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7 **Attorneys for the City and County of San Francisco**

8  
9 **BEFORE THE STATE OF CALIFORNIA**  
10 **STATE WATER RESOURCES CONTROL BOARD**

11  
12 In the Matter of Water Quality Certification ) CITY AND COUNTY OF SAN  
for Turlock Irrigation District and Modesto ) FRANCISCO'S PETITION FOR  
13 Irrigation District Don Pedro Hydroelectric ) RECONSIDERATION OF WATER  
Project and La Grange Hydroelectric Project - ) QUALITY CERTIFICATION  
14 Federal Energy Regulatory Commission )  
Project Nos. 2299 and 14581 )  
15 )

16 **I. Introduction**

17 Pursuant to California Code of Regulations, title 23, section 3867, the City and County of  
18 San Francisco, on behalf of the San Francisco Public Utilities Commission ("San Francisco"),  
19 respectfully petitions the State Water Resources Control Board ("SWRCB") to reconsider the Clean  
20 Water Act section 401 Water Quality Certification for the Turlock Irrigation District and Modesto  
21 Irrigation District (collectively, "Districts") Don Pedro Hydroelectric Project and La Grange  
22 Hydroelectric Project (collectively, "Project," or "Projects") released by the SWRCB's Executive  
23 Director on January 15, 2021.

24 San Francisco is the third largest supplier of water for domestic and municipal purposes in  
25 California, supplying water to over 2.7 million Bay Area residents and businesses, both directly and  
26 through wholesale agreements with other public entities in the Bay Area. Although San Francisco is  
27 not a licensee to the Projects, San Francisco stands to bear the brunt of the new flow conditions in  
28

1 the WQC because under the Fourth Agreement Between the City and County of San Francisco and  
2 the Turlock Irrigation District and the Modesto Irrigation District (“Fourth Agreement”), San  
3 Francisco could be responsible for providing up to 51.7 percent of the additional water compelled to  
4 be provided under the WQC.<sup>1</sup>

5 The requirements in the WQC could have catastrophic effects on San Francisco’s water  
6 supply, far greater than those that San Francisco would experience under either the Staff Alternative  
7 proposed in the Federal Energy Regulatory Commission’s (“FERC”) Final Environmental Impact  
8 Statement (“FEIS”)<sup>2</sup> for the licensing applications for the Projects, or as proposed in the SWRCB’s  
9 2018 Bay Delta Plan Amendment. The WQC could result in the total depletion of San Francisco’s  
10 water supplies during periods of drought, with devastating and likely unrecoverable socioeconomic  
11 and environmental impacts to the 2.7 million Bay Area residents and businesses who rely on these  
12 water supplies.

13 The SWRCB should rescind the WQC and withdraw it from the FERC record because it  
14 exceeds the SWRCB’s jurisdiction and is contrary to the law. First, the WQC improperly relies on  
15 an exemption from review under the California Environmental Quality Act (“CEQA”) that is not  
16 applicable here because there was “no substantial threat of waiver” of the one-year deadline under  
17 the Clean Water Act at the time the Executive Director issued the WQC. (Wat. Code §  
18 13160(b)(2)). Nor can the SWRCB rely on the Substitute Environmental Document (“SED”) for the  
19 December 2018 amendment to the Water Quality Control Plan for the San Francisco  
20 Bay/Sacramento-San Joaquin Delta Estuary (“Bay Delta Plan”) because (1) the SED does not  
21 address many of the conditions in the WQC and (2) the SED violates CEQA for the reasons set  
22

23 \_\_\_\_\_  
24 <sup>1</sup> The analysis in this Petition assumes a 51.7 percent flow contribution by San Francisco. As a  
25 water supply provider to approximately 2.7 million people and businesses throughout the Bay Area,  
26 San Francisco must utilize worst case scenarios for water supply planning purposes. In presenting  
27 the potential water supply, environmental, and socioeconomic effects from certain interpretations of  
28 the Raker Act and the Fourth Agreement, San Francisco does not waive arguments it may have  
about how the Raker Act or Fourth Agreement should or will be interpreted in future proceedings  
before the SWRCB, FERC, courts of competent jurisdiction, or in any other context.

<sup>2</sup> FERC, Final Environmental Impact Statement for the Hydropower Licenses, Don Pedro  
Hydroelectric Project, Project No. 2299-082—California La Grange Hydroelectric Project, Project  
No. 14581-002—California, EIS No. EIS-0293F (filed July 2020) (“FEIS”)

1 forth in multiple pending lawsuits, including in *San Joaquin Tributaries Authority v. Cal. State*  
2 *Water Res. Control Bd.*, Case No. CV62094 (filed Jan 10, 2019) (“Bay Delta Plan Lawsuit”). This  
3 Board may not circumvent the court’s review of the SED and the Bay Delta Plan through this WQC  
4 process.

5         Second, the WQC violates Section 401 of the Clean Water Act by imposing conditions that  
6 are unrelated to water quality impacts caused by Project discharges and are not based on any nexus  
7 between Project discharges and water quality requirements. The WQC also purports to give  
8 SWRCB staff authority to control Project operations through staff approval of plans that will be  
9 created, reviewed, approved, and implemented only *after* adoption of the FERC licenses for the  
10 Projects. This would make SWRCB staff the final arbiter of Project operations, which goes well  
11 beyond the limited authority granted to states under both section 401 of the Clean Water Act and  
12 under the Federal Power Act (16 U.S.C. § 791 et seq.).

13         Third, the WQC violates the Porter-Cologne Act and California water rights laws by failing  
14 to adequately consider and balance beneficial uses, unlawfully attempting to implement the  
15 objectives and Program of Implementation contained in the Bay Delta Plan, and failing to protect  
16 the Districts’ and San Francisco’s senior water rights and provide required due process.

17         Issuance of this wide-ranging WQC not only violates the law, it undermines ongoing  
18 negotiations for a “voluntary agreement” to implement the Bay Delta Plan. In its Resolution No.  
19 2018-0059 adopting the December 2018 Bay Delta Plan Amendment, this Board instructed its staff  
20 to bring a proposed voluntary agreement before the Board for its consideration by March 1, 2019.  
21 Since that time, San Francisco has worked diligently with the Districts and other agencies, non-  
22 governmental organizations, SWRCB staff, and resource agencies to develop the proposed  
23 Tuolumne River Voluntary Agreement (“TRVA”). San Francisco remains ready to enter into and  
24 begin implementation of the TRVA upon approval by the SWRCB. We urge the Board to rescind  
25 and withdraw the WQC, and hold the WQC in abeyance pending the outcome of the TRVA  
26 negotiations. If those negotiations are successful, the SWRCB should redraft the WQC to reflect the  
27 terms of the TRVA.

1 **II. Petitioner’s Information**

2 Per California Code of Regulations, title 23, section 3867, Petitioner submits the following  
3 information:

4 **1. Petitioner’s Contact Information:**

5 Michael Carlin, Acting General Manager  
6 San Francisco Public Utilities Commission  
7 525 Golden Gate Ave.  
8 San Francisco, CA 94102  
9 mcarlin@sfgwater.org  
10 (415) 934-5787

11 All correspondence to Petitioner should be directed to its attorneys:

12 San Francisco City Attorney’s Office  
13 c/o Nicholas Whipps  
14 1390 Market St., Suite 418  
15 San Francisco, CA 94102  
16 nicholas.whipps@sfcityattorney.org

17 Robert E. Donlan  
18 Ellison Schneider Harris & Donlan LLP  
19 2600 Capitol Avenue, Suite 400  
20 Sacramento, California 95816  
21 Telephone: (916) 447-2166  
22 RED@eslawfirm.com

23 **2. Action Being Challenged:**

24 SWRCB’s unlawful issuance on January 15, 2021 of the WQC in violation of state and  
25 federal laws. (See **Exhibit A**, attached).

26 **3. Date on Which Action Occurred:**

27 January 15, 2021.

28 **4. Statement of Reasons Why Action Was Improper:**

See Section III, below.

**5. Manner in Which Petitioner Is Aggrieved:**

Petitioner is aggrieved by the WQC because it contains conditions that threaten San Francisco’s water supplies, including but not limited to conditions regarding minimum instream flows, pulse flows, Bay Delta Plan Amendment unimpaired flow, Dry Year Management Operations Plan, ramping rates, Temperature Management and Monitoring Plan, Revised

1 Operations Plan, and Southern Delta Salinity. The WQC will directly impact San Francisco and the  
2 water supply available to millions of residents and workers in the San Francisco Bay Area. San  
3 Francisco could be responsible for more than half of the flows required in the WQC, which would  
4 cause significant socioeconomic and other related environmental impacts in the Bay Area, and  
5 would cause substantial economic impact to Bay Area residents and businesses reliant on SFPUC's  
6 regional water supplies.

