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JOINT LEGISLATIVE COMMITTEE ON
EMERGENCY MANAGEMENT

CHAIR: SELECT COMMITTEE ON HEALTH
ACCESS IN RURAL COMMUNITIES

12 December 2020

Eileen Sobeck, Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: Don Pedro 401 Certification

Dear Director Sobeck:

The State Water Resources Control Board ("SWRCB") is engaged in an inappropriate and unacceptable action designed to short-circuit the regulatory process and kill the spirit of negotiation. This action would have lasting health, economic and social impacts on the 460,000 people living in my Assembly District as well as the millions living in the San Joaquin Valley.

SWRCB staff quietly released a draft 401 Certification document affecting Tuolumne River flows well after business hours on Nov. 30. As most in our Valley were preparing for a sadder Christmas due to Covid-19, the board's staff members were dreaming up conditions that will subject the people of Stanislaus and Merced counties to life-altering deprivations. If the demands contained in this document become law, we will see the dislocation of thousands of jobs held mostly by the region's most disadvantaged residents. In dry years, our drinking water could be significantly reduced. And it's likely that our farmers could face years when no water is available for irrigation – injuring a \$5 billion industry and diminishing the value of our land by a factor of 10.

By extension, this document will have similar impacts on farming in the adjacent Merced and Stanislaus watersheds and, eventually, the Sacramento River Valley.

Normally, any such far-reaching policy would require 60 or 90 days for public comment. The SWRCB originally gave us only ten days to respond. Only because SWRCB staff missed a federal deadline for putting their plan on the Federal Energy Regulatory Commission's meeting agenda was the comment period extended through January 4.

This draft document will supersede the Substitute Environmental Draft, originally prepared in 2012 and revised in 2016, that detailed the SWRCB's demands for dramatically increased environmental flows on the Tuolumne River. The resulting furor over the SWRCB's draconian demands caused two governors – Jerry Brown and Gavin Newsom – to jointly ask that the disagreements be addressed through negotiated voluntary agreements.

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In December 2018, Karla Nemeth, then-Director of the California Department of Water Resources, and Chuck Bonham, Director of the California Department of Fish and Wildlife, presented the SWRCB with a voluntary agreement that met or exceeded all of the state's goals. Only a few details remained to be ironed out.

But, the SWRCB refused to accept that agreement, voting instead to implement the flawed SED as proposed. Despite its action, the SWRCB urged continued negotiations toward the voluntary agreements.

Just 12 days ago, in the draft 401 document for Don Pedro Dam, SWRCB staff replaced those original goals with far more onerous conditions. This is an end-around, bad-faith tactic that makes any further negotiations futile.

The draft 401 document is a basket of disaster for several reasons. Consider:

- The draft document ignores our 2018 promise to provide an additional 300,000 acre feet of water – some one billion gallons – for environmental purposes. Instead, it insists on new flow requirements that would reduce agriculture water by roughly one acre foot per acre, or one-third the total. This will make our most high-value crops such as almonds, walnuts, cherries and peaches untenable.
- On top of increased flows, the draft document would require a large pool of water be left behind Don Pedro Dam under state control to help cool Delta flows. This would deprive farmers of even more of the water they need to nourish the nation.
- Under the draft document, there is every likelihood that in consecutive dry years zero water would be available for irrigation, causing economic catastrophe. Even in wetter years, there would be no certainty about water deliveries, making orchard crops too risky.
- With less river water available, farmers will be forced to pump more groundwater. This could lower water tables around urban areas and small communities, leading to hundreds of dry wells.
- Already tenuous in southern portions of the Central Valley, the human right to clean drinking water could be denied to thousands more people as ag pumping diminishes supply.
- Under the draft document, the state will take greater operational control of New Don Pedro Reservoir, which could lead to an interruption in the year-round supplies of drinking water sent to San Francisco. The costs of securing other sources of water will be staggering.
- The document demands holes in the riverbed, created decades ago by mining operations, be filled by the water districts. The districts had nothing to do with creating those holes and filling them will put tens of thousands of air-polluting trucks on county roads not made for the pounding.
- The state still refuses to accept voluminous, peer-reviewed studies conducted at our expense, each refuting decades-old data the water board relied on in making its 2018 decision. Much of that data pertains to rivers hundreds of miles from California.

