

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

<b>Turlock Irrigation District and Modesto Irrigation District</b>	) ) ) ) )	<b>Don Pedro Hydroelectric Project (P-2299-) La Grange Hydroelectric Project (P-14851-)</b>
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**CONSERVATION GROUPS’ MOTION TO INTERVENE IN OPPOSITION TO THE  
PETITION FOR DECLARATORY ORDER OF TURLOCK IRRIGATION DISTRICT  
AND MODESTO IRRIGATION DISTRICT REQUESTING WAIVER OF WATER  
QUALITY CERTIFICATION FOR THE DON PEDRO AND LA GRANGE  
HYDROELECTRIC PROJECTS**

California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (collectively, “Conservation Groups”) move to intervene in opposition to the “Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification” (“Petition”). Turlock Irrigation District (“TID”) and Modesto Irrigation District (“MID”); (collectively, “Districts”) filed the Petition on October 2, 2020. It asks that the Federal Energy Regulatory Commission (“FERC” or “Commission”) find that the State of California, through the State Water Resources Control Board (“State Water Board”), has waived its authority under Section 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341, to issue water quality certification for the relicensing of the Don Pedro (P-2299-) and the original licensing of the La Grange (P-14581-) Hydroelectric Projects.<sup>1</sup>

Conservation Groups are parties to the relicensing proceedings for both projects.<sup>2</sup> However, the Commission has not issued a notice regarding the Petition pursuant to Rule 210 of the Commission’s Rule of Practice and Procedure (“Rules”), and it is therefore unclear to Conservation Groups whether it is necessary to file an additional intervention regarding the Petition *per se*. We do so here, within the time 30-day time period outlined in Rule 213 of the Rules, out of an abundance of caution. Conservation Groups reserve all rights to supplement and/or modify these comments at a later date.

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<sup>1</sup> Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification, P-2299- and P-14581- (Oct. 2, 2020), eLibrary no. 20201002-5186.

<sup>2</sup> See Don Pedro Hydroelectric Project, P-2299-082, Motion to Intervene of California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (Jan. 23, 2018), eLibrary no. 20180123-5010; La Grange Hydroelectric Project, P-14581-002, Motion to Intervene of California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (Jan. 23, 2018), eLibrary no. 20180123-5013.

Conservation Groups oppose waiver of Section 401 certification for the relicensing of the Don Pedro Project and the licensing of the La Grange Project.

## **I. DESCRIPTION OF INTERVENORS**

California Sportfishing Protection Alliance (hereinafter “CSPA”) is a non-profit, public benefit fishery conservation organization incorporated in 1983 to protect, restore and enhance California’s fishery resources and their aquatic ecosystems. CSPA works to ensure that public fishery resources are conserved to enable public sport fishing activity. As an alliance, CSPA represents over 1,000 members that reside in California. Since its inception, CSPA has aggressively advocated for the conservation of the fishery resources throughout the state in proceedings before local, state and federal government entities. CSPA is concerned about the prolonged and extensive decline of the state’s fish species and works with many government agencies to reverse these declines. CSPA has a longstanding interest in the Tuolumne River and its resources, including reintroduction of salmonids to the upper watershed, flows in the Tuolumne River, recreational fishing, and the contribution of the Tuolumne River to fisheries in the wider Bay-Delta system. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of CSPA, and its participation in this process is in the public interest.

The Tuolumne River Trust (hereinafter “TRT”) is a non-profit organization founded in 1981 to promote stewardship of the Tuolumne River through education, community outreach, restoration projects, and outdoor adventures for its members along the Tuolumne River. TRT works to safeguard the Tuolumne River environment, as well as its fish and wildlife, for the benefit of its members and future generations who will use and enjoy the river. TRT has long been active in advocacy and grassroots efforts to protect the environment of the Tuolumne River. In the 1990s, TRT played a major role in winning higher flows for salmon on the Lower Tuolumne. In 2008, TRT won a five-year effort to prevent the San Francisco Public Utilities Commission from diverting an additional 25 million gallons of water per day from the Tuolumne River. TRT has approximately 1,500 members, many of whom regularly use and enjoy the Tuolumne River for fishing, canoeing, rafting, kayaking, backpacking, and camping. TRT promotes its members’ interests by working to protect the Tuolumne River’s health and preserve the river for its members’ recreational use. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of TRT, and its participation in this process is in the public interest.

Trout Unlimited (hereinafter “TU”) is a national non-profit conservation organization with California offices in Emeryville, Fort Bragg, Salinas, and Truckee. TU is the nation’s largest coldwater fisheries conservation organization. TU has over 300,000 members and supporters nationwide, and is dedicated to protecting, conserving, and restoring North America’s coldwater salmonid and trout fisheries and their watersheds. In California alone, TU has more than 10,000 members. TU members and the general public use the sections of the Tuolumne River watershed affected by the Don Pedro and La Grange Projects for recreational and aesthetic purposes including, but not limited to, fishing, viewing, and enjoyment of the outdoors. The Tuolumne River is a major angling destination for TU members. TU members, along with the general public, have significant recreational interests attached to healthy trout and salmon populations and habitat in and along the Tuolumne River. The disposition of Section 401

Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of TU, and its participation in this process is in the public interest.

American Whitewater is a national non-profit organization with a mission “to conserve and restore America’s whitewater resources and to enhance opportunities to enjoy them safely.” American Whitewater represents a broad diversity of individual whitewater enthusiasts, river conservationists, and more than 6,000 members and 100 local paddling club affiliates across America. The organization is the primary advocate for the preservation and protection of whitewater resources throughout the United States. Members of American Whitewater boat in river reaches affected by the Don Pedro and La Grange Projects. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of American Whitewater’s members, and its participation in this process is in the public interest.

Merced River Conservation Committee (hereinafter “MRCC”) is a local volunteer organization of members interested in the San Joaquin River watershed and its future. MRCC is based in Mariposa County. MRCC’s principal interests are fisheries and aquatic habitat, trail and boating recreation, and historic sites of the tributaries to the San Joaquin, including the Merced and Tuolumne Rivers. MRCC members’ fish, raft, and hike on the Tuolumne River and are interested in the long-term protection of the Tuolumne River. The interests of MRCC’s members are directly affected by the outcome of any processes that have the potential to determine protection, mitigation, and enhancement measures associated with facilities and operations of hydropower facilities on the Tuolumne River. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of MRCC, and its participation in this process is in the public interest.

