

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

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In the Matter of Water Quality Certification for the  
**EL DORADO IRRIGATION DISTRICT  
MILL CREEK DIVERSION STRUCTURE REMOVAL PROJECT**

SOURCE: Mill Creek

COUNTY: El Dorado

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**WATER QUALITY CERTIFICATION FOR FEDERAL PERMIT OR LICENSE**

BY THE EXECUTIVE DIRECTOR:

**1. Background and Project Description**

El Dorado Irrigation District (EID or Applicant) proposes the Mill Creek Diversion Structure Removal Project (Project), to remove the inoperative water diversion structure on Mill Creek. The diversion structure is a feature of the El Dorado Hydroelectric Project, which is also referred to as Federal Energy Regulatory Commission (FERC) Project No. 184. The Project is required by the United States Forest Service (Forest Service)<sup>1</sup> and FERC<sup>2</sup>.

The Project is located on Mill Creek, approximately 2,000 feet upstream of the confluence of Mill Creek and the South Fork American River. The Project site is accessed via a foot-trail that begins at Randall Tract, off Highway 50 near White Hall, California. Mill Creek is a perennial creek, comprised of predominantly high gradient bedrock cascade with minimal fine sediments.

Prior to 1997, the diversion structure on Mill Creek diverted water into a conduit system as part of the El Dorado Hydroelectric Project. In January 1997, the conduit system was damaged due to storm runoff and associated landslides. EID repaired the conduit system with a tunnel and removed a majority of the Mill Creek Diversion structure<sup>3</sup>. The remnants of the Mill Creek Diversion structure consist of an approximately 17-foot long by 18-inch wide steel reinforced concrete structure that spans Mill Creek. A 6-foot by 4-foot opening is present in the middle of the concrete structure. Portions of a slide gate and outlet pipe are attached to the concrete structure.

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<sup>1</sup> In letters dated October 22, 2012 and April 5, 2016, the Forest Service stated that the Mill Creek Diversion structure needs to be removed from National Forest System lands and the area restored to the satisfaction of the Forest Service.

<sup>2</sup> In an Environmental Inspection, dated August 12, 2015, FERC identified the need to remove inoperative features from the El Dorado Hydroelectric Project boundary, including the Mill Creek Diversion structure.

<sup>3</sup> EID no longer diverts water at Mill Creek. Since 2007, EID states it has diverted Mill Creek water at Folsom Reservoir under its pre-1914 water right (Statement No. S000974).

The purpose of the Project is to remove the remnants of the Mill Creek Diversion structure with minimal disturbance to the Project area and Mill Creek. EID proposes to use crews with hand tools (e.g., sledge hammer, pick, breaker bar, and shovel) and power tools (e.g., demolition hammer, grinder, and dry concrete power cutting saw) to remove the concrete and slide gate. Metal structures that cannot be removed without significant impact to the Project area will be cut flush with surrounding parent materials (e.g., bedrock) using power tools or a cutting torch. EID estimates approximately 1.1 cubic yards of concrete will be removed. Metal debris and concrete fragments from the structure will be transported off-site for disposal. A helicopter will transport tools and equipment to and from the Project site, and transport diversion structure material for disposal.

The Project is anticipated to take five days and be implemented between August 16 and October 31, when instream flow is anticipated to be low (i.e., less than 0.2 cubic feet per second or 90 gallons per minute) and outside the Limited Operating Period for the California Spotted Owl (*Strix occidentalis occidentalis*)<sup>4</sup>. Prior to removing the diversion structures, EID will install a temporary sandbag cofferdam and a 6-inch to 8-inch bypass pipe to dewater and route flows around the Project work area. Minor willow trimming will be required to access the Mill Creek Diversion structure. A Water Pollution Control Plan<sup>5</sup>, including best management practices and site monitoring, will be implemented during Project activities to protect water quality and minimize impacts to Mill Creek.