The SWRCB is making these dramatically revised demands without any additional review of the impacts, because evaluating the economic and social impacts to hundreds of thousands of Californians would take far longer than ten or even thirty days. Perhaps that's why the SWRCB attempted to force this down our throats – the staff didn't want the rest of the state to see the damage and suffering they are willing to inflict on hundreds of thousands of their fellow citizens. These citizens are my constituents, my neighbors, my friends, and my family.

In 2015, I authored legislation to hold the SWRCB accountable for the devastating impacts of the water grab. As that legislation moved out of committee, then-Speaker Toni Atkins removed me from my seat on the Assembly Water, Parks, and Wildlife Committee. Now, Speaker Anthony Rendon has removed me from the chairmanship of the Governmental Organization Committee, an acknowledged result of my refusal to vote for budget trailer language authorizing the 401 certification objectives.

Like many others who will be irreparably harmed by the State Water Resources Control Board's actions, I do not intend to stand by while the state brings so much suffering to our doorsteps. Not during the holidays. Not ever.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Gray", written in a cursive style.

Assemblymember Adam Gray
21st Assembly District

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Water Boards

Frequently Asked Questions Don Pedro and La Grange Hydroelectric Projects Relicensing

In California, all water is the property of the people, but individuals and entities can hold valuable rights to use that water. When hydroelectric projects located in California undergo relicensing by the Federal Energy Regulatory Commission (FERC), the State Water Resources Control Board (State Water Board) is the agency tasked with ensuring that the use of the state's waters for hydroelectric power does not impair the quality of the state's waters, including for fish and wildlife. The State Water Board achieves this protection by issuing a water quality certification (certification), which is a set of mandatory conditions that must be included in the FERC license. Turlock Irrigation District (TID) and Modesto Irrigation District (MID) (collectively referred to as Districts) jointly own and operate the Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (collectively referred to as the Projects). The Districts are required to obtain a certification from the State Water Board for the Projects before they can obtain a license(s) from FERC for the operation of the hydroelectric facilities for a 40-50 year period. The water quality certification process provides a powerful tool for California to protect its public waters during the 40- or 50-year FERC license term.

Why are the Districts applying for relicensing of the Don Pedro and La Grange Projects?

It has been over 50 years since FERC issued a license for the Don Pedro Hydroelectric Project (FERC Project No. 2299) and that license has since expired¹. The La Grange Hydroelectric Project (FERC Project No. 14581) has never been licensed by FERC. In 2012, FERC determined that the La Grange Project was required to be licensed because it is located on a navigable river and includes federal lands. The Districts are seeking a new FERC license(s) for the Projects that will allow them to operate the Projects for the next 40 to 50 years.

¹ The original FERC license for the Don Pedro Project was issued on March 10, 1964 and expired on April 30, 2016.



Why do the Districts need a water quality certification for the Don Pedro and La Grange Projects?

Operation of the Projects benefits the public through energy generation, municipal and irrigation water supply, and recreational opportunities. The Projects also significantly impact the volume, rate, and quality of water flowing in the Tuolumne River downstream of the Projects, affecting temperature, dissolved oxygen, and other water quality parameters and beneficial uses of water. The Clean Water Act recognizes that States should have a right to protect the quality of their waters and provides that opportunity through the certification process. Section 401 of the Clean Water Act requires that every applicant for a federal license or permit that may result in a discharge into a State's navigable waters must provide the licensing or permitting federal agency with a certification that the project will be in compliance with specified provisions of the Clean Water Act, including State water quality standards and other appropriate requirements of state law.

The State Water Board is the State agency responsible for protecting the California's water quality and is authorized to certify that an activity will meet applicable water quality requirements. The certification can prescribe conditions necessary to ensure protection of water quality. Section 401 of the Clean Water Act requires that certification conditions become conditions of the federal license or permit for the project. If the State denies certification, the federal agency cannot issue the permit or license. The State Water Board's certification conditions are designed to allow the continued use of the Tuolumne River for energy generation while also adequately protecting water quality and associated beneficial uses, including for fish and wildlife.