7 **6. Specific Action Requested:**

8 San Francisco respectfully requests that the SWRCB grant San Francisco's Petition for  
9 Reconsideration, rescind the WQC, withdraw the WQC from the FERC record, and hold further  
10 consideration and issuance of a WQC in abeyance pending the outcome of ongoing TRVA  
11 negotiations.

12 **7. List of Other Interested Parties:**

13 FERC, Modesto Irrigation District, Turlock Irrigation District, all other parties that  
14 commented on the Draft WQC, and all petitioners and/or plaintiffs in pending challenges to the  
15 SWRCB's adoption of the Bay Delta Plan and SED.

16 **8. Statement That Petition Has Been Sent to Executive Officer and the  
17 Applicant<sup>3</sup>:**

18 Electronic copies of this Petition (including attachments) have been sent to the following  
19 persons:

20 Eileen Sobeck, Executive Director  
21 State Water Resources Control Board  
22 P.O. Box 100  
23 Sacramento, CA 95812-0100  
24 eileen.sobeck@waterboards.ca.gov

25 Bill Schwandt, General Manager  
26 Modesto Irrigation District  
27 1231 11th St.  
28 Modesto, CA 95354  
bill.schwandt@mid.org

Michelle Reimers, General Manager  
Turlock Irrigation District

<sup>3</sup> Note: as discussed herein, there is currently no pending application for Section 401 certification before the SWRCB, and, thus, there was no "applicant" for this WQC.

1 333 East Canal Drive  
2 P.O. Box 949  
3 Turlock, CA 95381  
4 mareimers@tid.org

5 **9. A Copy of a Request to the Executive Director for Preparation of the State**  
6 **Board Staff Record:**

7 A copy of the February 16, 2021 letter sent to the SWRCB Executive Director requesting  
8 preparation of the administrative record is attached to this Petition as **Exhibit B**.

9 **10. A Summary of the Manner in Which and to What Extent the Petitioner**  
10 **Participated in any Process Leading to the Action or Failure to Act in**  
11 **Question:**

12 On January 4, 2021, San Francisco timely submitted comments to the SWRCB on the Draft  
13 WQC which was published on November 30, 2020. On January 29, 2018, Petitioner sought and was  
14 ultimately granted intervention in the FERC proceedings for the Projects. San Francisco has  
15 actively participated in the FERC proceedings. San Francisco also commented on and participated  
16 extensively in the SWRCB proceedings on the Bay Delta Plan, and is a party to pending litigation  
17 challenging the 2018 Bay Delta Plan Amendment (See *San Joaquin Tributaries Authority v. Cal.*  
18 *State Water Res. Control Bd.*, Case No. CV62094 (filed Jan 10, 2019)).

19 **III. Statement of Reasons**

20 Per subdivision (d)(4) of California Code of Regulations, title 23, section 3867, San  
21 Francisco submits the following statement of reasons why the Executive Director's issuance of the  
22 WQC on January 15, 2021 was inappropriate or improper.<sup>4</sup>

23 **A. The WQC Will Severely Impact San Francisco's Water Supplies and Cause**  
24 **Unsustainable Rationing in the Bay Area**

25 As shown in Table 1, below and attached in further detail as **Exhibit F**, the WQC would  
26 potentially have devastating impacts on San Francisco's water supplies and irreparably compromise  
27 its ability to continue providing water service to 2.7 million Bay Area residents and businesses.  
28 Pursuant to a 1995 Agreement between San Francisco and the Districts (referred to as the "Side  
Agreement"), San Francisco is required to make annual payments to the Districts in return for the

<sup>4</sup> We also incorporate the Districts' Petition for Reconsideration and January 4, 2021 comments on the Draft WQC herein by reference.

1 Districts meeting all the minimum flow requirements FERC required as part of a 1996 amendment  
2 to the Districts' New Don Pedro FERC license. By its terms, the Side Agreement remains in effect  
3 only until FERC issues a new license for the Don Pedro Project.<sup>5</sup>

4 As of now, there is no agreement between San Francisco and the Districts to extend the Side  
5 Agreement, and as such, any potential extension remains speculative. Table 1 models impacts to  
6 water supplies using, inter alia, SFPUC's design drought sequence under (1) Base Case (2010  
7 NEPA base case demand), (2) the proposed Tuolumne River Voluntary Agreement, and (3) the  
8 WQC using normalized demand levels within San Francisco's service area of 238 mgd (present-day  
9 demand), as well as 265 mgd and 287 mgd (projected future demand).<sup>6</sup> Table 1 shows each  
10 rationing level under two scenarios: with a continuation of the existing "Side Agreement" and  
11 without such an agreement.

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27 <sup>5</sup> See April 12, 1995 Agreement Between San Francisco and the Districts. (Attached as **Exhibit D**).  
28 <sup>6</sup> Motion to Intervene and Comments and Recommendations of the City and County of San  
Francisco, eLibrary No. 20180129-5254 (filed on Jan. 29, 2018), Exh. 2. (Attached as **Exhibit E**).

**Table 1: Summary of SFPUC Water Supply Rationing<sup>7</sup>**

SFPUC Service Area Demand (MGD)	Base Case	Voluntary Agreement for the Tuolumne River (T-VA)	401 Water Quality Certification
Water Supply Rationing Required During Droughts Assuming Existing Side Agreement			
238	10%	10% to 20%	75% to 90%
265	10% to 20%	10% to 25%	80% to 90%
287	15% to 30%	20% to 35%	90%
Water Supply Rationing Required During Droughts Assuming No Side Agreement			
238	10% to 20%	20% to 30%	greater than 95%
265	10% to 25%	20% to 35%	greater than 95%
287	20% to 35%	30% to 45%	greater than 95%

Assuming the continuation of the Side Agreement, Table 1 shows the WQC would require rationing during single-year and extended periods of drought to range between 75 and 90 percent under present and future demand levels. Assuming no extension of the Side Agreement, San Francisco’s water supplies would become entirely depleted during times of drought under all present and future demand scenarios. The total loss of San Francisco’s water supplies during periods of drought would lead to unfathomable social, economic, and environmental impacts in the Bay Area.

<sup>7</sup> The rationing estimates in Table 1 are output from the Hetch Hetchy / Local Simulation Model, which models water supply and operations incorporating, inter alia, the SFPUC’s 8.5-year design drought sequence. For a detailed explanation of the Model and the SFPUC’s design drought, see Decl. Matt Moses in Support of Supplemental Comments of the City and County of San Francisco, Supplemental Comments of the City and County of San Francisco, eLibrary No. 20180522-5204 (filed on May 22, 2018), Exh. 2, att. 1 at 1-6 (attached as **Exhibit C**); City and County of San Francisco, Motion to Intervene & Comments & Recommendations, eLibrary No. 20180129-5254 (filed on Jan. 29, 2018), Exh. 4, Att. 1, at 1-3 (attached as **Exhibit E**). All fields in Table 1 that show a rationing of “greater than 95%” represent a total loss of all of San Francisco’s water supplies. When water supplies run to zero, as is the case under the WQC, SFPUC’s water supply models cease to function. For more detailed information describing these water supply impacts, see SFPUC, Water Supply Effects on SFPUC at 238, 265, and 287 MGD Systemwide Demand, attached as **Exhibit F**; SFPUC, SFPUC Analysis of Proposed Changes to Tuolumne River Flow Criteria (Mar. 14, 2017) at 3-4 (attached as **Exhibit H**).



1 **B. SWRCB Staff Released the WQC Prior to the Completion of Environmental**  
2 **Review, in Violation of the California Environmental Quality Act (“CEQA”)**

3 **1. The CEQA Exemption in Water Code Section 13160(b)(2) Does Not Apply**

4 SWRCB staff released the WQC without environmental review, relying on a recently  
5 enacted CEQA exemption in Water Code Section 13160(b)(2) that provides in relevant part:

6 The state board may issue the certificate or statement . . . before completion of the  
7 environmental review . . . if the state board determines that *waiting until completion*  
8 *of that environmental review to issue the certificate or statement poses a substantial*  
9 *risk of waiver of the state board’s certification authority under the Federal Water*  
10 *Pollution Control Act or any other federal water quality control law.*

11 (emphasis added). The waiver of certification authority referenced in Section 13160(b)(2) refers to  
12 Clean Water Act’s requirement that the SWRCB must “act on a certification request” within one  
13 year.<sup>8</sup>

14 Here, there was no “substantial risk of waiver of the state board’s certification authority”  
15 because there was no pending certification request as of January 15, 2021 when the SWRCB  
16 Executive Director issued the WQC. The Districts applied for a WQC first in 2018 and then again  
17 in 2019. SWRCB staff denied each application without prejudice, citing the need to complete  
18 environmental review before issuance of a WQC. If waiver had occurred, it would have occurred  
19 either by January 26, 2019 (the one-year deadline of the Districts’ first WQC application) or, at the  
20 latest, on April 22, 2020 (the one-year deadline of the Districts’ second WQC application).