## 2. Regulatory Authority

### Water Quality Certification and Related Authorities

The Federal Clean Water Act (CWA) (33 U.S.C. §§1251-1387) was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. §1251(a).) Section 101 of the CWA (33 U.S.C. §1251 (g)) requires federal agencies to “co-operate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”

Section 401 of the CWA (33 U.S.C. §1341) requires every applicant for a federal license or permit which may result in a discharge into navigable waters to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the CWA, including water quality standards and implementation plans promulgated pursuant to section 303 of the CWA (33 U.S.C. §1313). CWA section 401 directs the agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the CWA and with any other appropriate requirement of state law. Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. The State Water Resources Control Board (State Water Board) is designated as the state water pollution control agency for all purposes stated in the CWA and any other federal act. (Wat. Code, §13160.) The State Water Board’s Executive Director has been delegated the authority to issue a decision on a water quality certification application. (Cal. Code Regs., tit. 23, § 3838, subd. (a)).

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<sup>4</sup> The Limited Operating Period for California Spotted Owl is from March 1 through August 15 (United States Forest Service Guidance on Limited Operating Periods for the California Spotted Owl, dated November 15, 2006).

<sup>5</sup> The Water Pollution Control Plan for the Project can be found online at:  
[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/401\\_certification.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/401_certification.html).

Water Code section 13383 provides the State Water Board with the authority to “establish monitoring, inspection, entry, reporting and recordkeeping requirements... and [require] other information as may reasonably be required” for activities subject to water quality certification under section 401 of the Clean Water Act that involve the diversion of water for beneficial use. The State Water Board delegated this authority to the Deputy Director of the Division of Water Rights (Deputy Director), as provided for in State Water Board Resolution No. 2012-0029. In the Redelegation of Authorities Pursuant to Resolution No. 2012-0029 memo issued by the Deputy Director on October 19, 2017, this authority is redelegated to the Assistant Deputy Directors of the Division of Water Rights.

On April 15, 2016, EID filed an application with FERC to amend the El Dorado Hydroelectric Project FERC license to remove the diversion structure on Mill Creek (non-capacity related amendment)<sup>6</sup>. Because the Project will require a FERC license amendment and has the potential to affect water quality, EID must obtain water quality certification from the State Water Board, pursuant to section 401(a)(1) of the CWA (33 U.S.C. §1341(a)(1)).

The State Water Board received EID’s application for certification on December 8, 2017. The State Water Board provided public notice of EID’s application for certification pursuant to California Code of Regulations, title 23, section 3858, by posting information describing the Project on the State Water Board’s website on January 5, 2018. The State Water Board received one comment from the United States Fish and Wildlife Service (USFWS) requesting information on the Project area. State Water Board staff provided information to the USFWS on January 8, 2018. State Water Board staff forwarded the application for certification to the Central Valley Regional Water Quality Control Board (Central Valley Regional Water Board) on March 12, 2018 for comment. (See Cal. Code Regs., tit. 23, §3855, subd. (b)(2)(B).) Central Valley Regional Water Board staff responded with no comments on March 13, 2018. On June 4, 2018, State Water Board staff forwarded the draft Project certification to the Central Valley Regional Water Board for comment. Central Valley Regional Water Board staff did not provide any comments on the draft Project certification.

On March 13, 2018, the United States Army Corps of Engineers (ACOE) determined that activities in waters of the United States associated with the Project are authorized by Nationwide Permit (NWP) Nos. 33 and 53. However, the ACOE denied authorization without prejudice until Project certification under section 401 of the CWA is issued or waived. After EID receives certification or waiver thereof, Project activities are authorized and the work may proceed subject to the conditions of certification and the terms and conditions of NWP Nos. 33 and 53. The ACOE identification number for the Project is SPK-2017-01024.

