



DENNIS J. HERRERA
City Attorney

DONN W. FURMAN
Deputy City Attorney

Direct Dial: (415) 554-3959
Email: donn.w.furman@sfgov.org

SENT VIA U.S. MAIL AND EMAIL TO

July 8, 2013

Tammy Vallejo
State Water Resources Control Board
Division of Water Rights
Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Comments on FERC/SWRCB Draft MOU

Dear Ms. Vallejo:

The City and County of San Francisco ("San Francisco") appreciates the opportunity to comment on the draft Memorandum of Understanding ("MOU") between the California State Water Resources Control Board ("SWRCB") and the Federal Energy Regulatory Commission ("FERC"),¹ which SWRCB noticed for public comment on June 10, 2013.² San Francisco currently participates as a stakeholder and intervener in FERC licensing matters and will participate in related Water Quality Certification ("WQC") proceedings that could affect the consumptive water supply of San Francisco and of the Bay Area communities that rely on water deliveries from San Francisco to serve their residents and businesses. San Francisco supports the goal of more efficient hydroelectric licensing and WQC processes that will reduce the costs and public resources necessary to participate in such proceedings, while assuring that the concerns of consumptive water users are properly addressed.

1. Purpose of the Draft MOU Is Not Achieved

The purpose of the draft MOU is to coordinate FERC and SWRCB pre-application activities, though the draft MOU addresses certain post-application activities as well. More specifically, the purpose of the draft MOU is to coordinate the procedures and schedules prior to the FERC's review of hydropower license applications and the SWRCB's review of water

¹ Memorandum of Understanding Between FERC and The California State Water Resources Control Board Concerning Coordination of Pre-Application Activities for Non-Federal Hydropower Proposals in California (June 10, 2013) available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/ferc_mou/docs/fercmou_final.pdf ("Draft MOU").

² Notice of Opportunity for Public Comment and Informational Item of Draft MOU at 2 (June 10, 2013) available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/ferc_mou/docs/fercmou_notice.pdf ("Notice").

Letter to SWRCB
Page 2
July 8, 2013

quality certification applications leading to National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) documents that meet each agencies' needs.

The draft MOU does not actually coordinate or streamline the process. In many instances, the draft MOU states the status quo regarding the SWRCB's participation in the FERC licensing process while at the same time asserting that the SWRCB has authority to require additional studies at any time in the licensing process. For example, the draft MOU states that the SWRCB will participate in FERC scoping meetings and study plan determination process, which it already does, but nonetheless, regardless of the outcome, may proceed using its own geographic scope and independently require additional studies. (See "Pre-Application Filing Activities Under the ILP," 1.b, 3.d, 3.e.) Similarly, there is no attempt to streamline the schedule or timelines for the licensing or certification processes, as the draft MOU states that while the SWRCB will attempt to request studies and information early in the licensing process, it may require any study or information at any time. ("Pre-Application Filing Activities Under the ILP," 1.b.) Although the SWRCB will participate in FERC's scoping process and should provide its recommendations regarding the alternatives and scope of analysis for the NEPA document at that time, the draft MOU states that the SWRCB will provide this information later, prior to the start of the post-filing activity. (See "Pre-Application Filing Activities Under the ILP," 5.) Identifying the information needed to inform the FERC licensing process and environmental analysis is the purpose of FERC's environmental scoping process and the Study Plan Determination and the appropriate forum and timing for other agencies to provide their input on to FERC.

Further, the draft MOU attempts to circumvent FERC's Study Plan Determination Process, stating that 35 days after the Study Plan Determination, the SWRCB may notify the applicant of additional studies that the SWRCB will require. (See "Pre-Application Filing Activities Under the ILP," 3.e.) FERC regulations provide that the SWRCB may dispute a Study Plan Determination and that the dispute resolution panel makes a recommendation to the Director of the Office of Energy Projects who has the final say whether to order the studies. (18 CFR 5.14(l).) The draft MOU appears to inject further process and additional opportunities for the SWRCB to attempt to obtain studies and information even after FERC has ruled that they are unnecessary, which will not improve coordination or streamline the process beyond what already occurs.