Friends of the River is a nonprofit 501(c)3 organization headquartered in Sacramento, California, working to protect, preserve, and restore California rivers and streams for both environmental and recreational purposes. Friends of the River has approximately 3,500 members in the state of California. Friends of the River has a longstanding history of advocacy and interest in the Tuolumne River and its resources, including flood control, dam construction, reintroduction of salmonids to the upper watershed, and flows in the Tuolumne River. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of Friends of the River, and its participation in this process is in the public interest.

Golden West Women Flyfishers (hereinafter “GWWF”) is a non-profit organization founded in 1983 to support the sport of fly fishing through conservation, education, social, and fishing programs. GWWF has approximately 150 members who are engaged in the sport of fly fishing in the rivers of California. The organization is dedicated to protecting aquatic habitats and fish populations in California for fly fishers to use and enjoy. GWWF members often go on fishing outings along the Tuolumne River, including below the La Grange Dam and above the Don Pedro Project on the upper part of the river. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of GWWF, and its participation in this process is in the public interest.

The Central Sierra Environmental Resource Center (hereinafter “CSERC”) is a 501(c)(3) nonprofit organization located in Twain Harte, California. CSERC has 750 members, with two biologists, a botanist and a fire/forestry specialist on staff. For 27 years CSERC has worked to defend water and wildlife, including doing fieldwork, watchdog monitoring, and advocacy work across the Tuolumne River watershed. CSERC biologists sample water quality in streams and rivers, work to protect at-risk fish and amphibian species, and have won a national award for implementing hands-on volunteer restoration projects on public lands, including rehabilitation projects in the Tuolumne River watershed. CSERC has been actively engaged in the FERC licensing process since the beginning of the Don Pedro Project relicensing and the start of the La Grange Project licensing. The disposition of Section 401 Certifications for the Don Pedro Project relicensing and the La Grange Project licensing will directly affect the interests of CSERC staff and members as well as aquatic species that are a CSERC priority for protection, and its participation in this process is in the public interest.

All filings, orders, and correspondence respecting this intervention should be sent to the following:

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Conservation Groups request service and other correspondence related to this proceeding in electronic format. No hardcopies please.

## **I. Administrative Background**

On January 26, 2018, the Districts filed applications with the State Water Board for Section 401 certification in connection with the relicensing proceeding for the Don Pedro Project and the original licensing of the La Grange Project.<sup>3</sup> In their applications, the Districts announced their intention to be Lead Agencies for purposes of the California Environmental Quality Act (“CEQA”) in support of Section 401 Certification.<sup>4</sup>

On January 24, 2019, the State Water Board denied both applications without prejudice.<sup>5</sup>

On February 11, 2019, the Commission issued the combined Draft Environmental Impact Statement (“DEIS”) for the relicensing of the Don Pedro Project and the original licensing of the La Grange Project.<sup>6</sup>

On April 22, 2019, the Districts re-applied for Section 401 certification of each of the projects.<sup>7</sup>

On April 20, 2020, the State Water Board denied both applications without prejudice.<sup>8</sup>

On July 7, 2020, the Commission issued the Final Environmental Impact Statement (“FEIS”) for the relicensing of the Don Pedro Project and the original licensing of the La Grange Project.<sup>9</sup> The Commission’s issuance occurred approximately 30 months after the 401 applications were required to be filed under the Commission’s regulations, *see* 18 C.F.R. § 5.23(b).

On July 15, 2020, Mr. Vince Yearick, Director, Division of Hydropower Relicensing at FERC, sent a letter to Michael I. Cooke, Director of Water Resources and Regulatory Affairs, TID, and John Davids, Assistant General Manager, MID, stating that the Commission may dismiss license applications 90 days after denials of Section 401 Certification. Mr. Yearick further noted: “Accordingly, the Districts must promptly notify the Commission whether they have, within the 90-day period, filed a timely appeal of the denials with the Water Board or has

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<sup>3</sup> *See* letters from Steve Boyd, Director of Water Resources and Regulatory Affairs, TID, and Anna Brathwaite, Staff Attorney, MID, to Districts Eileen Sobeck, Executive Director, State Water Board (Jan. 26, 2018), eLibrary nos. 20180129-5044 (Don Pedro) and 20180129-5046 (La Grange) (2018 Applications for Certification).

<sup>4</sup> *Id.*, p. 2 of each application (“The Districts intend to be the Lead Agencies for the purpose of complying with the California Environmental Quality Act, and will coordinate with the Board and other responsive agencies.”)

<sup>5</sup> *See* letter from Eileen Sobeck to Steve Boyd, TID, and John Davids, MID (Jan. 24, 2019), eLibrary no. 20190206-0011.

<sup>6</sup> FERC, Draft Environmental Impact Statement for Hydropower Licenses, Don Pedro Hydroelectric Project, Project No. 2299-082 – California and La Grange Hydroelectric Project, Project No. 14581-002 – California (Feb. 11, 2019), eLibrary no. 20190211-3006

<sup>7</sup> *See* letters from Steve Boyd and John Davids to Eileen Sobeck (Apr. 22, 2019), eLibrary nos. 20190424-5196 (Don Pedro) and 20190424-5193 (La Grange).

<sup>8</sup> *See* letter from Eileen Sobeck to Steve Boyd, TID, and John Davids, MID (Apr. 20, 2020), eLibrary no.

<sup>9</sup> FERC, Final Environmental Impact Statement for Hydropower Licenses, Don Pedro Hydroelectric Project, Project No. 2299-082 – California and La Grange Hydroelectric Project, Project No. 14581-002 – California (July 7, 2020), eLibrary no. 20200707-3000.

refiled its certification requests, or whether, and on what basis, it believes that the Water Board has waived certification.”<sup>10</sup>

On July 20, 2020, the Districts re-applied for Section 401 certification of each of their projects.<sup>11</sup> In the respective cover letters filing notification of the applications with FERC, the Districts stated: “The Districts reserve the right to petition the Commission for an order finding that the Board has waived its authority under Section 401 of the Clean Water Act to issue water quality certification.”<sup>12</sup>

On October 2, 2020, the Districts filed their Petition seeking waiver of certification for the Don Pedro and La Grange Projects. The Districts now allege that the 401 certifications for the Don Pedro and La Grange and Merced Falls Projects should be deemed waived because the State Water Board’s denials without prejudice of the Districts’ applications for certification were issued more than one year after the original applications.