21 The WQC states that Section 13160(b)(2) applies because, “[o]n October 2, 2020, the  
22 Districts petitioned FERC to issue a declaratory order finding that the State Water Board waived  
23 certification.” (Final WQC at 7). But the Districts’ petition to FERC argued that waiver had  
24 occurred nearly two years earlier, in January 2019. The fact that the Districts were asking FERC in  
25 October 2020 to determine whether waiver occurred two years prior did not create “a substantial  
26 risk of waiver of the state board’s certification authority” as of January 2021. In fact, in its October

27 <sup>8</sup> See 40 C.F.R. §§ 121.7(a); 121.9(a)(2)(i) (stating that waiver occurs where the SWRCB has  
28 “Fail[ed] or refus[ed] to act on a certification request within the reasonable period of time.”  
(emphasis added)); 33 U.S.C. § 1341(a)(1) (a reasonable period of time to “act on a request for  
certification . . . shall not exceed one year.”); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103-  
1104 (D.C. Cir. 2019) (failure by state to act on Section 401 certification application within one  
year resulted in waiver).

1 29, 2020 filing before FERC, the SWRCB itself argued that no waiver had occurred when it denied  
2 the Districts’ certification applications back in 2019 and 2020, respectively.<sup>9</sup> And on November 19,  
3 2020, the Districts formally withdrew their most recent request for certification. Absent a pending  
4 certification request, there simply was no basis on January 15, 2021 for the SWRCB to assert that a  
5 substantial threat of waiver existed. Accordingly, Water Code Section 13160 (b)(2) does not apply  
6 and the SWRCB was required wait until after completion of CEQA review before issuing the WQC.

7 **2. The SWRCB Cannot Rely on the Substitute Environmental Document for**  
8 **the Bay Delta Plan as the Environmental Document for the WQC**

9 Absent a CEQA exemption, the SWRCB cannot issue the WQC prior to completion of  
10 environmental review. Nor can the SWRCB rely on the SED for the 2018 Bay Delta Plan  
11 Amendment to issue this WQC because the SED only evaluated a small number of environmental  
12 impacts caused by the 45 conditions contained in the WQC.

13 Further, as San Francisco and the Districts have set forth in detail in their Petition in the Bay  
14 Delta Plan Lawsuit, the SED fails to comply with CEQA and is currently under court review. The  
15 SWRCB should not be allowed to circumvent that legal challenge by relying on the SED to issue  
16 this WQC.

17 **C. The WQC Exceeds the SWRCB’s Authority Under the Clean Water Act**

18 **1. The SWRCB Cannot “Issue” a WQC Without a Pending Application**

19 The Clean Water Act and implementing regulations authorize states to issue a WQC only  
20 when requested to do so by a license applicant.<sup>10</sup> The requirement for a pending request is  
21 fundamental to the certification procedure; without a pending request for certification that provides

22 \_\_\_\_\_  
23 <sup>9</sup> California State Water Resources Control Board’s Motion to Intervene and Comments on Turlock  
24 Irrigation District’s and Modesto Irrigation District’s Petition for Declaratory Order, eLibrary No.  
25 20201029-5212 (filed Oct. 29, 2020) (“SWRCB Opposition to Waiver”) (The SWRCB asserting  
26 that its denial of the Districts’ certification application “*does not* support [a] finding of waiver under  
27 the *Hoopa* decision or any other basis”); FERC, Declaratory Order on Waiver of Water Quality  
28 Certification, 174 FERC ¶ 61,042 (Jan. 19, 2021) (attached as **Exhibit G**).

<sup>10</sup> 40 C.F.R. §§ 121.7(a) (authorizing action by a certification authority on “a certification request”);  
121.9; Cal. Code Regs., tit. 23, § 3838(a) (authorizing executive director to act on “*applications for*  
certification”) (emphasis added); 3838(c) authorizing action on request for Section 401  
certification, “*unless the applicant in writing withdraws the request for certification*”) (emphasis  
added). As the SWRCB was not authorized to “issue” its WQC, this serves a further support that the  
CEQA exemption in Section 13160(b)(2) was inapplicable, here.

1 relevant and up-to-date details concerning the activities and discharges in question, the SWRCB’s  
2 certification may be based on incorrect assumptions or information. It is the Section 401  
3 certification applicant’s responsibility to ensure the SWRCB is provided this critical information.  
4 (See 40 C.F.R. § 121.5(b) (describing information required to be included in a certification  
5 request)). Without a pending certification request, the SWRCB has no authority to assume the  
6 activities and discharges to be certified or to issue a WQC. For this reason alone, the WQC should  
7 be rescinded.

8           **2.       Conditions in the WQC Exceed the State’s Authority to Regulate Point**  
9           **Source Discharges under Section 401**

10           Contrary to federal regulations, the WQC conditions the “activity as a whole,” and not just  
11 Project discharges. (Final WQC at 13). The U.S. Environmental Protection Agency (“EPA”)’s final  
12 rule issued in July 2020 provides that states are *not* authorized to condition “the activity as a whole,  
13 once the threshold condition, the existence of a discharge, is satisfied.” (EPA, Clean Water Act  
14 Section 401 Certification Rule, 85 Fed. Reg. 42210 at 42233-34, 42251-52 (July 13, 2020) (“EPA  
15 Final Rule”). Rather, the proper scope of Section 401 certification is to condition “the *discharge*  
16 from a federally licensed or permitted activity, *as opposed to the activity as a whole.*” (*Id.* at 42251  
17 (emphasis added)). The EPA rule provides that the “certifying authority’s review and action under  
18 section 401 is limited to water quality impacts to waters of the United States resulting from a  
19 potential *point source* discharge from a proposed federally licensed or permitted project.” (EPA  
20 Final Rule at 42233-34, 42251-52). For purposes of Section 401, “[d]ischarge . . . means a  
21 discharge from a point source into a water of the United States,” and “[w]ater quality requirements  
22 means applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or  
23 tribal regulatory requirements for point source discharges into waters of the United States.” (40  
24 C.F.R. § 121.1(f), (n)).

25           Here, several conditions in the WQC, including conditions 1.B, 1.C, 1.D, 2, 3, 5, and 8  
26 through 13, are not limited “to assuring that a discharge from a Federally licensed or permitted  
27 activity will comply with water quality requirements.” (40 C.F.R. § 121.3). Rather, the WQC states  
28 that it is conditioning the “activity as a whole,” and SWRCB staff made no attempt to evaluate or

1 quantify the water quality impacts of the Projects’ point-source discharges or even to establish a  
2 nexus between the Projects’ discharges and the WQC conditions.<sup>11</sup> For example, condition 3 of the  
3 WQC (Temperature) impermissibly contains a storage requirement. The storage levels of Project  
4 reservoirs are not “discharges” and, thus, minimum carryover storage is not a “water quality  
5 requirement” related to Project discharges.<sup>12</sup> Because numerous WQC conditions are not designed  
6 to assure the Projects’ point-source discharges comply with applicable water quality requirements,  
7 these conditions fall outside of the scope of the SWRCB’s authority under Section 401.

8 **3. The WQC Fails to Provide Adequate Justification for Each Condition as**  
9 **Required by the Clean Water Act**

10 Clean Water Act regulations require the SWRCB to provide justification for each condition  
11 in the WQC:

12 (d) Any grant of certification with conditions shall be in writing and *shall for*  
13 *each condition include*, at a minimum:

- 14 (1) For certification conditions on an individual license or permit,  
15 (i) A statement explaining why the condition is necessary to assure  
16 that the discharge from the proposed project will comply with water  
17 quality requirements; and

18 <sup>11</sup> See EPA Final Rule at 42253 (noting specific considerations that “should be excluded from the  
19 scope of certification . . . , such as effects caused by the presence of pollutants in a discharge *that are*  
20 *not attributable to the discharge from a federally licensed activity, effects attributable to features of*  
21 *the permitted activity besides the discharge, and effects caused by the absence or reduction of*  
22 *discharge*”) (emphasis added), 42257 (“certification conditions must be directly related to water  
23 quality impacts from the proposed project”); 40 C.F.R. § 121.7(d). For example, condition 3 goes  
24 well beyond remedying Project discharge impacts and thus exceeds the authority provided to the  
25 SWRCB under Section 401.