2. The Draft MOU Asserts Overbroad SWRCB Certification Authority

a. Timing of SWRCB's Certification Authority

The draft MOU states that it applies during the pre-application phase of FERC's licensing process, but the water quality certification process may not be initiated until later in the FERC process. FERC regulations require that an applicant submit a water quality certification to the state after FERC determines that the application for a license meets its requirements and the application is ready for environmental analysis. (18 CFR §§5.22, 5.23.) The SWRCB participates in the FERC process in anticipation of a water quality certification application, but the SWRCB cannot act on a water quality certification until it receives an application and determines that the application is complete. (23 CCR §§ 3833.1, 3835.) In several instances, the draft MOU implies that the SWRCB has authority to order studies and determine the alternatives and analyses required for the environmental document to issue a water quality certification even before it receives an application for water quality certification. (See "Pre-Application Filing Activities Under the ILP," 3.d, 3.e, 4.)

Letter to SWRCB
Page 3
July 8, 2013

The Federal Power Act preempts state authority to regulate federally-licensed hydropower projects. (*California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 506 (1990); *Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993).) The SWRCB is authorized by the federal Clean Water Act to assert regulatory control over federally-licensed projects in one instance: to issue a water quality certification. (33 U.S.C. § 401(a).) Although the SWRCB may have broad substantive authority when issuing a water quality certification, it is “subject to relatively narrow procedural limitations governing how and when that authority may be exercised.” (*Karuk Tribe of N. Cal. v. Cal. Reg'l Water Quality Control Bd.* (2010) 183 Cal.App.4th 330, 340, fn 6.) Independent state laws that authorize the SWRCB to order studies, obtain information, or conduct environmental analyses are preempted because they add additional requirements and costs to the securing of a license. (*Id.* at 358; *Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 454-456.) As such, the SWRCB has no authority to order studies or initiate an environmental review process for FERC license applicants who have not initiated the water quality certification process.

In addition, it is unclear at what point in relation to the water quality certification application the SWRCB intends to participate, where it is lead agency, in joint scoping meetings, present the alternatives and analyses that it has determined are necessary for issuance of the water quality certification to FERC and/or provide the preliminary terms and conditions of the water quality certification to FERC. (See “Pre-Application Filing Activities Under the ILP,” 2, 5, and “Post-Application Filing Activities Under the ILP,” 2.) As currently written, the draft MOU implies that these determinations might precede the water quality certification application, initiation of CEQA review, CEQA scoping process, and CEQA analysis. The SWRCB does not have authority to act on a water quality certification until it has a complete application, as noted above, and the CEQA process similarly is not initiated until there is a proposed project. CEQA requires that the SWRCB complete its environmental analysis prior to taking action to approve a project, and the SWRCB should not commit to a project or to particular features so as to effectively preclude alternatives or measures that otherwise would be considered under CEQA. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139.)

b. Scope of SWRCB's Certification Authority

The draft MOU states that the SWRCB has authority to order additional studies and use its own geographic scope of studies in order to issue a water quality certification and complete environmental review pursuant to CEQA, regardless of FERC's determinations or contents of FERC's NEPA document. (See “Pre-Application Filing Activities Under the ILP,” 1.b, 3.d, 3.e, 4.) The draft MOU does not specify clear boundaries or guidelines for resolving conflicts between FERC-required studies and those that the SWRCB believes are necessary, nor does it propose to limit studies to those necessary for the water quality certification.

While the SWRCB may impose conditions in a water quality certification that address the water quality impacts of the activity as a whole, “that authority is not unbounded.” (*PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology* (1994) 511 U.S. 700, 712.) The conditions must relate to water quality and be necessary “to ensure that the activity will comply with applicable water quality standards and other appropriate requirements.” (23 CCR § 3859(a); See 33 U.S.C. § 1341(d); See also 40 CFR § 121.2.) Even after a water quality certification application is submitted, the preemptive effect of the Federal Power Act continues to apply such that the SWRCB cannot rely on independent state law to authorize it to obtain information or order studies that will impose additional burdens on an applicant that are not strictly necessary to