On October 29, 2020, the State Water Board filed “California State Water Resources Control Board’s Motion to Intervene and Comments on Turlock Irrigation District’s and Modesto Irrigation District’s Petition for Declaratory Order under open dockets P-2299- and P-14581-” (hereafter “State Water Board Motion to Intervene”).<sup>13</sup>

## **II. Procedural Issues**

As shown at the top of their filing, the Districts filed their Petition under open sub-docket numbers rather than under the sub-dockets for the relicensing and licensing proceedings. However, the Commission has not issued a notice for the Petition. This absence of notice, combined with procedural inconsistency over the last year and half on the part of the Commission regarding several petitions and requests for waiver of Section 401 certification, creates uncertainty regarding appropriate procedure in this case. As stated above, Conservation Groups therefore present this filing as a motion to intervene in opposition. Conservation Groups reserve all rights to supplement and/or modify these comments at a later date.

Conservation Groups request and recommend that the Commission issue a notice of the Districts’ Petition pursuant to Rule 210 of the Commission’s Rules of Practice and Procedure. Conservation Groups also request that such notice permit further argument regarding the Districts’ petition. We review briefly below some of the reasons for which this is appropriate and necessary.

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<sup>10</sup> See letter from Vince Yearick, Director, Division of Hydropower Relicensing, to Michael I. Cooke, Director of Water Resources and Regulatory Affairs, TID, and John Davids, Assistant General Manager, MID (July 15, 2020), eLibrary no. 20200715-3014, p. 2.

<sup>11</sup> See letters from Michael I. Cooke and John B. Davids to Eileen Sobek (Jul. 20, 2020), eLibrary no. 20200720-5169 (Don Pedro), eLibrary no 20200720-5170 (La Grange).

<sup>12</sup> *Id.*, p. 2.

<sup>13</sup> State Water Board, “California State Water Resources Control Board’s Motion to Intervene and Comments on Turlock Irrigation District’s and Modesto Irrigation District’s Petition for Declaratory Order under open dockets P-2299- and P-14581-.” (State Water Board MOI).

In its June 16, 2020 Order on Waiver of Certification for the Merced River Project (FERC No. 2179) and Merced Falls Project (FERC No. 2467), the Commission directed: “Going forward, when a party requests that the Commission find a State has waived its right to issue a water quality certification, the party should file its request as a petition pursuant to section 385.207 of our Rules of Practice and Procedure.”<sup>14</sup>

However, the Commission has set no similar defaults for how it will address such petitions once filed. The Commission’s responses and decisions regarding notice and intervention following recent petitions for waiver of certification are not internally consistent and are not consistent with the fact that the Commission has not issued a notice for the Districts’ Petition.

On February 22, 2019, Placer County Water Agency (“PCWA”) petitioned for waiver for Section 401 Certification for its Middle Fork American Project, P-2079-079.<sup>15</sup> FERC issued a notice of the petition on March 13, 2019, prior to the expiration of the standard 30-day time period for answers. In its March 13, 2019 Notice of Petition for Declaratory Order, Placer County Water Agency, Project No. 2079-080, the Commission assigned the petition a separate sub-docket and solicited both comments and interventions.<sup>16</sup>

On May 15, 2019, Pacific Gas and Electric Company (“PG&E”) petitioned for waiver of Section 401 Certification for the license surrender proceeding of its Kilarc-Cow Project, P-606-027.<sup>17</sup> FERC issued a notice of the petition on June 6, 2019, prior to the expiration of the standard 30-day time period for answers. In its June 6, 2019 Notice of Petition for Declaratory Order, Kilarc-Cow Project No. 606-027, the Commission did not assign the petition a separate sub-docket, but did solicit both comments and interventions.<sup>18</sup>

On June 17, 2019, Southern California Edison Company (“SCE”) petitioned for waiver of six of its Big Creek Projects (P-67-, P-120-, P-2085-, P-2086-, P-2174-, P-2175-).<sup>19</sup> FERC issued a notice of the petition July 6, 2019, prior to the expiration of the standard 30-day time period for answers.<sup>20</sup> In its Notice of Petition for Declaratory Order, Southern California Edison Company, Project Nos. P-67-133, P-120-028, P-2085-020, P-2086-039, P-2174-017, P-2175-021, the Commission issued separate sub-dockets for each of the projects, and solicited both comments and interventions.

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<sup>14</sup> 171 FERC ¶ 61,240, Merced Irrigation District Order on Waiver of Certification, p. 6 n.29.

<sup>15</sup> Petition for Declaratory Order of Placer County Water Agency, P-2179-079 (Feb. 22, 2019), eLibrary no. 20190222-5133.

<sup>16</sup> FERC, Notice of Petition for Declaratory Order, Placer County Water Agency, Project No. 2179-080 (Mar. 13, 2019), eLibrary no. 20190313-3076.

<sup>17</sup> Petition for Declaratory Order Requesting Waiver of Water Quality Certification of Pacific Gas And Electric Company, Project No. 606-, Kilarc-Cow Creek (May 15, 2019), eLibrary no. 20190515-5213.

<sup>18</sup> FERC, Notice of Petition for Declaratory Order, Pacific Gas and Electric Company, Project No. 606-027 (June 6, 2019), eLibrary no. 20190606-3063.

<sup>19</sup> Letter from Charles Sensiba to Secretary Bose, Southern California Edison Company; Petition for Declaratory Order and Request for Expedited Consideration; Project Nos. 67- \_\_, 120- \_\_, 2085- \_\_, 2086- \_\_, 2174- \_\_, 2175- \_\_, (Jun. 17, 2019), eLibrary no 2019-617-5228.

<sup>20</sup> Notice of Petition for Declaratory Order, Southern California Edison Company, Project Nos. P-67-133, P-120-028, P-2085-020, P-2086-039, P-2174-017, P-2175-021 (Jul. 8, 2019), eLibrary no. 20190708-3006.