26 <sup>12</sup> Courts have held that reservoir management policies affecting the volume of water stored in an  
27 impoundment do not constitute a “discharge” that may be regulated under Section 401. See *North*  
28 *Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (“neither the withdrawal of water from the  
Lake nor the reduction in the volume of water passing through the dam turbines ‘results in a  
discharge’ for purposes of Section 401(a)(1).”); see also *Great Basin Mine Watch v. Hankins*, 456  
F.3d 955, 963 (9th Cir. 2006) (withdrawal of water from a stream does not constitute a discharge  
under the Clean Water Act); Storing water is the opposite of discharging it. See, *e.g.*, EPA Final  
Rule at 42257 (listing conditions that are likely “beyond the scope of certification,” including  
“building and maintaining fish passages, compensatory mitigation, temporal restrictions on  
activities to mitigate hazards or protect sensitive species, preconstruction monitoring and  
assessment of resources, habitat restoration, tree planting along waterways, *spill management plans*,  
stormwater management plans, and facilitating public access”) (emphasis added); see also EPA  
Final Rule at 42253 (noting specific considerations that “should be excluded from the scope of  
certification . . . , such as effects caused by the presence of pollutants in a discharge that are not  
attributable to the discharge from a federally licensed activity, effects attributable to features of the  
permitted activity besides the discharge, *and effects caused by the absence or reduction of*  
*discharge*”) (emphasis added), 42257 (“certification conditions must be directly related to water  
quality impacts from the proposed project”); 40 C.F.R. § 121.7(d).

1 (ii) A citation to federal, state, or tribal law that authorizes the  
2 condition.

3 (40 C.F.R. § 121.7(d) (emphasis added)).

4 The WQC fails to provide the information required for each condition. Instead of citing to  
5 specific “water quality requirements,” as that term is defined in 40 C.F.R. § 121.1, the WQC makes  
6 broad references to regulatory and environmental review documents and studies. See, *e.g.*, Final  
7 WQC at 13-17, 18-19 (nonspecific references to various documents)). Environmental review  
8 documents and studies are not “water quality requirements,” nor can the SWRCB claim that such  
9 references adequately justify the WQC conditions would assure the Projects’ point-source  
10 discharges comply with any applicable water quality requirements. (40 C.F.R. § 121.7(d)(1)(i)). In  
11 fact, most, if not all, of the WQC conditions are not tied to or based on “applicable provisions of §§  
12 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for  
13 point source discharges into waters of the United States.” (40 C.F.R. § 121.1(n)). For most of the  
14 WQC’s conditions, no such regulatory requirements exist. And, in the case of condition 1.D (Bay  
15 Delta Plan Unimpaired Flow Objective), this regulatory requirement is the subject of ongoing  
16 litigation.

17 **4. Conditions Purporting to Give SWRCB Enforcement Authority Are Invalid**

18 The WQC imposes the following conditions that exceed the SWRCB’s authority under  
19 Section 401 of the Clean Water Act by attempting to grant SWRCB staff enforcement authority,  
20 including authority to review and approve (or deny) a variety of plans *after* FERC issues the  
21 license:

- 22 • Condition 1.C: Would subject Project operations to decisions made by a newly  
23 formed “Tuolumne River Anadromous Fish Committee and the Lower San Joaquin  
24 River Watershed Group,” comprised of “State Water Board, California Department  
25 of Fish and Wildlife (CDFW), National Marine Fisheries Service (NMFS), United  
26 States Fish and Wildlife Service (USFWS), BLM, and other members identified by  
27 the Deputy Director.” (Final WQC at 48, 63).
- 28 • Condition 1.D: Reserves the right to the SWRCB to adaptively manage flows.

- Numerous conditions require the creation and filing with SWRCB of a series of studies and reports. Examples include: condition 11 (filing gravel augmentation reports); 12 (filing habitat improvement reports); 13 (predator suppression report); 14 (aquatic invasive species report); 15 (recreation facility report); 18.A (requiring the creation of an elaborate “comprehensive Tuolumne River monitoring, assessment, reporting, and special studies plan”); 18.B (annual summary reports), 18.C (peer-reviewed “comprehensive” report).

If allowed, such conditions would provide SWRCB staff authority to decide compliance with the majority of WQC conditions and Project operations, an authority that can be found nowhere in the Clean Water Act. Under the Clean Water Act, FERC is the sole entity with enforcement authority over the FERC license conditions, including the WQC.<sup>13</sup> Similarly, the SWRCB cannot, through a WQC, order the Districts to file ongoing reports or studies, as such conditions are not water quality requirements and doing so would improperly tread into FERC’s enforcement authority. (See, *e.g.*, EPA Final Rule at 42275, 42279).

**5. The WQC Also Cannot Include Conditions that Are Unenforceable by FERC**

The WQC also includes several conditions that fall outside of FERC’s jurisdiction:

- Condition 1.D: Water conditions in the Lower San Joaquin River and Bay Delta fall well outside of the Project boundaries and, therefore, fall outside of FERC’s jurisdiction to regulate or enforce.

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<sup>13</sup> 40 C.F.R. § 121.11(c) (“The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit”); EPA Final Rule at 42275 (“The CWA does not provide an independent regulatory enforcement role for certifying authorities. The role of the certifying authority is to review the proposed project and to either grant certification, grant certification with conditions, deny certification, or waive certification. Once the certifying authority acts on a certification request, section 401 does not provide an additional or ongoing role for certifying authorities to enforce certification conditions under federal law.”), 42279 (“section 401 certifications . . . are not subject to ongoing enforcement by certifying authorities”; likewise, “section 401 does not provide authority for a certifying authority to unilaterally modify a certification, either through certification conditions that purport to authorize the certifying authority to reopen the certification in the future or through any other mechanism.”).

- 1 • Condition 1.D: Compliance points for condition 1.D at Modesto and Vernalis fall  
2 well outside of the Project boundaries, FERC’s enforcement jurisdiction, and the  
3 Districts’ ability to control flows. (See Final WQC at 51 (setting Vernalis as a  
4 compliance point)). Flow conditions at these compliance points represent the  
5 cumulative activities of hundreds to thousands of water users, and water quality  
6 conditions at these locations cannot, therefore, be validly attributed to Project  
7 discharges.
- 8 • Condition 5: The compliance point for condition 5 (Vernalis) is dozens of miles  
9 away from the Projects’ discharges and falls well outside of Project boundaries and  
10 FERC’s enforcement authority.
- 11 • Condition 8.A: Compliance points at the confluence of the Lower Tuolumne River  
12 fall well outside of the Project boundary and, thereby, outside of FERC’s  
13 enforcement authority.

14 Compliance points that are dozens of miles downstream of the Districts’ discharges are not  
15 only inappropriate and irrelevant to the Projects’ point-source discharges, but such conditions fail to  
16 account for the Districts’ lack of control over tributary, Lower San Joaquin River, and Bay Delta  
17 water conditions at these proposed compliance points. Given that such conditions are unenforceable  
18 by FERC, and that the Clean Water Act vests FERC with sole enforcement authority, these  
19 conditions have no place in the WQC.

20 **D. The WQC Exceeds the SWRCB’s Authority Under the Federal Power Act**

21 **1. FERC Has Already Determined A Key Component of the WQC Is Not Best  
22 Adapted to A Comprehensive Plan for Improving the Tuolumne River**

23 The Federal Power Act requires that FERC licenses be “best adapted to a comprehensive  
24 plan for improving or developing a waterway or waterways . . . including . . . water supply.” (16  
25 U.S.C. § 803(a)(1); *U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 544-545 (D.C. Cir. 1992)); *Nat’l*  
26 *Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1483 (D.C. Cir. 1990)). In its FEIS, FERC staff rejected  
27 the Bay Delta Plan Unimpaired Flow Objective—which appears in the WQC as Condition 1.D—on  
28 the basis that it does not appropriately balance power and non-power values associated with the

1 operation of the Projects. (See FEIS at A-35 (reasoning that the 40% unimpaired flow proposal does  
2 not represent “the appropriate balance among all competing uses of water” on the Tuolumne  
3 River)).<sup>14</sup> The FEIS found that the Bay Delta Plan flows are not best adapted to a comprehensive  
4 plan for the Tuolumne River because they would result in far greater levels of water supply  
5 rationing—in the case of San Francisco, as high as 65 percent under 238 mgd and 265 mgd demand  
6 scenarios—and across more years than would occur under the FERC Staff Alternative. (See FEIS at  
7 3-454–3-455; Decl. Matt Moses in Support of Supplemental Comments of the City and County of  
8 San Francisco, Supplemental Comments of the City and County of San Francisco, eLibrary No.  
9 20180522-5204 (filed on May 22, 2018), Exh. 2, Att. 1 at 7-19 (attached as **Exhibit C**).