Most FERC-licensed hydroelectric projects pursuing certification were constructed prior to the adoption of the Clean Water Act (1972), have never received water quality certifications, and do not meet the State's water quality standards. It is necessary for the State to act to address water quality issues now; otherwise any water quality problems may not be addressed until 40 or 50 years later, when a new certification is required as part of the next FERC licensing process.

Why did State Water Board staff release a draft water quality certification?

The Tuolumne River is a tributary to the lower San Joaquin River, which forms part of the watershed of the Sacramento-San Joaquin Delta (Delta), the largest estuary on the West Coast. Given the high level of public interest in the Delta, the Tuolumne River, and the Projects, State Water Board staff determined that releasing draft water quality certification conditions in November 2020 and requesting public comment would provide transparency about the certification process and help inform the State Water Board's consideration of the certification.

Does the draft certification address protection of the downstream Bay-Delta?

Yes. The draft certification requires compliance with applicable water quality control plans. Water quality control plans are adopted pursuant to the Clean Water Act and California's own Porter-Cologne Water Quality Control Act. The plans identify beneficial uses of water (e.g., municipal, irrigation, fish and wildlife, recreation, and others) and establish water quality objectives, which are the criteria that must be met to protect the beneficial uses of water. Water quality control plans also include a program of implementation, monitoring, and other measures to ensure the water quality objectives are met. Water quality control plans can be adopted by Regional Water Quality Control Boards or the State Water Board but where there is potential conflict, the State Water Board's water quality control plan controls.

The Tuolumne River is included in both the State Water Board's *Water Quality Control Plan for the San Francisco/ Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan) and the Central Valley Regional Water Quality Board's *Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin* (SR/SJR Basin Plan). The State Water Board adopts the Bay-Delta Plan due to its ecological significance and the Bay-Delta's importance as the cross-roads for much of the state's water supply. The Bay-Delta Plan establishes water quality objectives to protect beneficial uses of water in the Bay-Delta Estuary and tributary watersheds, including drinking water supply, irrigation supply, and fish and wildlife. On December 12, 2018, the State Water Board adopted amendments to the Bay-Delta Plan for the lower San Joaquin River that require increased instream flows in the Stanislaus, Tuolumne, and Merced Rivers in order to protect fish and wildlife beneficial uses and revise southern Delta salinity objectives to protect agricultural beneficial uses. The draft certification integrates the requirements of the Bay-Delta Plan and SR/SJR Basin Plan that apply to the Tuolumne River.

Does the draft certification allow for a Voluntary Agreement on the Tuolumne River?

Yes. The Districts and stakeholders, including water users and environmental interest groups, have discussed potential voluntary agreements that could protect fish and wildlife beneficial uses in the Bay-Delta watershed through a combination of increased instream flows and non-flow measures (e.g., habitat restoration). The State Water Board's 2018 update to the Bay-Delta Plan recognized that robust voluntary agreements could serve as an alternate means of meeting Bay-Delta Plan requirements at potentially lower water cost for water users. The draft certification is expressly written to ensure that the Districts have the flexibility to pursue and implement a future voluntary agreement on the Tuolumne River if they choose to do so.

What can change between a draft and final certification?

This draft certification does not constitute a final action by the State Water Board. Comments from the applicant, agencies, and the public on the draft certification will be reviewed and considered in preparing the final certification.

What does the California Environmental Quality Act (CEQA) require?

The Districts are the lead agencies for the purposes of CEQA compliance, but have not initiated the CEQA process. CEQA requires public agencies to consider the significant environmental impacts of a project involving a discretionary approval and to avoid or mitigate those impacts where feasible. Based on the potential impacts of operating and maintaining the Projects throughout the duration of the FERC license(s), it is anticipated that the environmental review document required pursuant to CEQA will be an environmental impact report (EIR). In general, an environmental review document (e.g., EIR) will analyze potentially significant adverse environmental impacts associated with the proposed project and measures that may be implemented to avoid, minimize, and mitigate for those impacts during construction, maintenance, and operations. Additionally, CEQA requires that a lead agency make "findings" with respect to each significant effect that it analyzes.