Following the February 19, 2019 request for waiver by Nevada Irrigation District for the Yuba-Bear Project (Project No. 2266),<sup>21</sup> the Commission did not issue a notice, and on April 16, 2020 issued an Order on Waiver for that project without having solicited comments or interventions.<sup>22</sup> Similarly, the Commission issued no notice regarding the May 22, 2019 request for waiver by Merced Irrigation District for the Merced River Project (FERC No. 2179) and the Merced Falls Project (FERC No. 2467),<sup>23</sup> and issued an Order on waiver on June 16, 2020.<sup>24</sup>

Yuba County Water Agency (“YCWA”) filed a request for waiver of certification for its Yuba River Development Project on August 22, 2019.<sup>25</sup> The Commission issued a notice for YCWA’s request on March 3, 2020, after more than six months had elapsed since YCWA filed its request. The Commission’s Notice of Petition for Waiver Determination for the Yuba River Development Project (FERC No. 2246) treated licensee’s “request for determination of waiver” as a petition, even though YCWA did not style its request as a petition.<sup>26</sup> However, the Notice also stipulated: “Yuba County Water Agency’s request is part of its relicensing proceeding in Project No. 2246-065. Thus, any person that intervened in the relicensing proceeding is already a party.”<sup>27</sup>

In sum, the fact that the Commission has not issued a notice for the Districts’ Petition is inconsistent with its recent practice of issuing a notice for petitions for declaratory orders for waiver of certification when the petitions specifically style themselves as such.

The lack of a notice has also created lack of clarity about timelines. This has created a hardship for Conservation Groups, who had reasonably awaited procedural direction in a notice and who have now had to address in a few days the Districts’ novel argument that two denials of certification without prejudice constitutes an unlawful delay under the Clean Water Act.

As stated above, Conservation Groups request and recommend that the Commission notice and solicit interventions on the Districts’ Petition. Conservation Groups reserve the right to supplement their intervention with comments and arguments regardless of whether such notice is issued.

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<sup>21</sup> Letter of Remleh Scherzinger, General Manager, Nevada Irrigation District, to Secretary Bose, Subject: Yuba-Bear Hydroelectric Project, FERC Project No. 2266-102 – California, Section 401 Water Quality Certification (Feb. 19, 2019), eLibrary no. 20190219-5133.

<sup>22</sup> 171 FERC ¶ 61,029, Order on Waiver of Water Quality Certification, Nevada Irrigation District, Project No. 2266-102.

<sup>23</sup> See May 22, 2019 Letter of John Sweigard, General Manager, Merced ID, to Secretary Bose, FERC, (“Merced River Hydroelectric Project FERC Project Nos. 2467 and 2179, Notice of Denial of Clean Water Act Section 401 Water Quality Certifications, and Request for Clarification Regarding Status of Standing of New License Applications before the Commission P-2179 and P-2467”) (May 22, 2019), eLibrary no. 20190522-5094.

<sup>24</sup> 171 FERC ¶ 61,240, Order on Waiver of Water Quality Certification, Merced Irrigation District (June 16, 2020).

<sup>25</sup> Letter from Mike Swiger, YCWA to Secretary Bose, FERC Re: Yuba River Development Project, FERC Project No. 2246, Section 401 Water Quality Certification (Aug. 22, 2019), eLibrary no. 20190822-5016.

<sup>26</sup> FERC, Notice of Petition for Waiver Determination, Yuba County Water Agency, Project No. 2246-065 (Mar. 3, 2020), eLibrary no. 20200302-3032.

<sup>27</sup> *Id.*, p. 1 n.1.

### III. Statement of Position

#### A. **The Commission Should Deny the Districts’ Request for a Finding of Waiver under CWA Section 401.**

##### 1. **The State Water Board Acted within One Year on all of the Districts’ Certification Requests**

Section 401(a)(1) provides: “[a]ny applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable” state water quality standards.”

The plain text of the statute requires the State to “act” on “a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request,” or certification may be deemed waived.

In denying without prejudice each of the Districts’ requests for Section 401 certification, the State Water Board has acted under the plain meaning of the CWA. In issuing such denials in less than one year after the Districts’ applications, the State Water Board has timely acted.<sup>28</sup> Denial of state certification is one of four acceptable state actions anticipated by the authors of the CWA<sup>29</sup> and is accepted by the EPA’s new Final Rule.<sup>30</sup> If denial were not acceptable, certifying authorities would have no suitable response to incomplete or insufficient applications, save granting such certification, which is entirely contrary to the intent and purposes of the CWA.

Alternatively, if only denial without prejudice were not an acceptable “act” on a “request for certification” by a state, a state could only deny an incomplete application for Section 401 certification with prejudice. A prejudiced denial would encumber any project that may eventually have been successful, rendering the certification procedurally flawed and leaving project proponents with only “one bite at the apple”. In a process such as the one before the Commission in this proceeding, under this reading of the CWA, the Districts would undoubtedly have been denied certification with prejudice, due to their failure to complete a CEQA document to support certification.<sup>31</sup>

If the Commission were to agree with the Districts, it would effectively write “denied” out of the CWA. However, it is already clear that the Commission does not subscribe to the Districts’ flawed reading of the CWA. In recent Commission precedent, in the Order on Waiver

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<sup>28</sup> See also 18 C.F.R. § 4.34(b)(5)(iii) (“A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency *has not denied* or granted certification by one year after the date the certifying agency received a written request for certification.) (emphasis added).

<sup>29</sup> 33 U.S.C. § 1341

<sup>30</sup> Clean Water Act Section 401 Certification Rule (June 1, 2020) (hereinafter Final Rule), pre-publication draft available at <https://www.epa.gov/cwa-401/final-rule-clean-water-act-section-401-certification-rule>. The Final Rule became effective 60 days after publication in the Federal Register, on August 1, 2020.

<sup>31</sup> State Water Board MOI, pp. 31-33.

of Water Quality Certification, Yuba County Water Agency, the Commission stated (emphasis added)”:

And courts are in agreement that “the plain language of [s]ection 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’” Accordingly, a state may not extend the one-year deadline to act even if a state process may, in practice, often take more than one year to complete. **We note that to the extent a state lacks sufficient information to act on a certification request, it has a remedy: it can deny certification.** Delay beyond the statutory deadline, however, is not an option.<sup>32</sup>

The Commission contemplated the event in which a “state lacks sufficient information to act on a certification request” and made clear an appropriate remedy: “it can deny certification”.<sup>33</sup> Here, that is just the case before the Commission. The Districts failed to provide statutorily-mandated, requisite information to allow the State Water Board to “act on [their] certification request”. The State Water Board affirmatively acted in response: it denied certification.<sup>34</sup> Consistent with California law, the State Water Board detailed the reasons it rejected the application, including that “the Districts ... have not begun the CEQA process.”<sup>35</sup> Absent CEQA compliance, the State Water Board must deny certification.<sup>36</sup> The State Water Board has acted in denying the Districts’ request for water quality certification. The Districts’ request for waiver of water quality certification here is untenable.

a. The federal government expressly delegated certification authority to states.