10 As condition 1.D, by itself, does not strike “the appropriate balance among all competing  
11 uses of water” on the Tuolumne River due to the high levels of rationing it would cause, the same is  
12 true for the WQC, which includes not only condition 1.D but multiple other conditions that severely  
13 harm San Francisco’s water supply, including conditions 1.B, 1.C, 2, 3, and 5. (FEIS at A-35). As  
14 shown in Table 1, *supra*, the flow conditions in the WQC could cause rationing to occur in more  
15 years and result in total depletion of San Francisco’s water supplies, or “100%” rationing during  
16 multi-year droughts. This level of rationing is far greater than the rationing that would be caused by  
17 Condition 1.D alone. 100% rationing for 2.7 million Californians and businesses during severe  
18 drought plainly fails the “best adapted” mandate of the Federal Power Act. As the WQC does not  
19 represent a plan that would be “best adapted . . . for improving or developing a waterway or  
20 waterways . . . including . . . water supply,” it cannot be incorporated into the FERC license in its  
21 current form. (16 U.S.C. § 803(a)(1); *U.S. Dep’t of Interior v. FERC*, *supra*, 952 F.2d at 545; *Nat’l*  
22 *Wildlife Fed’n v. FERC*, *supra*, 912 F.2d at 1483.

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27 <sup>14</sup> SWRCB staff never attempted to refute the conclusion that the Staff Alternative would improve  
28 aquatic habitat conditions compared to baseline conditions. As all of the conditions in the WQC are  
designed to enhance conditions beyond this improvement, none of these conditions can be viewed  
as mitigation and, thus, fall outside of the scope of the SWRCB’s section 401 certification authority.



1                   **2.       Conditions Purporting to Grant the SWRCB Planning Authority and**  
2                   **Control over Project Operations Violate the Federal Power Act**

3                   States, through issuance of WQCs or otherwise, are not allowed to “interfere with [the]  
4 comprehensive planning authority” provided to FERC under the Federal Power Act. (*California v.*  
5 *FERC* (1990) 495 U.S. 490, 506-507; see also, 16 U.S.C. § 791a et seq.). Several conditions,  
6 including 1.E, 1.F, 2, 3, and 5 through 16 of the WQC violate the Federal Power Act because they  
7 would require FERC to cede near-total control of Project planning and operations to SWRCB staff  
8 after FERC has approved the Project licenses. Certain of these conditions provide:

- 9                   • Conditions 1.E and 1.F unlawfully attempt to usurp FERC’s planning, operations  
10 management, and enforcement authority over the Project licenses by requiring the  
11 Districts to submit compliance and operations plans for SWRCB review and  
12 approval.
- 13                   • Conditions 1.G and 4 unlawfully attempt to usurp FERC’s authority to ensure the  
14 proper operation of the Projects and to ensure compliance with license conditions by  
15 compelling the creation of a Dry Year Management Operations Plan and forcing the  
16 Districts to seek discretionary relief from the SWRCB during periods of extended  
17 drought, in the form of a Revised Operations Plan.
- 18                   • Condition 2: The WQC says condition 2 can be modified by the State-controlled  
19 Tuolumne River Anadromous Fish Committee at any time during the life of the  
20 license, which would unlawfully usurp FERC’s and U.S. Army Corps of Engineers’  
21 jurisdiction over this aspect of Project operations.
- 22                   • Condition 3: The requirement for Project operations to be subject to “a collaborative  
23 effort through the Tuolumne River Watershed Group . . . to identify *comprehensive*  
24 *reservoir operation requirements*, including carryover storage, needed to maintain  
25 suitable downstream temperature targets” is an unlawful attempt to assume full  
26 control over the operation of the Projects, in violation of the Federal Power Act and  
27 is beyond the allowable scope of a WQC condition. (Final WQC at 57 (emphasis  
28 added)).

- Condition 5: It is impermissible for SWRCB staff to reserve the authority to dictate Project operations through forced monthly consultation with SWRCB staff and by ordering the “curtailment” of the Districts’ diversions at SWRCB staff’s discretion. (Final WQC at 62).
- Condition 8.A requires the Districts to submit an Annual Operations Plan that would be reviewed and approved exclusively by SWRCB staff, and SWRCB staff would have the ability to “require modifications as part of any approval.” (Final WQC at 65).

The requirements in the WQC for the Districts to establish committees and attend planning meetings controlled by state entities and to make a wide variety of plans for post-licensing review, approval, and implementation by SWRCB staff that would dictate almost every aspect of the operation of the Projects invades FERC’s exclusive planning authority. Furthermore, requiring the later development of plans subject to exclusive post-license-issuance review, approval, and implementation by the SWRCB is tantamount to requiring the Project applicants to obtain a variety of permits from the SWRCB after FERC has issued a license. These conditions would effectively grant SWRCB staff “a veto power over the federal project,” and unlawfully “subordinate to the control of the State the ‘comprehensive’ planning which the Act provides”—a result that the Federal Power Act does not allow. (*First Iowa Hydro-Elec. Co-op. v. Federal Power Commission* (1946) 328 U.S. 152, 164).

**E. The WQC Unlawfully Attempts to Implement Components of the Bay Delta Plan, in Violation of the Porter-Cologne Water Quality Control Act**

The WQC incorporates two water quality objectives from the 2018 Bay Delta Plan Amendment—the unimpaired flow and salinity objectives—which were unlawfully adopted for the reasons set forth in the Bay Delta Plan lawsuit<sup>15</sup> and cannot be implemented in this WQC. Furthermore, several conditions in the WQC unlawfully seek to compel compliance with

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<sup>15</sup> See, e.g., Bay Delta Plan Lawsuit, 1st, 4th, 12th, 15th, 16th, 19th, 21st, 22nd, and 26th Causes of Action.

1 components of the Bay Delta Plan’s Program of Implementation (“POI”) in excess of the SWRCB’s  
2 authority under Section 401 and the Porter-Cologne Water Quality Control Act:

- 3 • Condition 1.D (Bay Delta Plan unimpaired flow) reserves authority for SWRCB staff  
4 to dictate that the Projects adaptively implement the unimpaired flow objective in a  
5 manner described in the POI and inconsistent with the unimpaired flow objective.  
6 (Final WQC at. 25-26, 50 (allowing SWRCB staff to compel that the flow be  
7 “adjusted, shaped, or shifted”).
- 8 • Condition 3 (Temperature) impermissibly implements another recommendation in  
9 the POI by requiring carryover storage.<sup>16</sup>
- 10 • Conditions 9, 11, 12 all require habitat improvements and would similarly implement  
11 a recommendation in the POI. (See Bay Delta Plan at 23 (listing “habitat restoration”  
12 as a recommended means of achieving protection of fish and wildlife beneficial  
13 uses)).

14 These components of the POI are not “water quality standards” adopted pursuant to section  
15 303 of the Clean Water Act, nor are they “water quality requirements” pursuant to Section 401 of  
16 the Clean Water Act. (40 C.F.R. §§ 121.1(f), (n); 121.3) and, thus, fall outside of the scope of the  
17 SWRCB’s authority under Section 401 of the Clean Water Act and have no place in a WQC.<sup>17</sup> This  
18 is because the POI is not regulatory and serves only as a series of *recommendations* to other  
19 agencies. As set forth in *United States v. State Water Resources Control Board*, the Porter-Cologne  
20 Water Quality Control Act grants the SWRCB “little or no control” over how other agencies with  
21 the authority to implement water quality objectives choose to do so.<sup>18</sup> The SWRCB’s authority to  
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23 <sup>16</sup> *E.g.*, Final WQC at 57-61; Bay Delta Plan at 24; separately, it is unlawful for SWRCB staff to  
24 attempt to prescript storage capacity in the Districts’ reservoirs as a WQC condition or otherwise.  
(See, *e.g.*, Cal. Code Regs, tit. 23, §§ 780(b)(1); 784(b); see also Bay Delta Plan Lawsuit, 29th  
25 Cause of Action).

