

Modesto Irrigation District (“MID”) Has Not Met Its Minimum Obligations As a “Responsible Agency” Under CEQA To Be In a Position to Consider or Approve a 2 mgd Transfer At This Time

As laid out in MID staff’s June 26, 2012 Revised Draft Resolution, MID’s reason for declining to undertake *any independent CEQA review* of the proposed 2 mgd/yr. transfer is MID staff’s representation that, as a *responsible agency* under CEQA, MID is only obligated to comply with CEQA with respect to any *discretionary approvals* for the project that lie within MID’s direct responsibility. MID’s Revised Draft Resolution states that the only element of the proposed 2 mgd transfer over which MID has *any* discretionary authority or independent responsibility is the SFPUC’s proposed mitigation measure 5.3.6-4a, relating to potentially significant adverse impacts to Upper Tuolumne River fisheries under the larger proposed WSIP Dry-Year Transfer. Mitigation measure 5.3.6-4a would in turn involve SFPUC financing of surface water demand reduction activities by MID and/or TID, as a means to address the WSIP’s potentially significant adverse impact on the Upper Tuolumne River fishery (either water conservation or conjunctive use of groundwater).

Because the 2 mgd transfer, as opposed to the much larger 27-29 TAF transfer separately considered in the SFPUC’s PEIR, would allegedly *have no significant impact* on Upper Tuolumne River fisheries, and because the SFPUC’s implementation of proposed mitigation measure 5.3.6-4a would therefore, allegedly, not be required for the smaller 2 mgd transfer, MID’s Revised Draft Resolution concludes that MID has *no independent duty as a responsible agency under CEQA* to complete any independent CEQA review of the proposed transfer. Instead, having characterized its task in this very limited fashion, MID staff in MID’s Revised Draft Resolution concludes that MID has *no obligation* to conduct any further review under CEQA, and that it can instead stand wholly on the strength of the SFPUC’s analyses in its 2008 PEIR.

This is patently false. The fundamental problem with this conclusion is that it paints MID’s legal obligation as a responsible agency too narrowly. In pertinent part, the CEQA Guidelines define a “responsible agency” as any “public agency other than the lead agency which [has] discretionary approval power over the project.” (14 Cal. Code Regs., § 15381.) As described in CEQA Guidelines section 15096, a “responsible agency” has numerous independent responsibilities under CEQA. Among other things, a responsible agency must (1) “consider the environmental effects of the projects” as analyzed in the lead agency’s completed EIR or negative declaration (14 Cal. Code Regs., § 15096, subd. (e)), and on that basis (2) determine whether or not the lead agency’s final EIR or negative declaration is “adequate for use by the responsible agency” (14 Cal. Code Regs., § 15096, subd. (f)). The responsible agency has direct “responsibility for mitigating or avoiding [...] the direct or indirect environmental effects of *those parts of the projects which it decides to carry out, finance, or approve.*” (14 Cal. Code Regs., § 15096, subd. (g).)

In this case, MID has “discretionary approval power,” not merely over SFPUC’s proposed mitigation measure 5.3.6-4a, but rather over whether to approve the transfer at all. Accordingly, MID has an *independent legal obligation* to review the proposed transfer under CEQA.

MID’s purported reliance on the SFPUC’s 2008 PEIR is insufficient for at least the following reasons:

- First, while the SFPUC’s 2008 PEIR included some preliminary modeling of a potential 2 mgd MID/TID transfer, this smaller transfer is not discussed in the PEIR itself, was not considered in detail even in the SFPUC’s modeling, and was not the subject of any significant public comment at the time.
- Second, since the SFPUC’s certifications of its 2008 PEIR, major aspects of the underlying environmental and regulatory baseline have changed.² These major baseline shifts were not addressed in the SFPUC’s 2008 PEIR—nor are they considered in the SFPUC’s subsequently prepared May 8, 2012 “Supplemental Review on 2 mgd Water Transfer from MID to SFPUC” document, or its May 9, 2012 “Note to File for Water System Improvement Program, Program Environmental Impact Report – 2 mgd Water Transfer from MID to SFPUC.”
- Third, the project considered by the SFPUC in its 2008 PEIR (and in the supplemental analyses informally prepared since) is, from the perspective of MID’s ratepayers and from the standpoint of MID’s distinct mission and agency purpose, *a completely different project* than the one now before the MID board.