When it enacted the CWA, the federal government expressly expected states to properly deny certification to projects not meeting state standards

Congress designed the CWA to continue “the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency.” The legislative history of Section 401 makes clear that the CWA was designed to prevent the federal government from usurping state authority over water quality requirements. “The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.”<sup>37</sup>

The Supreme Court has addressed the legislative history of Section 401.<sup>38</sup> The Court emphasized, “State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution,” and quoted Senator Edmund Muskie’s 1970 speech on the floor of the Senate in doing so:

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<sup>32</sup> 171 FERC ¶ 61,139, Order on Waiver of Water Quality Certification, Yuba County Water Agency, Project No. 2265-065 (May 21, 2020), ¶ 25 (internal citations omitted).

<sup>33</sup> *Id.*

<sup>34</sup> See letter from Eileen Sobeck to Steve Boyd, TID, and John Davids, MID (Apr. 20, 2020), eLibrary no.

<sup>35</sup> *Id.*; Cal. Code Regs. tit. 23, § 3837.

<sup>36</sup> Cal. Code Regs. tit. 23, §§ 3836(c); 3837(b)(2).

<sup>37</sup> 1972 U.S.C.C.A.N. 3668, 3735

<sup>38</sup> *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

“No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a *fait accompli* by an industry that has built a plant without consideration of water quality requirements. 116 Cong. Rec. 8984 (1970).”<sup>39</sup>

The federal government enacted the CWA to intercede when states failed to prevent pollution under prior clean water laws—the CWA has, as express intent, cooperative federalism between states and the federal government in search of water quality standards.

Congress designed CWA Section 401 to empower the states to participate in the Federal CWA licensing process. The CWA was intended to encourage the states to enact clean water policies, and it set a nationwide baseline to protect the waters of the United States. The authors of the CWA included Section 401 to give states the ability to properly condition, certify, or deny licensing of projects, whether the denial is with or without prejudice. Agreeing with the Districts here would write states’ rights clear out of the CWA, in contradiction with clear congressional intent to foster state engagement in the licensing process.

b. Denial is one of four acceptable state actions.

The EPA’s Final Rule on CWA Section 401 certification accepts four certifying authority actions in response to a certification request.<sup>40</sup> A state or tribal certifying authority must (a) grant, (b) grant with conditions, (c) deny, or (d) waive the decision.<sup>41</sup> Here, the State Water Board has acted by denying the Districts’ application—option (c)—without prejudice.

Under California’s CWA Section 401 certification procedure, as codified in state law, the State Water Board will deny an application without prejudice for procedural inadequacies (e.g., failure to provide a complete fee or to meet CEQA requirements) or deny an application for cause.<sup>42</sup> New York has similar regulations.<sup>43</sup> However, an applicant is always free to submit a new application for the same project if defects can be corrected. For example, Transco’s New York project was denied without prejudice in 2019 because of a failure to provide documentation demonstrating compliance with New York’s water quality requirements.<sup>44</sup> In 2020, New York denied the same project for cause because of a continued failure to show compliance with their water quality requirements.<sup>45</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> Certain of the Conservation Groups challenge the validity of EPA’s August 1, 2020 Final Rule. Nevertheless, aspects of interpretation are important to discuss in the context of this proceeding.

<sup>41</sup> Final Rule at 145.

<sup>42</sup> Cal. Code Regs. tit. 23, § 3837.

<sup>43</sup> N.Y. Comp. Codes R. & Regs. tit. 6, § 621.10.

<sup>44</sup> New York State Dep’t of Env’tl. Conserv., *Notice of Denial of Water Quality Certification* (May 15, 2019) (denying certification without prejudice for failure to show the project would comply with water quality standards when modeling default 500-foot mixing zone), [https://www.dec.ny.gov/docs/administration\\_pdf/nodtgp.pdf](https://www.dec.ny.gov/docs/administration_pdf/nodtgp.pdf).

<sup>45</sup> See New York State Dep’t of Env’tl. Conserv., *Notice of Denial of Water Quality Certification* (May 15, 2020) (denying certification for failure to show the project would comply with water quality standards when lacking

The EPA drafted its 2020 Final Rule to interpret water quality requirements as “provisions of the CWA and State and Tribal regulatory requirements that pertain specifically to point source discharges into waters of the United States.”<sup>46</sup> Therefore, any state or tribal regulation that applies to point source discharges may serve as grounds for denial of an application for water quality certification in licensing projects. Recently, Washington State’s Department of Ecology denied *with* prejudice an application that failed to comply with the Washington State Environmental Policy Act (“SEPA”).<sup>47</sup> This denial under ‘substantive SEPA’ was upheld on appeal to the Pollution Control Hearings Board<sup>48</sup> and through two subsequent appeals.<sup>49</sup> Denial with prejudice is a rare enough procedure that the applicant, Millenium-Longview, challenged whether the Washington State Department of Ecology had the authority to deny the application with prejudice rather than without prejudice. The Pollution Control Hearings Board ruled on other grounds.<sup>50</sup> California similarly enforces compliance with CEQA before granting certification. Here, non-compliance with CEQA resulted in the Districts’ application being denied without prejudice, allowing Districts to rectify past inadequacies in the application before the State Water Board.

## 2. Conservation Groups Support the State Water Board’s Motion to Intervene.

As described above, the State Water Board on October 26, 2020 moved to intervene in response to the Districts’ Petition.<sup>51</sup> In addition to Conservation Groups’ rationale as stated above of the reasons for which notice and opportunity for intervention in response to the Districts’ Petition is generally appropriate, Conservation Groups support the State Water Board’s motion to intervene.

More specifically, Conservation Groups agree with, support, and incorporate by reference the following arguments from the State Water Board’s October 26, 2020 intervention, attached hereto as Appendix A:

- The State Water Board’s arguments in support of the reasons for which the Commission should accept the State Water Board’s intervention.<sup>52</sup>
- The State Water Board’s arguments that *Hoopa Valley Tribe v. Federal Energy Regulatory Comm’n*, 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa*) does not apply to the State Water Board’s denials without prejudice of the Districts’ applications for certification.<sup>53</sup>

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default 500-foot mixing zone),

[https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/nesewqcd denial05152020.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcd denial05152020.pdf).

