water quality certification
2 authority must be exercised within and consistent with the FERC licensing process. (*Karuk*, 183
3 Cal.App.4th at 360.) The Board recognized this limitation in the recent *Karuk* case, where it
4 argued that while the state has authority to apply its water quality certification requirements in a
5 FERC relicensing proceeding, the initiation of the relicensing “does not lift the Federal Power
6 Act preemption that applies to independent state law.” (*Karuk*, 183 Cal.App.4th at 340, fn 6.)
7 Even if the Board were acting on an application for water quality certification, it could not order
8 the studies under independent state law procedures such as Water Code section 13383.

9 The FPA sets forth requirements for an application, and FERC may require the applicant
10 to perform certain studies, the results of which will be included in the license application.² FERC
11 provides an opportunity for the Board to participate in the Study Plan Determination process,
12 through which it might obtain information concerning the certification before receiving an
13 application. (18 CFR §§ 5.9-5.14.) In this case, many of the studies ordered in the Investigation
14 Order were already requested by the Board in a notice of study dispute, which requested
15 additional studies the Board claimed pertain “directly to the exercise of their authorities under...
16 section 401 of the Clean Water Act.” (18 CFR § 5.14.) FERC determined the requested studies
17 to be unnecessary because they lacked a nexus with project operations and/or would not be
18 useful in developing license conditions or supporting section 401 certification conditions. (*See*
19 *Study Plan Determination* (September 14, 2009); *See also* *Director’s Formal Study Dispute*
20 *Resolution Determination* (December 22, 2009).) The Board cannot rely on state law authority
21 to circumvent this determination and order Petitioner to conduct these studies now.

22 The Board is limited in its authority to obtain information by Clean Water Act section
23 401 and state implementing regulations. Section 401 of the Clean Water Act does not prescribe
24 any informational or study requirements of a water quality certification applicant, nor does it
25 expressly authorize the state to order such information or studies. Under the Clean Water Act,

26 ² Congress has set forth the contents of an application for federal license in section 9 of the Federal Power Act.
27 Section 9(c) permits FERC to secure from the applicant “[s]uch additional information as the commission may
28 require.” (16 U.S.C. § 802(c).) As the court in *First Iowa* explained: “This enables [FERC] to secure, in so far as it
deems 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.)

1 the state's authority to impose measures or requirements on a water quality certification
2 applicant is limited to the water quality certification itself. (33 U.S.C. § 1341(d).) The Board
3 has promulgated procedural regulations describing the informational requirements for
4 applications for certification. Those regulations authorize the Board, upon receipt of an
5 application, to review the application for completeness pursuant to the requirements set forth in
6 the Board's regulations. (23 CCR §§ 3835, 3856.) If the application is not complete, the Board
7 may notify the applicant within 30 days of any additional information necessary. (23 CCR §
8 3835(a).) If the application is deemed complete, the Board may request further information, but
9 only to supplement the contents of the application. (23 CCR § 3836.)

10 Water Code section 13383 does not represent federal authority delegated to the state
11 pursuant to section 401 of the Clean Water Act. Rather, Water Code section 13383 is an
12 independent state law which provides that monitoring and inspection may be requested of a
13 discharger as authorized by one of the following Water Code sections: 13160, 13376, or 13377.
14 If authorized by one of these statutes, the Board may then require monitoring, reporting and
15 other information from any person who discharges or proposes to discharge to navigable waters.
16 (Water Code § 13383.)

17 Water Code sections 13376 and 13377 are clearly inapplicable in this case, as those
18 sections authorize the Board to issue National Pollutant Discharge Elimination System (NPDES)
19 permits and dredge and fill material permits, which are not required for the hydroelectric
20 facilities at issue. Water Code section 13160 authorizes the Board to perform functions
21 delegated to the state by the federal Clean Water Act, including issuance of water quality
22 certifications. As discussed above, however, the Clean Water Act does not authorize the state to
23 impose a broad array of studies on the applicant prior to the issuance of a water quality
24 certification decision, as the Board attempts to do here. As such, the Board is not acting pursuant
25 to Clean Water Act authority delegated through Water Code section 13160, but is acting solely
26 under state water quality laws which are preempted by the FPA.³

27 ³ The Legislature's placement of section 13383 within Chapter 5.5 of Division 7 of the Water Code, providing the
28 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

1 **III. The Investigation Order is Overbroad**

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

12 After reviewing, analyzing and considering a section 401 water quality certification
13 application, and any required environmental documentation,⁴ the Board may then take action to
14 issue or deny certification for the project.⁵ If certification is issued, the Board may include
15 measures to ensure compliance with applicable water quality standards. The Board does not
16 define the scope of the application, and may not unilaterally expand the scope of the activity
17 examined under the application. (23 CCR § 3859.)

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

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these permits.

24 ⁴ The application of the California Environmental Quality Act (CEQA) to water quality certifications for FERC-
25 licensed projects is uncertain after the court's holding in *Sayles Hydro*, that CEQA is preempted by the FPA in a
26 water rights proceeding for a FERC-licensed project. (229 F.2d at 454-456.) CEQA is a state law and not
27 necessarily rescued from preemption when performed in conjunction with a water quality certification. If CEQA is
28 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).)

1 related to fisheries resources. (Investigation Order, at p. 5.) However, the pollutants affecting the
2 fisheries are not introduced by the Project, but rather by agricultural run-off during rain events
3 and irrigation return flows. (Investigation Order, at p. 4.) The Investigation Order attempts to
4 expand the relicensing proceeding for the Project to address anadromous fisheries resources and
5 instream flow in the Merced River and downstream, which are affected by a much broader set of
6 factors than the operation of the Project.

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

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12 DATED: March 24, 2011

Respectfully submitted,

13
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1 PROOF OF SERVICE

2
3 I declare that:

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

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

11 Jennifer Watts, State Water Resources Control Board
12 *jwatts@waterboards.ca.gov*

13 Barbara L. Evoy, Deputy Director, Division of Water Rights,
14 State Water Resources Control Board
bevoy@waterboards.ca.gov

15 Bryan Kelly, Merced Irrigation District, Petitioner
16 *bkelly@mercedid.org*

17 Kenneth M. Robbins, Mason Robbins, Browning & Godwin,
18 Attorney for Petitioner
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19 I declare under penalty of perjury that the foregoing is true and correct and that this
20 declaration was executed on March 24, 2011, at Sacramento, California.

21
22 
Patty Slomski