Notably, the SFPUC’s stated “need” for the WSIP and its “program objectives” in preparing the PEIR and including certain Dry-Year Transfer options in its analyses was “[t]o serve San Francisco and its Bay Area customers with reliable, high-quality and affordable water, while maximizing benefits from power operations and responsibly managing the resources entrusted to its care.”³ As described in the PEIR, the SFPUC’s “goals and objectives” in the WSIP are “founded on two fundamental principles pertaining to the existing regional system: (1) maintaining a clean, unfiltered water source from the Hetch Hetchy system, and (2) maintaining a gravity-driven system.”⁴ Beyond this, “overall goals” cited by the SFPUC’s as its motivation for the WSIP and the PEIR itself are to:

- Maintain high-quality water and a gravity-driven system
- Reduce vulnerability to earthquakes
- Increase delivery reliability
- Meet customer water supply needs
- Enhance sustainability
- Achieve a cost-effective, fully operational system⁵

² Examples of major changes in the relevant environmental, regulatory, and water supply baseline that *were not* meaningfully considered in the SFPUC’s PEIR include 1) MID’s existing 50-year transfer of 67,200 acre-feet of water the City of Modesto; (2) the State Water Resource Control Board’s proposed San Joaquin River Instream Flow Standards; (3) potential terms or conditions of New Don Pedro hydropower license renewal through the Federal Energy Regulation Commission (“FERC”); (4) potential basin-wide impacts of the San Joaquin River Restoration Program; (5) recent major changes in operations of the Central Valley Project and State Water Project, and possible additional changes within the next several years; (6) potential water rights, water quality, and other regulatory changes associated with implementation of the proposed Bay-Delta Conservation Plan; and (7) potential long-term changes in regional hydrology.

³ See PEIR, Chapter 3, Project Description at 3-5.

⁴ See *id.* at 3-8.

⁵ *Id.* at 3-8 and 3-9.

In contrast to these goals and objectives as the primary motivators for and focus of the SFPUC PEIR, MID's reasons for considering the proposed transfer are completely different. For example, according to the MID's "Frequently Asked Questions" on the proposed transfer, MID's primary reasons for considering the transfer at this time include the MID's goals to "generate revenue which will be used to improve MID's irrigation system infrastructure," to cover anticipated costs of the approaching New Don Pedro relicensing process, to reduce the potential vulnerability of the district's senior water rights to attacks on reasonable use grounds, to avoid rate increases, and to retire existing debt.

In contrast to the SFPUC's mission and objectives for Bay Area water users, the MID's mission is to "provide electric, irrigation and domestic water services for its customers, delivering the highest value at the lowest cost possible through teamwork, technology, innovation and commitment." Among other things, MID is the steward of the district's very senior water rights. MID supplies an average 173,750 acre-feet of surface water irrigation to some 3,104 irrigation accounts, on some 57,955 irrigated acres of land. Part of MID's stewardship of the district's water rights includes management of MID's surface water entitlements in a responsible manner, to help ensure a sustainable balance of surface and groundwater use in its service area. Additionally, MID has prior contractual, regulatory, water rights-related and other responsibilities - all very separate from any mission, purpose, or objective of the SFPUC in its WSIP.

The MID's public outreach materials on the proposed transfer discuss potential options which might be pursued to define a set of project goals and objectives, to frame potential alternatives, and to compare the potential direct, indirect, and cumulative impacts of these and other potential options in detail, from an MID perspective. In other words, as the *transferor* of water, rather than the *transferee* of water, MID is positioned such that it is incumbent that it perform an independent alternatives analysis that considers other options to meet its own purposes and objectives. Unfortunately, instead of acknowledging and squarely meeting this mandatory legal duty, MID staff recommends that the district approve the transfer now, without formal consideration of input from the public and without any type of additional CEQA analysis whatsoever.

Contrary to MID staff's recommendation concerning the smaller 2 mgd transfer, Farm Bureau maintains that to proceed in the proposed manner is imprudent and irresponsible. Rather than abdicating on its mandatory obligations under CEQA, the MID Board must, at minimum, table the transfer proposal until the district has completed a legally adequate independent analysis of the potential environmental impacts of the proposal.