Letter to SWRCB
Page 4
July 8, 2013

complete its water quality certification. The Clean Water Act only authorizes the SWRCB to impose monitoring as a condition of certification; it does not authorize the SWRCB to order any study or obtain any information or to complete environmental analysis at all, let alone environmental analysis of topics not related to water quality. (33 U.S.C. § 1341(d); Cf. Water Code §§ 13160, 13383 (authorizing the SWRCB to exercise authority delegated to it by the Clean Water Act, including any authority to impose monitoring.) The Clean Water Act authorizes states to adopt procedures for public notice and hearings on certification applications but not to expand the geographic scope or study plan beyond the effects being considered for the federal permit that requires certification. (33 U.S.C. § 1341(a)(1).) The SWRCB's own regulations only allow it to review an application for completeness, request information needed to complete the application or additional information to supplement the contents of the application. (23 CCR §§ 3835, 3836.)

In addition, the draft MOU contains a statement regarding baseline which does not appear to serve the purposes of the draft MOU since it unnecessarily provides an interpretation of CEQA and NEPA and asserts the SWRCB's position on its certification authority. First, the statement that the SWRCB's certification authority "extends to project-related impacts to water quality notwithstanding whether those impacts are due to existing conditions" is unclear as to what it means by "existing conditions." It appears to be an incorrect statement of certification authority because "existing conditions" could be those that are not caused by the project being licensed and section 401 clearly limits conditions to those "necessary to assure that any applicant... will comply with" applicable water quality requirements and not remedy "existing conditions" that it does not cause. Second, the NEPA standard for baseline and the CEQA standard for baseline are slightly different and speak for themselves such that the draft MOU should not attempt to provide a legal interpretation.³ (Compare 40 CFR § 1502.14(d) (NEPA requires a no action alternative as the baseline against which the action alternative is compared) and 14 CCR § 15125(a) (CEQA requires a description of physical environmental conditions as a baseline to determine the significant effects of the proposed project and its alternatives).) Finally, the SWRCB should not conflate a regulatory compliance standard with the baseline for environmental analysis under CEQA. The two are separate and distinct standards. Under CEQA, the SWRCB should analyze the potentially significant environmental impacts of the proposed project and its alternatives measured against the existing environmental setting. (14 CCR § 15125(a).) The determination of appropriate water quality certification conditions should be entirely separate from a determination of significant project impacts under CEQA because the two have such different procedural and substantive standards.

3. Clarification Needed Regarding Coordination of CEQA and NEPA Review and SWRCB Authority as a Responsible Agency

The draft MOU specifies in only a few instances where its provisions apply only to instances where the SWRCB is lead agency or where a single NEPA and CEQA document is being prepared. (See "Pre-Application Filing Activities Under the ILP," 2 and "Post-Application Filing Activities Under the ILP, 2.) Otherwise, the draft MOU apparently applies to situations

³ San Francisco recommends modifying the draft MOU section entitled "Baseline" as follows: *Pursuant to the Commission's policy and California case law, the current state of the environment, with existing project facilities, is one of the baseline conditions against which the proposed action and all alternatives in the environmental document(s) will be compared for purposes of NEPA and CEQA. In addition, the proposed action may be compared against other baselines, if appropriate.*

Letter to SWRCB
Page 5
July 8, 2013

where separate CEQA and NEPA documents are being prepared and the SWRCB is providing information to FERC in its role as an agency that may rely on the NEPA document in lieu of preparing a new CEQA document. (Pub. Res. Code § 21083.7.) The SWRCB has no authority to require certain alternatives or analyses to be included in the NEPA document. Yet, the draft MOU implies that the SWRCB has the authority to determine the appropriate alternatives and analyses for the environmental analysis, stating the SWRCB will notify the applicant of specific environmental analyses that should be included in the Final License Application and present alternatives and analyses to FERC for its environmental document. (See “Pre-Application Filing Activities Under the ILP,” 4, 5.) Similarly, the SWRCB has no authority to determine the alternatives and analyses to be included in the CEQA document where it is not the lead agency. Rather, a responsible agency under CEQA is limited to providing comments to the lead agency in response to the CEQA notice of preparation regarding the scope and content of environmental information which is germane to its statutory responsibilities, consult regarding significant environmental issues and reasonable alternatives and mitigation measures, and comment on the draft environmental document. (14 CCR §§ 15082(b), 15096(b)(2), (d).) The draft MOU should clarify when it applies to situations involving a joint CEQA/NEPA document and/or situations where the SWRCB is the lead CEQA agency.