*Water Quality Control Plans and Related Authorities*

The Regional Water Quality Control Boards (Regional Water Boards) have primary responsibility for the formulation and adoption of water quality control plans for their respective regions, subject to the State Water Board and United States Environmental Protection Agency (USEPA) approval, as appropriate. (Wat. Code, § 13240 et seq.) The State Water Board may also adopt water quality control plans, which will supersede regional water quality control plans for the same waters to the extent of any conflict. (Wat. Code, § 13170.) For a specified area, the water quality control plans designate the beneficial uses of water to be protected, the water

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<sup>6</sup> On May 26, 2016, the State Water Board received notice of EID’s application to amend its FERC license, to remove El Dorado Hydroelectric Project facilities (including diversion structures on Mill Creek). On June 21, 2016, State Water Board staff filed a motion to intervene.

quality objectives established for the reasonable protection of those beneficial uses or the prevention of nuisance, and a program of implementation to achieve the water quality objectives. (Wat. Code, §§ 13241, 13050 subds. (h) and (j).) The beneficial uses together with the water quality objectives that are contained in the water quality control plans, in addition to state and federal anti-degradation requirements, constitute California's water quality standards.

The Central Valley Regional Water Board adopted, and the State Water Board and USEPA approved, the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (Basin Plan). The Basin Plan identifies existing beneficial uses for the American River South Fork source to Placerville as: municipal and domestic supply; power; contact recreation; canoeing and rafting; noncontact recreation; cold freshwater habitat; cold spawning habitat; and wildlife habitat. Warm freshwater habitat is identified as a potential beneficial use.

#### Construction General Permit

The State Water Board has adopted a Construction General Permit<sup>7</sup>, which is required for activities that disturb one or more acres of soil or projects that disturb less than one acre but are part of a larger common plan of development that in total disturbs one or more acres. Construction activities subject to the Construction General Permit include clearing, grading, and disturbances to the ground such as stockpiling or excavation, but does not include regular maintenance activities performed to restore the original line, grade, or capacity of the facility. It is not expected that a Construction General Permit will be required for this Project.

#### California Environmental Quality Act

EID is the lead agency for the purpose of California Environmental Quality Act (CEQA) compliance, and the State Water Board is a responsible agency (Cal. Pub. Resources Code, §21000-21177). EID determined that the Project is categorically exempt from CEQA requirements under section 15301 (Existing Facilities - Class 1) and section 15333 (Small Habitat Restoration Projects - Class 33) of the CEQA Guidelines. On December 4, 2017, EID filed a Notice of Exemption with the County Clerk for the County of El Dorado.

The State Water Board has reviewed the proposed Project and concurs that the Project qualifies for Class 1 and Class 33 categorical exemptions. The State Water Board will file a Notice of Exemption within five days of issuance of this certification.

All documents and other information that constitute the public record for this Project are maintained and available for public review at the State Water Board, Division of Water Rights, 1001 I Street, Sacramento, California 95814.

### **3. Findings and Conclusion**

When preparing the conditions in this certification, State Water Board staff reviewed and considered a wide range of information including the: (a) Applicant's certification application, including subsequent submissions; (b) the Basin Plan; (c) existing water quality conditions; (d) Project-related controllable factors; and (e) other information in the record.

In order to ensure the Project meets water quality standards as anticipated, to ensure compliance with other relevant state and federal laws, and to ensure the Project will continue to

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<sup>7</sup> Water Quality Order 2009-0009-DWQ and National Pollution Discharge Elimination System No. CAS000002, as amended by Order No. 2010-0014-DWQ and Order No. 2012-0006-DWQ and any amendments thereto.



**ACCORDINGLY, BASED ON ITS INDEPENDENT REVIEW OF THE RECORD, THE STATE WATER RESOURCES CONTROL BOARD CERTIFIES THAT THE MILL CREEK DIVERSION STRUCTURE REMOVAL PROJECT** will comply with sections 301, 302, 303, 306, and 307 of the Clean Water Act, and with applicable provisions of State law, if El Dorado Irrigation District complies with the following terms and conditions during the Project activities certified herein.

**CONDITION 1.** All proposed environmental measures described in the application for certification and supplemental application information are hereby incorporated by reference and are conditions of this certification. Notwithstanding any more specific conditions in this certification, the Applicant shall implement the best management practices described in the Water Pollution Control Plan for the Project<sup>8</sup>.

**CONDITION 2.** The Applicant shall notify the Deputy Director 30 days prior to commencing construction. Upon request, the Applicant shall provide State Water Resources Control Board (State Water Board) staff with a work schedule.

