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## State Water Resources Control Board

January 11, 2012

**E-FILE FERC NO. 2299**

Ms. Kimberly Bose  
Secretary, Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Dear Ms. Bose:

### NOTICE OF STUDY DISPUTE FOR NEW DON PEDRO HYDROELECTRIC PROJECT, FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2299

The State Water Resources Control Board (State Water Board) is hereby filing a Notice of Study Dispute with the Federal Energy Regulatory Commission (Commission) regarding the study plan determination issued on December 22, 2011, for the New Don Pedro Hydroelectric Project (Project), Commission Project No. 2299. The Project is licensed to the Modesto and Turlock Irrigation Districts (Districts). The State Water Board has authority to issue a water quality certification under section 401 of the Clean Water Act for this relicensing proceeding and is therefore eligible to file a study dispute pursuant to 18 C.F.R. § 5.14.

The State Water Board is mandated under provisions of the Clean Water Act to protect the beneficial uses established for the Tuolumne River as designated in the Central Valley Regional Water Quality Control Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins*. Before the State Water Board can issue a water quality certification for the Districts' Project, information will be needed that shows that operation of the Project under a new Commission license is consistent with both water quality objectives and the protection of beneficial uses. The study plan determination issued by the Commission does not sufficiently provide for the collection of information that the State Water Board believes will be required to make reasoned decisions concerning the issuance of water quality certification for the Districts' Project.

The State Water Board is aware that the National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (USFWS) also plan to file a Notice of Study Dispute with the Commission under their mandatory conditioning authority pursuant to section 18 of the Federal Power Act. The State Water Board supports these agencies in their study dispute regarding the need for information on fisheries resources, fish passage, and fishery habitat in the Tuolumne River both upstream and downstream of the Districts' Project. The Integrated Licensing Process (ILP) regulations [§ 5.14 (b)] require that a Notice of Study Dispute identify and provide contact information for the panel member designated by the disputing agency. At this time, the State Water Board identifies Mr. William Foster, NMFS Fisheries Biologist, to act as the agency panelist. However, the State Water Board leaves open the possibility of appointing another agency panelist, as time has not permitted sufficient discussions on this topic with personnel of USFWS and NMFS.

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

Mr. Foster has had no direct involvement with this Project's ILP, and therefore is not otherwise involved in the proceeding. § 5.14 (b). Mr. Foster's contact information is: William Foster, National Marine Fisheries Service, 650 Capitol Mall, Suite 5-100, Sacramento, California 95814. His telephone number is (916) 930-3617, and his email address is William.Foster@noaa.gov.

Finally, the State Water Board would like to reiterate what it has made clear previously, that the State Water Board intends to exercise its mandatory conditioning authority to the extent necessary to ensure that the operation of the Project under a new Commission license is consistent with both water quality objectives and the protection of the beneficial uses designated for the Tuolumne River. If this dispute process does not yield the study plans that the State Water Board needs to carry out its mandatory conditioning authority, the State Water Board may require such information under its Water Code section 13383 authority, to ensure that the State Water Board has the information necessary to issue a water quality certification for this Project.

The State Water Board is filing this Notice of Study Dispute in a good faith effort to participate fully in the ILP. However, as is clear from the Commission's Final Rule and Tribal Policy Statement for the ILP, as revised February 23, 2004, the State Water Board's participation in this process does not affect the State Water Board's independent authority to require the Districts to produce data or information in the context of the water quality certification application.

Additional information regarding the notice is contained in Attachment A. If you have any questions regarding this filing, please contact either Mr. Peter Barnes (Email: pbarnes@waterboards.ca.gov; Phone: 916-445-9989) or Ms. Erin Mahaney (Email: emahaney@waterboards.ca.gov; Phone: 916-341-5187).

Sincerely,

*ORIGINAL SIGNED BY:*

Thomas Howard  
Executive Director

Attachment A

cc: Modesto Irrigation District  
Attn: Melissa Williams  
P.O. Box 4060  
Modesto, CA 95352

Ms. Pamela Creedon  
Executive Officer  
Central Valley Regional Water Quality  
Control Board  
11020 Sun Center Dr. Suite 200  
Rancho Cordova, CA 95670

Turlock Irrigation District  
Attn: Michelle Reimers  
P.O. Box 949  
Turlock, CA 95381

Mr. Larry Thompson  
NOAA, National Marine Fisheries Service  
650 Capitol Mall, Suite 8-300  
Sacramento, CA 95814-4706

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

**Turlock Irrigation District  
Modesto Irrigation District  
New Don Pedro Hydroelectric Project**

**Project No. 2299-075**

**Notice of Study Dispute**

State Water Resources Control Board (State Water Board) staff participated in the New Don Pedro Hydroelectric Project (Project; Commission Project No. 2299) relicensing proceeding currently before the Federal Energy Regulatory Commission (Commission). State Water Board staff attended meetings and conference calls organized by Modesto and Turlock Irrigation Districts (Districts) throughout the study plan development process. State Water Board staff submitted scoping comments and preliminary study plan requests on June 9, 2011, and submitted additional comments on the Proposed Study Plan on October 24, 2011. The Districts subsequently filed with the Commission a revised study plan on November 22, 2011, which contains responses to comments and requests made by the Resources Agencies and Conservation Groups. The State Water Board submitted comments on the Districts' Revised Study Plan on December 7, 2011. The Commission issued its Final Study Plan Determination on December 22, 2011.