Staff's Recommendations Concerning Proposed Aggressive "Next Steps" On a Larger 25 taf/yr. Transfer Are Poorly Justified On Either Policy and Factual Grounds

In addition to the abovementioned concerns regarding MID's proposal to approve the smaller 2 mgd long-term transfer without any independent CEQA review whatsoever, Farm Bureau objects to staff's recommendation in the separate Draft Resolution on the potential 25 taf/yr. transfer, for reasons including but not limited to the following:

First, Farm Bureau believes staff's recommendations on the larger transfer reflect bad policy in that they recommend an imprudent course of action involving a sequence of steps that is not sufficiently protective of the best of interests of MID's ratepayers. By requesting authorization to negotiate details of

a potential transfer *before* completing a thorough water supply availability analysis—and by then allowing this water supply availability analysis to form the basis for a full-blown CEQA analysis of such a transfer—staff’s recommendation puts the proverbial cart far ahead of the horse.

Instead, given that the district proposes all but permanently transferring water out of the district, the district must complete an independent water supply availability analysis that shows whether there is actual surplus water available, and do so *before* it contemplates any specific water transfer or related environmental review. Also, the district should fund its own study and should not enter into any reimbursement contract with the SFPUC for such a study, since to do so will compromise the MID’s independent judgment and all but ensure a preordained result.

In addition to these policy-related objections, Farm Bureau further questions the factual basis and authenticity of the alleged crisis that district staff cite as a compelling reason for the transfer. We question the need, as well as the level, extent, and projected cost of a variety of supposed “must-have” system improvements cited by MID as the reason for the transfer. Given the significant level of private investment, on-going advances in terms of modern operations and irrigation practices, and the high basin-level efficiency existing within MID’s service area, we also question the severity and authenticity of any current threat of regulatory seizure of the district’s senior water entitlement due to potential waste, forfeiture, or unreasonable use.

To the extent the district’s past decisions may have placed MID in a fiscally precarious position, we dispute the claim that hasty liquidation and alienation of the district’s and the region’s most valuable asset—the district’s senior water rights and priority access to water from the Tuolumne River watershed—is either acceptable or inevitable. Furthermore, we dispute the premise that a 25 taf transfer is the district’s only choice and a *panacea* to whatever current difficulties it may face, or that thoughtful and less radical alternatives could not prevent drastic rate increases, or state confiscation of the district water rights.

Farm Bureau is very concerned that, for at least an initial and potential lengthy period future transfer water would *not* come from improved efficiencies in the area of “surface water outflows,” as shown in MID’s pie-charts depicting the supposed source of that water.⁶ Instead, MID proposes that any shortfall to meet these year-to-year deliveries would *necessarily* come out of “agricultural deliveries”—at the same time that future urban growth in the City of Modesto would potentially further reduce “agricultural deliveries” in the MID service district by up to 35,000 taf/yr.⁷ ***In other words, under inevitable shortage conditions in the future, the farmers’ only option would be to shift unmet demand to local groundwater, or to fallow land.***

⁶ See April 27, 2012 MID Memo regarding “Water Transfers”—including, specifically, the pie chart on page 4 noted as Exhibit B to the April 27, 2012 Memo, depicting the source of water for the 25,000 taf/yr and 2 mgd transfers. (Attachment A).

⁷ As shown in the referenced pie chart, SFPUC transfer water would come out of an assumed reduction in system-wide “surface water outflows” from 40,000 af/yr. to 12,800 af/yr.. Until major, system-wide infrastructure improvements were completed, however, this water would necessarily come out of “agricultural deliveries.” During the same period, however, the pie chart also shows that current firm “agricultural deliveries” of 185,000 taf will be reduced by up to 35,000 taf/yr., from 185,000 to 150,000 af/yr., as a result of increasing urban demand from growth in the City of Modesto that is virtually certain to occur over the next 50 years.

We dispute the claim that a large, long-term, out-of-basin transfer of water would necessarily put the district—and, more importantly, its customers—in a *better*, and *not a worse* position to resist potential future regulatory erosion of local water supply reliability in the impending New Don Pedro relicensing process, or in potential water rights proceedings by the State Water Resources Control Board. In fact, quite to the contrary, we see a very significant risk that such a transfer could leave the district and its customers *far more vulnerable* to potential future regulatory losses than would be the case *in the absence* of such a transfer.