<sup>46</sup> Final Rule at 160.

<sup>47</sup> Maia Bellon, *Section 401 Certification Denial* (2017), <https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acc4-d8277e1ad237.pdf>.

<sup>48</sup> *Millenium Bulk Terminals Longview, LLC v. Wash. State Dep’t of Ecology*, PCHB No. 17-090, [2018 WA ENV LEXIS 43](#) (Aug. 15, 2018).

<sup>49</sup> *Millenium Bulk Terminals Longview, LLC v. Wash. State Dep’t of Ecology*, No. 52270-5-II (Wash. Ct. App. Feb. 25, 2020), <https://law.justia.com/cases/washington/court-of-appeals-division-ii/2020/52270-5.html>

<sup>50</sup> *Millenium Bulk Terminals Longview, LLC*, [2018 WA ENV LEXIS 43](#), at \*33

<sup>51</sup> State Water Board MOI, *op. cit.*

<sup>52</sup> *Id.*, pp. 9-14.

<sup>53</sup> *Id.*, pp. 16-22.f

- The State Water Board’s arguments that denial without prejudice does not constitute a “failure to act” under CWA Section 401.<sup>54</sup>
- The State Water Board’s arguments that the Districts come to the Commission with “unclean hands” and that the Districts themselves are the source of delay in certification due to their failure as CEQA lead agencies to complete a CEQA document to support certification.<sup>55</sup>

**B. The Commission Should Let Stand the Districts’ July 20, 2020 Section 401 Applications.**

The record shows that the State Water Board has diligently acted in processing and has timely acted in response to each of the Districts’ applications. Contrary to the Districts’ assertions, the current delays in the 401 proceeding are due to Districts’ failure to provide information necessary to fully evaluate the Project’s potential impacts on water quality over the term of any new license by preparing the environmental document required under state law. The July 2020 legislative change to the State Water Board’s regulations cited in the Districts’ Petition,<sup>56</sup> far from being a symptom of an alleged effort of the State Water Board to delay, will enable the State Water Board to issue certifications for the Don Pedro and La Grange Projects within one year of the Districts’ July 20, 2020 applications for certification, consistent with both federal and state law.

**III. Conclusion**

The Commission should grant this motion to intervene of Conservation Groups. The Commission should also issue a notice soliciting interventions and comments in response to the Districts’ Petition. Conservation Groups reserve the right to supplement their intervention herein with comments and arguments regardless of whether such notice is issued.

The Commission should find that the California State Water Resources Control Board has *not* waived Clean Water Act § 401 Water Quality Certification for the relicensing of the Don Pedro and La Grange Projects.

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<sup>54</sup> *Id.*, pp. 22-27.

<sup>55</sup> *Id.*, pp. 31-33.

<sup>56</sup> See Cal. Water Code § 13160; Cal. Stats. 2020, c. 18 (A.B.92), § 9 (cited in Petition, p. 22 and reproduced in the Petition as Appendix F).

Respectfully submitted this 2<sup>nd</sup> day of November, 2020.



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**Tuolumne River**  
TRUST

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

<b>Turlock Irrigation District and</b>	)	
<b>Modesto Irrigation District</b>	)	<b>Don Pedro Hydroelectric Project</b>
	)	<b>(P-2299-)</b>
	)	<b>La Grange Hydroelectric Project</b>
	)	<b>(P-14851-)</b>

**Certificate of Service**

I hereby certify that I have this day served the foregoing document, Conservation Groups' Motion to Intervene in Opposition to the Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification for the Don Pedro and La Grange Hydroelectric Projects via email or surface mail (as required), upon each person designated on the official Service List compiled by the Commission Secretary in the above-captioned proceedings.

Dated at Berkeley, California this 2<sup>nd</sup> day of November, 2020.



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# **APPENDIX A**

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

<b>Turlock Irrigation District and Modesto Irrigation District</b>	) ) ) ) ) ) )	<b>Project No. 2299-____ (Don Pedro)  Project No. 14581-____ (La Grange)</b>
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**CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S  
MOTION TO INTERVENE AND COMMENTS ON TURLOCK IRRIGATION  
DISTRICT'S AND MODESTO IRRIGATION DISTRICT'S PETITION FOR  
DECLARATORY ORDER**

The California State Water Resources Control Board (State Water Board or Board) submits this motion to intervene and comments in response to the petition for declaratory order filed by Turlock Irrigation District and Modesto Irrigation District (collectively, Districts) dated October 2, 2020 (Petition). FERC eLibrary no. 20201002-5186. In their Petition, the Districts assert that the State Water Board's timely denial of the Districts' requests for water quality certification for the Districts' pending license applications for the Don Pedro Hydroelectric Project No. 2299 (Don Pedro Project) and the La Grange Hydroelectric Project No. 14581 (La Grange Project, collectively with the Don Pedro Project, the Projects) constitutes a waiver of the Board's authority under section 401 of the Clean Water Act (33 U.S.C. § 1341) (Section 401). The State Water Board disagrees with the Districts. *Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n*, 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa*) does not provide a basis for determining that the State Water Board has waived water quality certification for the Projects. *Hoopa* concerned the withdrawal of a request for certification before the

expiration of the certification period, not the denial of the request. Even as applied to withdrawal, *Hoopa* is limited to unique circumstances involving the repeated withdrawal and resubmittal of requests, pursuant to a written agreement. Section 401 addresses the issue in this proceeding, expressly and unambiguously: “No license or certification shall be granted if certification has been denied by the State.” 33 U.S.C. § 1341(a)(1).

The Clean Water Act specifically provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .” 33 U.S.C. § 1251(b). The State Water Board’s intervention in this proceeding and comments on the Districts’ Petition are essential to preserving the public interest in protecting the State of California’s water quality and the exercise of water quality certification authority allocated to the states under Section 401.

## **I. LEGAL BACKGROUND**

The Clean Water Act 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(g) of the Clean Water Act, 33 U.S.C. § 1251(g), requires federal agencies to “co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”

Section 303 of the Clean Water Act, 33 U.S.C. § 1313, requires each state to adopt water quality standards applicable to all of the waters of the United States within the state’s boundaries; the adopted water quality standards must be approved by the United States Environmental Protection Agency (U.S. EPA). In California, the state’s water quality standards are identified in water quality control plans or state policies for

water quality control adopted or approved by the State Water Board. Cal. Water Code §§ 13140 et seq., 13170, 13240 et seq. The standards designate the beneficial uses of water to be protected, establish water quality objectives for the reasonable protection of those beneficial uses, and describe a program of implementation to achieve the water quality objectives. Cal. Water Code §§ 13241, 13242, 13050(h) & (j). The beneficial uses together with the water quality objectives and state and federal anti-degradation requirements constitute California's water quality standards within the meaning of Section 303.