26 <sup>17</sup> Similarly, the SWRCB cannot require compliance with new numeric water quality criteria  
27 without first complying with state and federal regulations that dictate the procedure for  
28 promulgation of new water quality criteria, as was required, for example, with condition 3. (33  
U.S.C. § 1313(d); Water Code § 13000 et seq.; Gov. Code § 11340 et seq.).

<sup>18</sup> *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 123-125, citing  
Wat. Code §§ 13140, 13142, 13225, 13240 (The SWRCB has no authority to enforce with water  
quality objectives; instead it must rely on its authority to regulate “water rights to control

1 assure compliance with water quality objectives is “limited to *recommending* actions by other  
2 entities,” not compelling that certain actions be taken. (*United States v. State Water Resources*  
3 *Control Bd.*, *supra*, 182 Cal.App.3d at 124, citing Wat. Code § 13242(a) (emphasis in original)).  
4 The SWRCB conceded this point in its response to comments on the Bay Delta Plan. (See SED,  
5 Master Response 5.2, p. 7 (admitting that the SWRCB’s regulatory authority is limited to “flow-  
6 related objectives” and does not extend to “non-flow actions,” such as managing reservoir  
7 operations, storage, or implementing recommendations of the Program of Implementation)).

8 All WQC conditions that compel compliance with the recommendations of the POI are not  
9 independent requirements of State law and, thus, go beyond the SWRCB’s authority to condition  
10 the Projects. (See generally, Bay Delta Plan Lawsuit; *United States v. State Water Resources*  
11 *Control Bd.*, *supra*, 182 Cal.App.3d at 124 (citing Wat. Code § 13242) (The SWRCB’s “authority  
12 to implement water quality standards seems limited to *recommending* actions by other entities,” as  
13 opposed to compelling such actions to be taken)).

14 **F. The WQC Fails to Adequately Consider and Weigh Beneficial Uses in Violation of**  
15 **the Porter-Cologne Water Quality Control Act**

16 Section 13000 of the Water Code requires the SWRCB to balance beneficial uses when  
17 implementing water quality objectives. (See also, Wat. Code §§ 13241; 13170 (requiring that the  
18 Board comply with Water Code sections 13240 through 13244 when adopting water quality control  
19 plans)). In this balancing, the SWRCB must seek “the highest water quality which is reasonable,  
20 considering all demands being made and to be made on those waters and the total values involved,  
21 beneficial and detrimental, economic and social, tangible and intangible.”<sup>19</sup> The Water Code also

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23 diversions”). In addition, the POI recommendations cannot be implemented because they  
24 unlawfully allow deviation from the water quality objectives without undergoing the necessary plan  
25 amendment proceedings. In the Bay Delta Plan Lawsuit, petitioners objected to the Program of  
26 Implementation because the POI fails to describe the actions necessary to achieve water quality  
27 objectives as required by law, unlawfully allows SWRCB staff to unilaterally deviate from water  
28 quality objectives, and overstates the SWRCB’s authority to implement the Bay Delta Plan. (See  
Bay Delta Plan Lawsuit, 6th, 8th, and 9th Causes of Action; Wat. Code § 13242).

<sup>19</sup> Wat. Code § 13000; see also Wat. Code § 13050(f) (“‘beneficial uses’ of the waters of the state  
that may be protected against quality degradation include, but are not limited to, *domestic*,  
*municipal*, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment;  
navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or  
preserves”) (emphasis added); and Wat. Code § 1257 (The SWRCB “shall consider the *relative*

1 provides that, “*domestic use* is the highest use and irrigation is the next highest use of water,” and  
2 that “the use of water for the municipality or the inhabitants thereof for domestic purposes *shall be*  
3 *considered first in right*, irrespective of whether it is first in time.” (Wat. Code §§ 1254, 1460  
4 (emphasis added); see also Cal. Code Regs., tit. 23, §§ 660 (definition of “domestic use”), 663  
5 (definition of “municipal use”); *Meridian Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450).

6 Several conditions, including 1.D, 4, and 5, implement portions of the Bay Delta Plan and,  
7 for the same reasons as set forth in the Bay Delta Plan Lawsuit, were adopted without consideration  
8 or balancing of several of the most critical beneficial uses of the Tuolumne River as required by the  
9 Porter-Cologne Water Quality Control Act.<sup>20</sup> For example, SWRCB staff’s stated reason for  
10 condition 1.D is “to reasonably protect native fish and wildlife beneficial uses in the [Lower San  
11 Joaquin River] watershed to Bay-Delta.” (Final WQC at 25). This condition only “protects” one  
12 beneficial use at the severe cost of all others and explicitly fails to adequately consider, let alone  
13 balance, all other beneficial uses of Tuolumne River waters. The Projects’ discharges have minimal-  
14 to-negligible impacts on water conditions, and on fish survival, in the Lower San Joaquin River and  
15 Bay Delta. Nor can Project discharges appreciably improve or control water conditions in those  
16 water bodies.

17 The WQC fails to even mention San Francisco’s domestic and municipal uses in the  
18 evaluation of *any* of its WQC conditions, let alone balance these uses with others as required by the  
19 Water Code. Such balancing would have required SWRCB to acknowledge and evaluate the  
20 unprecedented levels of rationing that would have to be imposed in the Bay Area during droughts if  
21 the WQC were implemented, and to explicitly balance these domestic and municipal beneficial uses  
22 with the others on the Tuolumne River.

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25 *benefit* to be derived from . . . *all beneficial uses of the water concerned* including, but not limited  
26 to, use for *domestic, irrigation, municipal*, industrial, preservation and enhancement of fish and  
27 wildlife, recreational, mining and power purposes, and any uses specified to be protected in any  
28 relevant water quality control plan”) (emphasis added).

<sup>20</sup> This Petition also incorporates the claims contained in the 2nd, 3rd, 7th, 12th, and 13th Causes of  
Action of the Bay Delta Plan Lawsuit, as they apply to condition 1.D of the WQC and to the WQC  
as a whole.

{00538991;1}

1           **G.     The WQC Attempts to Protect Beneficial Uses Without Implementing Any Water**  
2           **Quality Objectives in Violation of the Porter-Cologne Water Quality Control Act**

3           The WQC also includes several conditions that attempt to protect beneficial uses but without  
4           the requisite accompanying water quality objectives. (See conditions 1.B (recreational beneficial  
5           uses), 1.G (to protect “all beneficial uses”), 3 (to protect “cold-water” beneficial uses), 7 (to  
6           generically protect beneficial uses), 12 (to protect “aquatic life” beneficial uses), 14 (to protect  
7           against “potential” impacts to unspecified beneficial uses). (Final WQC at 20-22, 29, 35, 39-40)).

8           Beneficial uses and water quality objectives only constitute “water quality standards” when  
9           applied “together.”<sup>21</sup> As the beneficial uses and water quality objectives are “inextricabl[y] linked,”  
10          separating the two would be an “impermissible modification of the State’s standards.” (SWRCB  
11          Letter to EPA at 6; Bay Delta Plan at 3 (beneficial uses and water quality objectives only constitute  
12          water quality standards “under the terminology of the federal Clean Water Act” when taken  
13          “[t]ogether”); Wat. Code § 13245). The Porter-Cologne Water Quality Control Act requires  
14          SWRCB to establish a “reasonable” level of protection for identified beneficial uses of water, while  
15          considering all competing “demands being made and to be made on those waters.” (Wat. Code, §§  
16          13000, 13241.) However, nowhere does the Act provide SWRCB the authority to compel the  
17          protection of beneficial uses outside of ensuring compliance with legally adequate water quality  
18          objectives adopted for the protection of those beneficial uses.

19          The SWRCB cannot compel entities to separately or independently protect identified  
20          beneficial uses through a WQC otherwise, and doing so would be tantamount to creating a new  
21          water quality objective without adhering to the proper procedure. (See Wat. Code § 13244). All  
22          such conditions are ultra vires and cannot be included in the WQC absent promulgation of related  
23          water quality objectives.

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26          <sup>21</sup> Bay Delta Plan at 3; State Water Resources Control Board, letter to Patrick Wright, U.S.  
27          Environmental Protection Agency, re: Proposed Criteria for the Bay-Delta Estuary, Mar. 11, 1994 at  
28          6 (“SWRCB Letter to EPA”) (recognizing that “beneficial uses and water quality objectives are not  
                separable” under California law; “Bay-Delta objectives are specifically linked to beneficial uses,  
                and the SWRCB’s determination that protection of these beneficial uses was attainable was based  
                on its analysis of the objectives.”).