The State Water Board has denied the Districts' applications for certification in the past because the Districts had not begun the CEQA process and the State Water Board could not determine whether the activity would meet the State's water quality requirements. The Districts recently requested that FERC find that the State Water Board has waived its water quality certification authority for the Projects. State law allows the State Water Board to issue a water quality certification before CEQA documentation is complete if there is a substantial risk of waiver of its certification authority. It may reopen the certification and revise it upon completion of environmental documentation prepared under CEQA, in order to ensure that issues raised by that process are fully addressed. Accordingly, the State Water Board may issue the water quality certification before the Districts have complied with CEQA, but will reserve authority to reopen the certification as appropriate after completion of environmental review.

What happens next?

State Water Board staff released the draft water quality certification for public comment in November 2020. State Water Board staff will consider comments on the draft water quality certification in preparing the final certification, which will be provided to State Water Board's Executive Director for consideration.

How can I learn more, and stay informed about the Don Pedro and La Grange Hydroelectric Projects?

For more information on the Projects, please visit the State Water Board's webpages from the [Don Pedro Hydroelectric Project webpage²](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/donpedro_ferc2299.html) and [La Grange Hydroelectric Project](#)

² https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/donpedro_ferc2299.html



Fast Facts Q & A

webpage³. If you would like to receive future announcements about Projects-related matters, you can subscribe to the State Water Board's "Water Rights Water Quality Certification" email list under "Water Rights" online at:

http://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.shtml

Alternatively, you may contact Mr. Chase Hildeburn to be placed on the State Water Board's hard copy mailing list. Mr. Hildeburn may be contacted by email at:

Chase.Hildeburn@waterboards.ca.gov or by phone at: (916) 323-0358.

How can I comment on the draft water quality certification?

Comments on the draft water quality certification are due **no later than 5:00 pm on December 11, 2020**. Comments may be submitted by:

Email: WR401Program@waterboards.ca.gov

or

Mail:

State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
Attn. Chase Hildeburn
P.O. Box 2000
Sacramento, CA 95812-2000

(This fact sheet was last updated on November 30, 2020.)

³ https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/lagrange_ferc14581.html

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California Assemblymember Adam C. Gray's Statement On Being Stripped Of Committee Chairmanship Says "I Have Spent My Entire Time In Public Office Fighting Sacramento's Insatiable Thirst For The Valley's Water"

⌚ Last Updated: Sunday, 13 December 2020 06:00

⌚ Published: Sunday, 13 December 2020 06:00



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December 13, 2020 - Sacramento – On Saturday, Assemblymember Adam C. Gray (D-Merced) released the following statement after being stripped of his position as Chair of the Assembly Governmental Organization Committee.



"History repeats itself.

"Five years ago, I fought to pass legislation to hold the State Water Board accountable for the devastating economic impacts the state water grab will inflict on the people living in my district and the greater San Joaquin Valley. Despite active opposition from legislative leadership, my bill was approved by a narrow committee vote, and I was summarily removed from my position on the Assembly Water Committee.

"This year, Speaker Anthony Rendon and State Water Board staff put forward special legislation to short-circuit the voluntary agreements being negotiated by the state and our local irrigation districts. The language was inserted into a Budget Trailer bill and gave the State Water Board staff the authority to implement an even

more destructive version of their water grab without review and without even a public vote. I voted no.

"As a result of my commitment to defend my district, Speaker Rendon has stripped me of my position as Chair of the Assembly Governmental Organization Committee.

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"I have spent my entire time in public office fighting Sacramento's insatiable thirst for the Valley's water. Every time I am punished by my own party's leadership for standing up for my district, it is a reminder that I was elected to represent the people who live and work in Merced and Stanislaus counties.

"No elected official should ever vote for policies that promise to destroy thousands of jobs and billions of dollars in economic opportunity in their district for the benefit of others. I remain unmoved. I would and will vote no again."

Assemblymember Adam C. Gray represents the 21st Assembly District which includes all of Merced County and portions of Stanislaus County.

Source: Assemblymember Adam C. Gray