**CONDITION 3.** The Applicant shall inspect, photograph, and document the condition of the Project area: (a) within five days prior to beginning construction activities; and (b) within five days after completion of construction activities. A minimum of four fixed photo points shall be established, including one photo point upstream of the Project on the left bank looking downstream; one photo point upstream of the Project on the right bank looking downstream; one photo point downstream of the Project on the left bank looking upstream; and one photo point downstream of the Project on the right bank looking upstream.

**CONDITION 4.** Disturbance within the bed and bank of Mill Creek associated with Project activities shall be limited to August 16 through October 31.

**CONDITION 5.** Upon completion of Project activities, all access routes, disturbed areas, and any degradation related to Project activities shall be restored to their pre-construction conditions. All disturbed areas shall be seeded with the appropriate native seed mix.

**CONDITION 6.** Within 30 days of Project completion, the Applicant shall submit a Project Compliance Report to the State Water Board Deputy Director for Water Rights (Deputy Director). The Project Compliance Report shall include:

- a. Project area documentation, collected in accordance with Condition 3;
- b. Daily Project work summaries;
- c. Documentation of compliance with each condition of this certification and details of any failure to meet the certification requirements; and
- d. If applicable, details of Project-related adverse impacts to beneficial uses.

The Deputy Director may request additional information or clarification regarding the Project Compliance Report. Upon request from State Water Board staff, the Applicant shall meet to discuss the Project Compliance Report.

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<sup>8</sup> The Water Pollution Control Plan for the Project can be found online at:  
[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/401\\_certification.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/401_certification.html).

**CONDITION 7.** Control measures for erosion, excessive sedimentation, and turbidity shall be implemented and in place at the commencement of, during, and after any ground clearing activities, excavation, or any other Project activities that could result in erosion or sediment discharges to surface waters. Erosion control blankets, liners with berms, and/or other erosion control measures shall be used for any stockpile of excavated material to control runoff resulting from precipitation and prevent material from contacting or entering surface waters.

**CONDITION 8.** Project-related construction material, debris, spoils, soil, silt, sand, bark, slash, sawdust, rubbish, steel, other organic or earthen material, or any other substances which could be hazardous to aquatic life shall be prevented from entering surface waters.

**CONDITION 9.** All equipment shall be washed prior to transport to the Project site and must be free of sediment, debris, and foreign matter.

**CONDITION 10.** Any maintenance or refueling of equipment occurring on-site will be done in a designated area with secondary containment, located away from drainage courses to prevent the runoff of storm water and the runoff of spills. All equipment using gas, oil, hydraulic fluid, or other petroleum products shall be inspected for leaks prior to use and shall be monitored for leakage. Stationary equipment (motors, pumps, generators, etc.) not in use shall be positioned over drip pans or other types of containment. Spill and containment equipment (oil spill booms, sorbent pads, etc.) shall be maintained onsite at all locations where such equipment is used or staged.

**CONDITION 11.** All construction debris and trash shall be contained and regularly removed from the work area to the staging area during construction activities. Upon completion, all Project-generated debris, building materials, excess material, waste, and trash shall be disposed at an authorized landfill or other disposal site in compliance with state and local laws, ordinances, and regulations.

**CONDITION 12.** Onsite containment for storage of chemicals classified as hazardous shall include secondary containment and appropriate management as specified in California Code of Regulations, title 27, section 20320.

**CONDITION 13.** A copy of this certification shall be provided to any contractor and all subcontractors conducting the Project work, and copies shall remain in their possession at the Project site. The Applicant shall be responsible for work conducted by its contractors and subcontractors. The Applicant, including its contractors and subcontractors, shall report any noncompliance with the conditions of this certification to the Deputy Director within 24 hours of the time when the Applicant, its contractors, or subcontractors becomes aware of noncompliance with the certification.

**CONDITION 14.** This certification requires compliance with all applicable requirements of the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins*. If at any time an unauthorized discharge to surface waters (including rivers or streams) occurs or monitoring indicates that the Project has or could soon be in violation water quality objectives, the associated Project activities shall cease immediately and the Deputy Director and the Central Valley Regional Water Quality Control Board (Regional Water Board) Executive Officer shall be notified. Associated activities may not resume without written approval from the Deputy Director.