{00538991;1}

1           **H.       The WQC Violates the Water Rights Priority System and Principles of Due Process**

2           The issuance of the WQC also violates the well-established water-rights priority system in  
3 California. (See generally, *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006)  
4 142 Cal.App.4th 937 (“*El Dorado*”).<sup>22</sup> The California Supreme Court has concluded that, “It  
5 should be the *first concern . . .* of the [SWRCB] in the exercise of its powers under the act to  
6 recognize and *protect the interests of those who have prior and paramount rights* to the use of the  
7 waters of the stream.” (*Meridian Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450 (emphasis  
8 added)). The WQC fails to evaluate the impacts from or require the curtailment of the thousands of  
9 more junior water rights holders that affect fisheries in the lower Tuolumne and San Joaquin Rivers  
10 *prior to* imposing significant restrictions on the Districts’ and San Francisco’s more senior water  
11 rights. These conditions shift responsibilities for downstream fishery and water quality conditions to  
12 the Districts’ and San Francisco and violates this core tenet of California’s water rights system,  
13 causing irreparable harm to San Francisco and the Districts. SWRCB staff have no justification for  
14 requiring San Francisco and the Districts to shoulder the brunt of the burden of achieving Lower  
15 San Joaquin River and Bay Delta fishery and water quality objectives while requiring junior rights  
16 holders to contribute *nothing* to meet these targets, let alone requiring these water users to  
17 contribute *first*.

18           This oversight is all the more egregious where, as here, several of the WQC conditions are  
19 designed (1) to improve environmental conditions in the Lower San Joaquin River and Bay Delta  
20 not caused by the Districts or San Francisco, and (2) to remedy impacts that are predominately  
21 caused by junior water rights holders.<sup>23</sup> To require the Districts and San Francisco as senior water  
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24 <sup>22</sup> This Petition also incorporates the claims contained in the 18th, 20th, 29th, and 30th Causes of  
Action of the Bay Delta Plan Lawsuit, as they apply to condition 1.D of the WQC and to the WQC  
as a whole.

25 <sup>23</sup> (*E.g.*, Final WQC conditions 1.D (unimpaired flow); 5 (Delta salinity)). The United States Bureau  
26 of Reclamation is one of the largest diverters within the state, and has water rights that are  
27 significantly junior to those of the Districts and San Francisco. Requiring the Districts and San  
28 Francisco to bear any responsibility for mitigating impacts to Bay Delta salinity caused by junior  
appropriators runs counter to California’s water rights priority system and goes beyond the  
allowable scope of WQC conditions, which may only be imposed to mitigate impacts caused by  
*Project* discharges. (See 40 C.F.R. § 121.3).

1 rights holders to remedy impacts caused by junior water rights holders falls well outside of the  
2 scope of its authority under Section 401 and also fails to adequately protect the Districts' and San  
3 Francisco's senior water rights in contravention of California's longstanding priority system. (*El*  
4 *Dorado* at 963-964). All such conditions are unlawful.

5 The approval of the WQC at the staff level, without consideration of the Districts' and San  
6 Francisco's water rights priorities and without a hearing, also infringed on the Districts' and San  
7 Francisco's water rights without providing due process of law.<sup>24</sup> Instead of providing the full  
8 protection of a water rights through adjudicative proceedings, as is required under law when vested  
9 water rights are at issue, the Districts and San Francisco were provided no process and were placed  
10 on essentially the same footing as any other member of the public interested in this WQC. San  
11 Francisco was only allowed to comment on the Draft WQC, to which SWRCB staff neglected to  
12 even respond.

13 The SWRCB's failure to provide even minimal notice and hearing processes before  
14 substantially impacting the Districts' and San Francisco's water rights violates the Porter-Cologne  
15 Water Quality Control Act, established California water rights law and due process protections, and  
16 infringes on the due process rights of the Districts and San Francisco. (See generally, *United States*  
17 *v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d 82). All flow-based conditions that  
18 would remedy environmental conditions beyond those caused by Project discharges violate these  
19 due process and water rights priority principles, including but not limited to, conditions 1.B, 1.C,  
20 1.D, 1.G, 3, 5, and 8.

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26 <sup>24</sup> See Cal. Const., art. 1, § 7; U.S. Const. 14th Amend., § 1; *United States v. State Water Resources*  
27 *Control Bd.*, *supra* 182 Cal.App.3d at 112 (it is "axiomatic that once rights to use water are  
28 acquired, they become vested property rights. As such, they cannot be infringed by others or taken  
by governmental action without due process and just compensation." (citations omitted).); *Fall*  
*River Valley Irr. Dist. v. Mt. Shasta Power Corp.* (1927) 202 Cal. 56, 67; see also Bay Delta Plan  
Lawsuit, 18th Cause of Action.



1 **I. WQC Conditions Are Unsupported by Substantial Evidence in the Record**

2 Finally, several conditions in the WQC are unsupported by substantial evidence and  
3 therefore must be rejected.<sup>25</sup>

4 **1. Condition 1.B (Minimum Instream Flows)**

- 5 • There is no evidence that 200 cfs is needed to maintain recreational boat flows, and  
6 flows for recreational uses is not a valid water quality requirement.
- 7 • SWRCB staff provides no evidence to support its claim that flows below 200 cfs  
8 would cause any negative water quality impacts, and these flows were not set in  
9 relation to water quality requirements. FERC rejected these and similar  
10 recommended flows due to the lack of support for this recommendation.
- 11 • SWRCB staff provides no rationale for requiring minimum flows year-round, where  
12 the conditions the WQC references are seasonal.
- 13 • Vague references to “poor water quality,” “stagnant conditions,” “poor aesthetic  
14 quality,” and inequitable access to natural resources are not “water quality  
15 requirements,” lack even basic evidentiary support or articulation, and fail to  
16 demonstrate a nexus between Project discharges and water quality requirements.  
17 (Final WQC at 23).

18 **2. Condition 1.C (Pulse Flows)**

- 19 • SWRCB claims to rely on FERC’s technical analysis regarding spring pulse flows,  
20 but then adopts a condition inconsistent with this technical analysis and FERC’s own  
21 Staff Alternative pulse flow condition, including by failing to incorporate the dry-  
22 year relief plan in the Staff Alternative.
- 23 • There is no substantial evidence to support the portion of condition 1.C requiring fall  
24 pulse flows; a graph purporting to show a correlation between pulse flows and near-  
25 instantaneous fish attraction at the mouth of the Tuolumne River is not substantial  
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27 <sup>25</sup> We also incorporate by reference the substantial evidence claims regarding the conditions  
28 referenced in the Districts’ January 4, 2021 comments on the Draft WQC and the Districts’ Petition  
for Reconsideration.

1 evidence of such correlation where it takes days for pulse flows to travel to the  
2 mouth of the river and at which location such flows will be almost entirely  
3 attenuated.

4 **3. Condition 1.D (Bay Delta Plan Unimpaired Flow Objective)<sup>26</sup>**

- 5 • SWRCB failed to demonstrate a nexus between the effects caused by Project  
6 discharges and condition 1.D.
- 7 • No evidence supports SWRCB’s conclusion that condition 1.D would provide  
8 reasonable protection of fish and wildlife species.

9 **4. Conditions 1.E and 1.F (Compliance)**

- 10 • SWRCB has not attempted to evaluate how, or even if, the Districts could comply  
11 with the conditions in the WQC, instead deferring development of compliance and  
12 operations plans to a later date. As the feasibility of compliance with these  
13 conditions is questionable at best, it was arbitrary and capricious for SWRCB staff to  
14 not first evaluate the feasibility of compliance before setting WQC conditions.

15 **5. Conditions 1.G (Drought Management) and 4 (Extremely Dry Conditions)**

- 16 • SWRCB staff provide no evidence that eliminating the dry-year relief plan in the  
17 FERC Staff Alternative would be beneficial to fish.
- 18 • All evidence in the record supports the conclusion that the elimination of the dry-  
19 year relief components of articles 409 and 410 of the FERC Staff Alternative fails  
20 the “best adapted” requirement in the Federal Power Act and does not strike a proper  
21 balance between beneficial uses. (See FEIS at B-8–B-11 (Staff Alternative, articles  
22 409 and 410); 16 U.S.C. § 803(a)(1)).
- 23 • SWRCB staff’s proposed replacement to the dry-year relief plan is unworkable even  
24 on paper. It would be impossible to timely implement, if it would even be possible to  
25 implement at all. By the time any such plan would become effective, San Francisco  
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27 \_\_\_\_\_  
28 <sup>26</sup> We incorporate by reference all claims raised in the Bay Delta Plan Lawsuit related to condition 1.D and implementation of the Program of Implementation.