In short, for these, and many more reasons, we consider the trade-off between short-term administrative convenience on the part of district and future water insecurity for our local users a poor trade. To the extent the district considers such a transfer *at all*, we strongly urge *against* the hasty approach recommended by staff. Instead, we strongly advise the district to approach any such proposal much more cautiously and prudently.

At a minimum, for Farm Bureau, key elements of a more prudent approach should include:

(1) much more accurately and precisely assessing the true nature and extent of the district's present fiscal and infrastructure needs, and potential present and future legal and regulatory vulnerabilities;⁸

(2) conducting a thorough, conservative, and *wholly independent* assessment of the district's present and future in-basin needs; and

(3) exploring non-transfer solutions, as well as a range of potential smaller and shorter-term transfers *before* studying, considering, or negotiating a transfer of *any* particular size, or to *any* particular party;

(4) subsequently moving forward on any specific transfer proposal *only* if a competent, independent assessment can show there are *true* surplus supplies available for transfer.⁹

Numerous Provisions In the June 26, 2012 Revised Draft Agreement For MID's Proposed 2 mgd Transfers Are Insufficient to Protect MID's Ratepayer's Best Interests, In Addition To Setting a Bad Precedent For Any Future Larger Transfer

Above, we have set forth numerous reasons why MID cannot avoid a proper independent CEQA review of the immediately proposed 2 mgd transfer. Secondly, concerning the current proposal with respect to staff recommended "next steps" on the larger proposed 25 taf/yr. transfer, we have also laid out various reasons we believe the recommended course amounts to bad policy, why we believe it does not serve or adequately protect the best interests of MID's ratepayers, and why numerous assumed factual

⁸ Very importantly, as already touched upon above, any water supply availability or environmental study of a potential transfer (or transfers) must include a baseline and cumulative impacts analysis extending to all of the important circumstances described in footnote 1 above.

⁹ In fact, in this regard, our current opinion is that the present combination and effect of MID's current contractual obligations to the City of Modesto, to its own customers, to neighbors and downstream users, as well as the district's potential, significant exposure future regulatory pressures and changing hydrology all make a "surplus" finding a difficult one to make in good faith, in the best of interests of MID's ratepayers and customers.

bases for the alleged need for a transfer of this magnitude demand much greater, more careful, and more deliberate consideration.

In addition to these significant concerns, we would like to close with a brief analysis of various potential legal and contractual infirmities that we see as additional compelling reasons the district should defer consideration of the larger 25 taf transfer at this time:

First, we are concerned that such a transfer could potentially place MID in an untenable position in terms of the district's future ability to meet the district's existing contractual and other legal obligations, including notably the district's obligations to its own customers and the City of Modesto.

Second, we are concerned, from a regional agricultural perspective, about the potential liabilities and environmental impacts on groundwater, adjacent areas, and downstream users who may rely on reuse of MID system losses.

Third, the foregoing concerns are greatly heightened when one considers the prospect of potential, future regulatory erosion of current MID supplies and potential, long-term hydrologic changes in the watershed.¹⁰

Lastly, we are concerned with aspects of the currently proposed 2 mgd Revised Draft Agreement,—especially to the extent that certain problematic provisions of the current Draft Agreement might, in any way, foreshadow similar terms of a future larger transfer to SFPUC. More specifically and precisely, some major concerns with current 2 mgd Revised Draft Agreement include the following:

1. The draft contract *asserts* in various places that (apparently from a theoretical water accounting standpoint) the agreement in no way affects or impairs the parties' water rights, or impairs any of the parties' existing legal and prior contractual obligations including water rights priorities, the Raker Act, *the Fourth Agreement between the City and County of San Francisco and the Turlock Irrigation District and Modesto Irrigation District*, or MID's existing contractual obligations to the Turlock Irrigation District and the City of Modesto, etc.¹¹ However, the agreement ultimately provides little real assurance that disputes will *not* arise, or that some of these obligations will *not* be potentially impaired, breached, or made more difficult to satisfy at various times in the future, including times of extended drought and under the effects of potential changed regulatory or hydrologic conditions within the basin.