Section 401 of the Clean Water Act requires every applicant for a federal license or permit for an activity that may result in a discharge into waters of the United States to provide the licensing or permitting federal agency with certification from the state in which the discharge originates that the project will be in compliance with specified provisions of the Clean Water Act, including water quality standards promulgated pursuant to section 303 of the Clean Water Act. 33 U.S.C. § 1341(a)(1). Section 401 directs the agency responsible for certification to prescribe effluent limitations and other conditions necessary to ensure the project's compliance with Clean Water Act requirements and with any other appropriate requirement of state law. *Id.* § 1341(d). Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. *Id.* Section 401 provides for waiver of certification authority if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request . . . ." 33 U.S.C. § 1341(a)(1). Under the Federal Energy Regulatory Commission's (Commission or FERC) regulations, certification is waived if the

certifying agency has not granted or denied certification within one year of receipt of a written request for certification. 18 C.F.R. §§ 4.34(b)(5)(iii). In California, the State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act and any other federal water quality law. Cal. Water Code § 13160.

Consistent with the cooperative federalism established in the Clean Water Act, Section 401 leaves it to the states to establish their own procedures for certification. Section 401 requires each state to establish procedures for public notice and for public hearings where the state deems appropriate, 33 U.S.C. § 1341(a)(1), but otherwise sets no express requirements or limitations on what information the states may require or what procedures they may follow. Under California law, the applicable procedures include compliance with the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 et seq. (CEQA), which was modeled after the federal National Environmental Policy Act. *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975). CEQA generally prohibits a state or local agency from issuing a discretionary approval such as water quality certification until after any environmental documentation required under CEQA has been completed. Cal. Pub. Res. Code §§ 21006, 21080; *see* Cal. Code Regs. tit. 23, § 3856(f) [requiring the certifying agency to be provided with a final copy of valid CEQA documentation before taking action]. Effective June 29, 2020, the State Water Board may now issue certification prior to completion of CEQA review, where failure to issue certification presents a substantial risk of waiver of Section 401 authority. Cal. Water Code § 13160(b)(2).

In taking a water quality certification action, the State Water Board must either:



(1) issue an appropriately conditioned certification; or (2) deny certification. Cal. Code Regs. tit. 23, § 3859. A certification may be issued if the State Water Board determines that there is reasonable assurance that an activity will comply with applicable Clean Water Act requirements and any other appropriate requirements of state law. 33 U.S.C. § 1341; Cal. Wat. Code § 13160. The State Water Board may deny an application for certification when the activity will not comply with applicable state water quality standards and other appropriate requirements. Cal. Code Regs. tit. 23, § 3837(b)(1). When a proposed project's compliance with water quality standards is not yet determined, the State Water Board may deny certification without prejudice. *Id.* § 3837(b)(2).

California law also establishes procedures by which an applicant for Section 401 certification or other interested person may seek administrative reconsideration and judicial review of any State Water Board action or failure to act as part of the water quality certification process. Cal. Code Regs. tit. 23, § 3867; Cal. Water Code § 13330. These procedures must be followed by any person who seeks to challenge the State Water Board's action. Cal. Water Code § 13330(d). If a party does not seek judicial review as provided under state law, the State Water Board's decision or order is not subject to review by any court. *Id.*

In *Hoopa*, 913 F.3d 1099, the D.C. Circuit Court of Appeals held that the State Water Board and the Oregon Department of Water Quality had waived their authority under Section 401 of the Clean Water Act in connection with the relicensing of the Klamath Hydroelectric Project where the Governors of California and Oregon had entered into a written agreement with PacifiCorp, the project owner and operator, to

delay water quality certification indefinitely by repeatedly withdrawing and resubmitting PacifiCorp's applications for certification. *Id.* at 1103-1105. By its terms, the agreement was intended to hold PacifiCorp's applications for water quality certification in abeyance while the parties pursued decommissioning of the project. *Id.* at 1101-1102. The court also reasoned that, if allowed, the parties' "withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." *Id.* at 1104. Based on this unique set of facts, the court held that the "withdrawal and resubmission scheme" embodied in the written agreement was inconsistent with the statutory deadline to act within a year, and therefore the certifying agencies had waived their authority under Section 401.

The court expressly declined to resolve whether the withdrawal and resubmittal of an application for water quality certification would result in waiver under different circumstances. *Id.* at 1104-1105. In particular, the court did not resolve whether the withdrawal and resubmittal of an application would result in waiver in situations involving different requests or incomplete applications because "PacifiCorp's water quality certification request had been complete and ready for review for more than a decade." *Id.* at 1105.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The Projects are located on the Tuolumne River in Tuolumne and Stanislaus Counties, California. The Tuolumne River is tributary to the San Joaquin River. The 168-megawatt (MW) Don Pedro Project is located in Tuolumne County. It includes Don Pedro Reservoir, Don Pedro Dam, Don Pedro Spillway, emergency spillway, power tunnel shaft and gate, Don Pedro Powerhouse, low level outlet, and various access roads and other appurtenant facilities. The 4.7-MW La Grange Project, which is located in

Stanislaus and Tuolumne Counties downstream of the Don Pedro Project, includes the La Grange Diversion Dam, storage reservoir, irrigation intakes and canals, powerhouse, access roads and other appurtenant facilities.

The Commission granted the original license for the Don Pedro Project on March 10, 1964. The original license expired on April 30, 2016, and the Don Pedro Project has operated under annual licenses since then. The original license was issued before Section 401, as now codified, was enacted. Absent the authority provided by Section 401, California through the State Water Board did not have the ability to impose conditions on the Projects to protect state water quality. In addition, applicable water quality standards have been updated since the prior license was issued.