1 would have already suffered from the worst effects of drought, thus rendering  
2 condition 4 ineffectual. Furthermore, even if a plan were to be adopted, nothing in  
3 condition 4 would require SWRCB to grant relief to San Francisco, thus further  
4 failing to assure that it has considered and mitigated these impacts.

5 **6. Condition 2 (Ramping Rates)**

- 6 • SWRCB staff provided no evidence to support the ramping rates they selected.  
7 Furthermore, the WQC’s ramping rates conflict with U.S. Army Corps of Engineers’  
8 flood control operations designed to prevent the loss of life and property. The WQC  
9 cannot mandate ramping rates that conflict with the U.S. Army Corps of Engineers’  
10 independent use of the Projects for flood-control purposes.

11 **7. Condition 3 (Temperature)**

- 12 • The temperature targets mandated by condition 3 cannot be attained, and are thus  
13 facially unreasonable, unenforceable, and unsupported by substantial evidence. In  
14 the WQC, SWRCB staff conclude that, in order to meet the temperature criteria in  
15 condition 3, New Don Pedro reservoir will be required to maintain, at minimum,  
16 800,000 acre-feet of carryover storage, perhaps more.<sup>27</sup> It will be impossible to  
17 maintain reservoir storage at 800,000 acre-feet at New Don Pedro under the flow  
18 schedule mandated by the WQC, which will require hundreds of thousands more  
19 acre feet to be discharged each year than have ever been released during the  
20 existence of the Projects. It is irrational to look back to historic reservoir levels  
21 maintained under massively less burdensome flow schedules to claim that this  
22 minimum storage requirement is attainable; if anything, historic storage levels are  
23 evidence of the opposite. (Final WQC at 30-31 (looking to historic reservoir levels  
24 from 1972 to at least 2015 to reason, “Examination of the historical record shows  
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26 <sup>27</sup> See Final WQC at 30 (concluding “that a carryover storage target of 800,000 AF in New Don  
27 Pedro Reservoir would likely provide La Grange Dam release temperatures” set by staff in the  
28 WQC); 32, tbl. 3; 57 (requiring Districts to develop a temperature management plan to be approved  
by SWRCB staff after license issuance that must “include[e] carryover storage” designed to meet  
temperature targets).

1 that New Don Pedro Reservoir has been observed above 800,000 AF at the end of  
2 September/beginning of October for more than 90 percent of years”). This is further  
3 indication that SWRCB staff failed to adequately evaluate or consider the combined  
4 impacts of the WQC conditions. As SWRCB staff concluded that “[c]arryover  
5 storage requirements are needed” to meet the temperature targets in the WQC, and  
6 the minimum mandated carryover storage is facially unattainable, no evidence  
7 supports imposing condition 3. (Final WQC at 30 (discussing carryover storage  
8 requirement)).

- 9 • SWRCB staff can provide no evidence of a nexus between the discharge impacts of  
10 the Project and condition 3.
- 11 • No evidence supports a conclusion that Project discharges affect water temperatures  
12 dozens of miles away from where these discharges occur, let alone to the  
13 temperature levels SWRCB staff purport to impose. Likewise, there exists no valid  
14 rationale for making the Districts wholly responsible for temperature conditions at  
15 Shiloh Bridge, or elsewhere, especially where other water users closer to these  
16 compliance points may have a disproportionate impact on temperature conditions at  
17 these locations. (Final WQC at 58 (setting Shiloh Bridge as a compliance point).
- 18 • SWRCB staff’s commentary that condition 3 is necessary to ensure adequate water  
19 supplies exist during dry-year conditions and that this condition will “improve water  
20 delivery reliability” is an invalid rationale because it is unrelated to assuring  
21 compliance with water quality requirements. (Final WQC at 31). Furthermore,  
22 significantly reducing water supplies in all water year types, and potentially entirely  
23 eliminating it in some, will eviscerate, rather than “improve,” water supply reliability  
24 for all who rely on San Francisco’s and the Districts’ water supplies. There is no  
25 scenario where implementation of condition 3, or any other condition that will  
26 irreparably reduce water supplies, could possibly provide “the benefit of improving  
27  
28

1 water delivery reliability,” and it is error to claim this would be the case. (Final  
2 WQC at 31).<sup>28</sup>

- 3 • SWRCB staff’s temperature targets are unsupported by substantial evidence.  
4 Evidence in the record amply demonstrates that SWRCB staff’s target water  
5 temperatures are much lower than that needed for salmonid species in the Lower  
6 Tuolumne River, and that these targets are not necessary for SWRCB’s stated  
7 purposes.

8 **8. Condition 5 (Salinity)**

- 9 • SWRCB staff demonstrate no nexus to impacts caused by the Projects’ discharges  
10 and Bay Delta salinity conditions.
- 11 • SWRCB staff provide no evidence or explanation as to why existing regulations  
12 (e.g., D-1641) are not adequately protective of Delta salinity, and imposing such a  
13 requirement on the Projects runs counter to prior determinations by SWRCB on this  
14 issue.<sup>29</sup>

15 **9. Condition 8.A (Dissolved Oxygen)**

- 16 • SWRCB fails to elucidate a nexus between impacts from Project discharges and  
17 dissolved oxygen, instead making Districts responsible for controlling dissolved  
18 oxygen through the entire Lower Tuolumne River. (Final WQC at 66 (setting a  
19 dissolved oxygen compliance point at the confluence of the Lower Tuolumne River  
20 with Lower San Joaquin River)). The Districts do not control intervening diversions  
21 and discharges from other water users on the Lower Tuolumne River, and Project  
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23

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24  
25 <sup>28</sup> For SWRCB’s failure to adequately balance and consider domestic, municipal, and irrigation  
beneficial uses, see, *supra*, Part III.F; and, Bay Delta Plan Lawsuit, 2nd, 3rd, 7th, 12th, and 13th  
Causes of Action, incorporated herein by reference.

26 <sup>29</sup> See SWRCB, Water Rights Decision 1641 (Dec. 29, 1999) at 80-82 (determining it “would not be  
27 reasonable” to require a reduction in diversions by senior water right holders on the Stanislaus,  
Tuolumne, and Merced Rivers who put those diversions to beneficial uses such as irrigation,  
28 hydropower generation, recreation, and fish and wildlife enhancement, “since water quality  
objectives can and should be attained through regulation of other controllable factors”).

1 operations should not be used to overcompensate for dissolved oxygen conditions  
2 not created by the Projects' discharges.

3 **10. Conditions 9 (Large Woody Material), 11 (Gravel Augmentation), 12**  
4 **(Riparian Habitat), 13 (Predator Suppression)**

- 5 • SWRCB staff provide no evidence of a nexus between these conditions and the  
6 Districts' discharges. Furthermore, SWRCB staff provide no evidence to suggest that  
7 FERC's own large woody material and gravel augmentation license articles are  
8 insufficient. FERC has already determined evidence in the record does not support  
9 these WQC conditions.

10 **IV. Support for the Tuolumne River Voluntary Agreement**

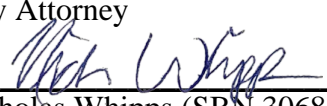
11 San Francisco reiterates its support for improving native fish species conditions through a  
12 series of both flow and habitat improvement measures. In the WQC, SWRCB staff recognizes that  
13 the TRVA may serve as a substitute to the WQC. (*E.g.*, Final WQC at 91). San Francisco supports  
14 the substitution of the TRVA in lieu of like WQC conditions for the Districts' FERC licenses, as it  
15 promises benefits for native fish species while greatly reducing impacts to Bay Area water supplies  
16 during periods of drought when compared to the WQC. Moreover, the TRVA would avoid many of  
17 the legal and evidentiary defects identified in the Bay Delta Plan Lawsuit and this Petition for  
18 Reconsideration, while providing the desired benefits sought by SWRCB staff.

19 **V. Conclusion**

20 San Francisco respectfully requests that SWRCB grant San Francisco's Petition for  
21 Reconsideration and provide the relief requested herein.  
22

23 Dated: February 16, 2021

DENNIS J. HERRERA  
City Attorney

24   
25 \_\_\_\_\_  
26 Nicholas Whipps (SBN 306865)  
27 Deputy City Attorney  
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CITY AND COUNTY OF SAN FRANCISCO