2. The Revised Draft Agreement “recognize[s]” the potential for additional increased reservoir bypass, water quality, or instream flow obligations as a result of future FERC relicensing or SWRCB proceedings.¹² In addition, the Revised Draft provides for potential 10-year “reviews” of possible baseline changes,¹³ and possible termination under such circumstances.¹⁴ However, such termination, in the event of “any subsequent judicial regulatory, legislative or administrative act, decision, or order preclud[ing] either Party from substantially realizing the benefits of [the] Agreement,” can occur *only*

¹⁰ Further, as noted already once herein, we are unconvinced that selling a large chunk of MID's current supplies would not leave the district and its customers in a *worse*, and not a *better* position, if faced in the future with potential shortages and increased regulatory demands.

¹¹ See, e.g., June 26, 2012 Revised Draft Agreement at I(D), (E), and (F); II(D)(5), (6), and (7); III(A), and III(D).

¹² See Revised Draft Agreement at I(I).

¹³ See Section II(C).

¹⁴ See Sections III(N)(1), (2), and (3).

upon a showing of “diligent and good faith effort” and “substantial deprivation” of contract benefits, subject to judicial review,” with “at least two (2) years notice.”¹⁵ Similarly, termination in a FERC relicensing context is predicated upon a somewhat ambiguous failure of the parties to “reach agreements regarding allocation of responsibility to provide water required to satisfy [any future flow schedules set in future New Don Pedro relicensing proceedings.]”¹⁶ Meanwhile, however, as established in the current draft contract, MID’s on-going obligation to transfer its water “will not be subject to shortage or reduction for any reason other than a Force Majeure Event,”¹⁷ whereas “[n]either drought nor changed hydrology” is considered “a Force Majeure Event” under the agreement.¹⁸ Thus, in any scenario, none of the intended ‘off-ramps’ in the current Revised Draft Agreement is, by any means, immune from potential complications, differences of interpretation, or potential costly and time-consuming litigation. Thus, much room is left for potential mischief and future harm to MID ratepayers, even under the intended assurances of the Revised Draft Agreement’s currently proposed termination clauses.

3. Lastly and very significantly, Farm Bureau has grave concerns regarding the current Draft Agreement’s grant of a proposed first right of refusal to the SFPUC on any future “out-of-basin water transfer” by MID.¹⁹

Conclusion

In closing, the Stanislaus County Farm Bureau strongly urges the MID Board to defer approval or further consideration of a 2 mgd transfer pending completion of a full and proper CEQA review of this smaller transfer, prepared from the independent perspective of MID and its ratepayers, consistent with MID’s status and its legal obligations as a “responsible agency” within the meaning of CEQA Guidelines section 15096.

Secondly, we urge the MID Board to reject staff’s recommendation to proceed aggressively forward with negotiation of potential terms and CEQA review of a specific 25 taf/yr. long-term transfer to the SFPUC, without first conducting a thorough independent study of present and future water supply availability, particularly in light of various current existing or reasonably foreseeable changes in the relevant regulatory, hydrologic, and environmental baseline, as noted herein.

Lastly, the Farm Bureau objects to various aspects of the current Revised Draft Agreement for the proposed 2 mgd transfer—and especially so to the extent that any of these provisions would portend an objectionable precedent for negotiation of a larger transfer.

In fact, we see it as somewhat ironic that we and others in our region should have to go to such lengths to impress upon the MID Board many of the same concerns and criticisms that were in 2007 self-evident to the MID itself, and raised by the district in its own public comments on a large 27-29 taf transfer, as analyzed in the SFPUC’s 2008 PEIR.²⁰ If the MID Board finds itself disinclined to consider

¹⁵ Section III(N)(3).

¹⁶ Sections III(N)(1) and (2).

¹⁷ Section II(D)(1)(i)(c).

¹⁸ Section III(I).

¹⁹ Section III(A).

²⁰ See MID’s October 1, 2007 comments on the SFPUC’s 2008 Draft PEIR, (Attachment B).

our concerns, or the significant concerns of other local constituents regarding the proposed transfers at this time, we would invite the Board to revisit some of the views offered by MID itself on a large SFPUC transfer during its more skeptical mood of just a few years ago.

The Stanislaus County Farm Bureau thanks the MID for the opportunity to offer these comments on the latest SFPUC water transfer proposals from MID. We look forward to collaboratively working toward an acceptable resolution of the above-mentioned concerns with MID in the near future.