State Water Board staff believes that the study plan determination issued by the Commission is inadequate by not providing for the collection of information that will be required for the State Water Board to make reasoned decisions concerning the issuance of water quality certification for the Districts' Project. As a mandatory conditioning agency and pursuant to 18 C.F.R. § 5.14, the State Water Board submits this document to the Commission as formal notice of study dispute.

**Agency Management Goals and Need for Information**

The State Water Board is mandated under provisions of the Clean Water Act to protect the beneficial uses established for the Tuolumne River as designated in the Central Valley Regional Water Quality Control Board's (Regional Board) *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan)*. Before the State Water Board can issue a water quality certification for the Districts' Project, the State Water Board needs information showing that operation of the Project under a new Commission license is consistent with both water quality objectives and the protection of the beneficial uses designated for the Tuolumne River. The studies must have the geographic scope to fully capture Project effects and Project contributions to cumulative effects on beneficial use of the Tuolumne River and the waterways affected by the Tuolumne River. The studies assessing aquatic resources and aquatic habitats must be robust enough to identify Project impacts and identify appropriate management alternatives that will protect aquatic resources. Studies must include full disclosure of the water right claims being relied upon to operate the Project and to mitigate Project impacts. The State Water Board must be provided with this information in order to understand the existing and future impacts to aquatic resources in the Tuolumne River from the operation of the Districts' Project.

Federal regulations governing the Integrated Licensing Process (ILP), which is being used for the Districts' Project relicensing, include guidelines regarding the development of studies to address information needed for the Commission proceeding. Part 5 of the Commission's regulations (18 C.F.R. § 5.9 (a)) describes the need for information and studies required for consultation under section 7 of the Endangered Species Act (ESA) and water quality certification under Section 401 of the Clean Water Act. State Water Board staff believes that the Commission did not adequately address this regulation when it failed to incorporate the study plan requests made by the agencies responsible for determining the information needs for ESA consultation and Clean Water Act water quality certification.

The State Water Board is aware that the National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (USFWS) are also planning to file a Notice of Study Dispute with the Commission under their mandatory conditioning authority pursuant to section 18 of the Federal Power Act. The State Water Board supports NMFS and USFWS in their study dispute regarding the need for information on fish passage, fisheries resources and fishery habitat in the Tuolumne River both upstream and downstream of Districts' Project. This information, which is not included in the Commission's study plan determination, is necessary in order for NMFS and USFWS to determine how best to exercise their authority pursuant to Section 18. The decision to exercise prescriptive authority with respect to fish passage cannot be made unless there is information on habitat conditions throughout the Tuolumne River.

## **Areas of Dispute**

### Water Rights

The State Water Board appreciates the Commission's direction to the Districts to provide information on *existing licenses, agreements and contracts that are not part of the licensing proceeding but include any streamflow-related requirements*. The State Water Board would like to point out that not all water rights contain stream-flow related requirements, but do have constraints regarding the amount and timing of the diversions. In order to adequately inform licensing conditions, such constraints must be reflected in any water balance model.

### Reservoir Water Temperature Management Feasibility Study as proposed by the California Department of Fish and Game

The Commission did not recommend that the Districts conduct this study as part of its Final Study Plan Determination, claiming that the study represents an assessment of potential protection, mitigation and enhancement (PM&E) measures. The State Water Board disagrees with this determination. The Tuolumne River is listed as impaired for temperature pursuant to section 303(d) of the Clean Water Act (USEPA 2011). Such impairment can be directly tied to the Project and its operations, therefore meeting study criterion 5 of the ILP. This study will inform the State Water Board whether or not the United States Environmental Protection Agency (USEPA) (2003) temperature criteria and habitat conditions in the lower Tuolumne River can be improved with water temperature management and the selective withdrawal of cold water from Don Pedro Reservoir. This information will be used by the State Water Board in the development water quality certification conditions as prescribed by Section 401 of the Clean Water Act.

### Other

Throughout the study plan development process, the State Water Board has maintained its support of the specialized expertise of relicensing participants such as the California Department of Fish and Game, USFWS, and NMFS. We respect the ability of these agencies

to rigorously evaluate the Project's impacts both on aquatic and terrestrial biological resources, which are integral components of the beneficial uses designated in the Basin Plan. State Water Board staff has consistently supported the study requests and proposals submitted by these resource agencies. The State Water Board finds that several of these requests for information put forth were not adequately incorporated into the studies that the Commission has ordered the Districts to carryout in the Final Study Plan Determination. The State Water Board supports these agencies in their disputes of the Final Study Plan Determination.