**CONDITION 15.** Unless otherwise specified in this certification or at the request of the State Water Board, data and/or reports shall be submitted electronically in a format accepted by the State Water Board to facilitate the incorporation of this information into public reports and the State Water Board's water quality database systems in compliance with Water Code section 13167.

**CONDITION 16.** The State Water Board reserves the authority to add to or modify the conditions of this certification to incorporate changes in technology, sampling, or methodologies.

**CONDITION 17.** Notwithstanding any more specific conditions in this certification, the Project shall be operated in a manner consistent with all applicable water quality standards and implementation plans adopted or approved pursuant to the Porter-Cologne Water Quality Control Act or section 303 of the Clean Water Act. The Applicant shall take all reasonable measures to protect the beneficial uses of waters of the South Fork American River and its tributaries.

**CONDITION 18.** This certification does not authorize any act which results in the taking of a threatened, endangered, or candidate species or any act, which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (ESA) (Fish & Game Code §§ 2050 - 2097) or the federal ESA (16 U.S. §§ 1531 - 1544). If a "take" will result from any act authorized under this certification or water rights held by the Applicant, the Applicant must obtain authorization for the take prior to any construction or operation of the portion of the Project that may result in a take. The Applicant is responsible for meeting all requirements of the applicable ESAs for the Project authorized under this certification.

**CONDITION 19.** In the event of any violation or threatened violation of the conditions of this certification, the violation or threatened violation is subject to any remedies, penalties, processes, or sanctions as provided for under applicable state or federal law. For the purposes of section 401(d) of the Clean Water Act, the applicability of any state law authorizing remedies, penalties, processes, or sanctions for the violation or threatened violation constitutes a limitation necessary to assure compliance with the water quality standards and other pertinent requirements incorporated into this certification.

**CONDITION 20.** In response to a suspected violation of any condition of this certification, the State Water Board and Regional Water Board may require the holder of any federal permit or license subject to this certification to furnish, under penalty of perjury, any technical or monitoring reports the State Water Board deems appropriate, provided that the burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports (Water Code sections 1051, 13165, 13267 and 13383). In response to any violation of the conditions of this certification, the State Water Board may add to or modify the conditions of this certification as appropriate.

**CONDITION 21.** No Project work shall commence until all necessary federal, state, and local approvals have been obtained. The Applicant is responsible for compliance with all applicable federal, state, and local laws or ordinances.

**CONDITION 22.** The Applicant must submit any changes to the Project which would have a significant or material effect on the findings, conclusions, or conditions of this certification, to the Deputy Director for review and written approval, prior to implementation. If the Deputy Director is not notified of a significant change to the Project, it will be considered a violation of this certification.

**CONDITION 23.** The Applicant shall provide State Water Board and Regional Water Board staff access to Project sites to document compliance with this certification.

**CONDITION 24.** The State Water Board shall provide notice and an opportunity to be heard in exercising its authority to add to or to modify any of the conditions of this certification.

**CONDITION 25.** This certification is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Water Code section 13330 and California Code of Regulations, title 23, division 3, chapter 28, article 6 (commencing with section 3867).

**CONDITION 26.** This certification is not intended and shall not be construed to apply to any activity involving a hydroelectric facility and requiring a Federal Energy Regulatory Commission (FERC) license or an amendment to a FERC license unless the pertinent certification application was filed pursuant to California Code of Regulations, title 23, section 3855, subdivision (b) and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.

**CONDITION 27.** Nothing in this certification shall be construed as State Water Board approval of the validity of any water rights, including pre-1914 claims. The State Water Board has separate authority under the Water Code to investigate and take enforcement action if necessary to prevent any unauthorized or threatened unauthorized diversions of water.

**CONDITION 28.** Any requirement in this certification that refers to an agency whose authorities and responsibilities are transferred to or subsumed by another state or federal agency, will apply equally to the successor agency.

**CONDITION 29.** This certification is conditioned upon total payment of any fee required under California Code of Regulations, title 23, division 3, chapter 28 and owed by the Applicant.

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Eileen Sobeck  
Executive Director

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Date

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