4. SWRCB Should Clarify the Effect of the Draft MOU on its Ability to Challenge FERC’s Licensing Decisions

The MOU envisions that SWRCB and FERC will conduct joint scoping for the NEPA and CEQA processes and may, on a case-by-case basis, decide to generate a joint environmental document. Although the MOU does not indicate that such joint efforts would affect SWRCB’s ability to participate in the FERC licensing proceeding as an intervenor, FERC’s policy generally prohibits a “cooperating agency”⁴ under NEPA from intervening in the same proceeding as a party.⁵ Since party status is a prerequisite under the Federal Power Act to requesting rehearing of, and appealing, a FERC licensing order, this FERC policy essentially prevents cooperating agencies from challenging FERC’s licensing decisions.

⁴ 40 C.F.R. §§ 1501.6, 1508.5.

⁵ See, e.g., *Rainsong Co.*, 79 FERC ¶ 61,338, at n.18 (1997) (rejecting motion to intervene of U.S. Forest Service, which had served as a cooperating agency for NEPA purposes, because “staff of a cooperating agency is treated in some respects as though it were Commission staff, including having conversations and exchanging information that may not be put in the record, just as Commission staff properly shares predecisional information internally”); *Arizona Pub. Serv. Co.*, 94 FERC ¶ 61,076 (2001) (denying U.S. Department of Agriculture’s motion for late intervention in relicensing proceeding because the USDA’s Forest Service was a cooperating agency in preparing the NEPA Environmental Assessment for the project); Order No. 2002, P 300 (rejecting proposed rule that would allow cooperating federal agencies to intervene in licensing proceedings because “allowing federal agencies to serve both as cooperators and intervenors in the same case would violate the APA.”); *Broadwater Energy LLC*, 125 FERC ¶ 61,369, P10 (2008) (denying motion for late intervention of New York State Department of State, which had been a cooperating agency in a FERC gas proceeding, stating that the “prohibition does not end at some point in the proceeding (e.g., after the completion of the staff’s environmental analysis) nor is it based on the nature of the issues proposed to be raised on rehearing”); Letter from Lauren O’Donnell, Director of Division of Gas – Environment and Engineering to Shannon Coleman, Esq., Husch Blackwell Sanders LLP (Dec. 2, 2009), eLibrary No. 20091202-3028 (stating that “[t]he prohibition [on cooperating agencies intervening in FERC proceedings] applies to state and local agencies as well as federal agencies”).

Letter to SWRCB

Page 6

July 8, 2013

The underlying trigger for the prohibition on intervention and party status for cooperating agencies—*ex parte* access to internal FERC predecisional information during NEPA document preparation—seems to apply equally in at least some of the situations contemplated by the draft MOU, particularly when FERC and SWRCB prepare a shared environmental document. Before entering into the draft MOU, it should be clarified for SWRCB and the public: (1) whether or not working on a joint environmental document with FERC would preclude SWRCB from later intervening in the FERC proceeding or appealing the FERC licensing decision; and (2) if collaborating on a joint scoping meeting with FERC might, by itself, be sufficient to have that effect.

5. Public Information

The draft MOU provides several instances in which the SWRCB and FERC will discuss, consult, and share information. The draft MOU should clarify that it does not modify or preclude the application of any laws intended to provide for public participation or provision of information to the public in the FERC licensing process and SWRCB's environmental review or adjudicative decision in the water quality certification process.

Thank you for your time and consideration of these comments. San Francisco appreciates the need and benefit to better coordinate the FERC licensing and SWRCB water quality certification processes and the attempt to do so in this draft MOU.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Signed in original

Donn W. Furman
Deputy City Attorney

cc: Ellen Levin