On April 28, 2014, the Districts filed an application for a new license with the Commission or FERC) for the Don Pedro Project. On October 11, 2017, the Districts filed an amended final license application. On October 11, 2017, the Districts also filed an application for original license for the La Grange Project. In 2012, the Commission had determined that the existing, unlicensed La Grange Project was required to be licensed because it is located on a navigable river and occupies federal lands.<sup>1</sup>

The Commission issued Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions (Notice of Application) on November 30, 2017. On January 29, 2018, the State Water Board submitted water quality certification preliminary

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<sup>1</sup> Turlock Irrigation Dist. and Modesto Irrigation Dist., 141 FERC ¶ 62,211 (2012), order on reh'g, 144 FERC 61,051 (2013), aff'd sub nom., Turlock Irrigation Dist. v. Federal Energy Regulatory Comm'n, 786 F.3d 18 (D.C. Cir. 2015).

terms and conditions to the Commission. The Commission issued a Draft Environmental Impact Statement (EIS) for the Projects on February 11, 2019, and filed a Final EIS on July 7, 2020.

On January 26, 2018, the Districts applied to the State Water Board for water quality certification for the Projects. The State Water Board denied the Districts' applications without prejudice on January 24, 2019. The Districts then applied for certification for the Projects on April 22, 2019 and the State Water Board denied the Districts' applications without prejudice on April 20, 2020. The Districts did not petition for administrative reconsideration or judicial review of the denials. The Districts next applied for certification on July 20, 2020. The State Water Board intends to adopt a final certification of the Projects, with appropriate conditions, within a year from the Districts' request.

The State Water Board's certification for the Projects must ensure compliance with the water quality standards in the State Water Board's Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) and the Central Valley Regional Water Board's Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin (Basin Plan). These water quality control plans designate beneficial uses for the Tuolumne River, including municipal and domestic supply, agricultural supply, contact and non-contact recreation, cold freshwater habitat, warm freshwater habitat, migration, spawning and early development, rare, threatened, or endangered species, and wildlife habitat.

On October 3, 2017, the State Water Board listed the Tuolumne River on the Clean Water Act Section 303(d) list of impaired water bodies. The United States

Environmental Protection Agency approved the California 303(d) list on April 6, 2018. Don Pedro Reservoir is impaired for mercury. The Tuolumne River, from Don Pedro Reservoir to the San Joaquin River, has been identified as being impaired by chlorpyrifos, diazinon, Group A pesticides, mercury, temperature, and toxicity.

In March of 2019, the State Water Board also filed with the Commission copies of California's most recent comprehensive plans for water quality control pursuant to Federal Power Act section 10(a)(2), 16 U.S.C. § 803(a)(2), and 18 C.F.R. § 2.19. Accordingly, the Commission revised and added to its list of approved comprehensive plans for the State of California. Prior to issuing a license for the Project, the Commission must first consider and ensure the Project's consistency with, and best adaptation to, these comprehensive plans. 16 U.S.C. § 803(a)(2).

### **III. THE STATE WATER BOARD SHOULD BE AN INTERVENOR IN THE PROCEEDING**

The State Water Board is the state agency responsible for water quality certification and water right administration in California. *See* Cal. Water Code §§ 174, 13160. Pursuant to Rule 214(b) of the Commission's Rules of Practice and Procedure<sup>2</sup>, 18 C.F.R. § 385.214(b), the State Water Board hereby moves to intervene in this proceeding. This motion and comments include all contents required for a motion to intervene under Rule 214(b), 18 C.F.R. § 385.214(b), including the State Water Board's right to participate and the substantial public interests supported by the State Water Board's participation as an intervenor in this proceeding.

Should the Commission ultimately require the State Water Board to file not

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<sup>2</sup> All references to a "Rule" or "Rules" are to the Commission's Rules of Practice and Procedure, 18 C.F.R. part 385.

simply a motion to intervene but rather a motion to intervene “out-of-time,” pursuant to Rule 214(b)(3) and (d), 18 C.F.R. § 385.214(b)(3) & (d), the State Water Board submits that there is sufficient “good cause” for the Commission to grant intervenor status to the State Water Board. First, the State Water Board calls the Commission’s attention to its recent practice and precedent of posting a Notice of Petition for Declaratory Order regarding waiver of water quality certification under Section 401. Such notices provided an opportunity for parties to file a protest, a notice of intervention, or a motion to intervene in response to the petition, regardless of the petition’s relation to an existing licensing or license surrender proceeding.<sup>3</sup> In these instances, the Commission accepted notices of intervention, motions to intervene, and protests as timely and valid, and the Commission granted party status to intervenors.<sup>4</sup> The Commission’s past practice was consistent with its obligation, under Rule 210, 18 C.F.R. § 385.210, to establish “dates for filing interventions and protests” when giving notice of petitions. *See also* 18 C.F.R. §§ 385.214(a)(2) (a state water quality or water rights agency “is a party” upon filing a notice of intervention within the time period required to be set by the Commission in a notice of petition) and 385.214(c)(1) (by default, any entity becomes a party 15 days after filing a motion to intervene within the time period required to be set by the Commission in a notice of petition). Pursuant to this recent practice and precedent, the State Water

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<sup>3</sup> *See, e.g.*, FERC eLibrary nos. 20190313-3076, 20190219-3020 (Commission’s Notices of Petition for Declaratory Order regarding Placer County Water Agency’s Middle Fork American Project [FERC Project No. 2079], 20190606-3063 (same for Pacific Gas and Electric Company’s Kilarc-Cow Creek Hydroelectric Project [FERC Project No. 606]), & 20190708-3006 (same for six of Southern California Edison Company’s projects within the Big Creek Hydroelectric System [FERC Project Nos. 67-133, 120-028, 2085-020, 2086-039, 2174-017, & 2175-021]).

<sup>4</sup> *See, e.g.*, *Placer County Water Agency*, 167 FERC ¶ 61,056, P 9 (2019); *Pacific Gas and Electric Company*, 170 FERC ¶ 61,232, P 18 (2020); *Southern California Edison Company*, 170 FERC ¶ 61,135, PP 13 & 15 (2020).

Board would be able to file a notice of intervention in response to a posted Notice of Petition for Declaratory Order and be granted party status.

It is uncertain, however, whether the Commission will issue a Notice of Petition for Declaratory Order regarding waiver of water quality certification in this proceeding. In a shift from recent practice and precedent, the notice of a petition for declaratory order in an unrelated proceeding stated that the notice does not itself confer an opportunity for intervention.<sup>5</sup> It is unclear whether this unexplained departure reflects a change in the Commission's practice, and if so, how that change may apply to this proceeding. Under these circumstances, good cause is shown that the State Water Board should be granted intervenor status as would be allowed under the Commission's regular practice and procedure.

Second, intervention is required for the State Water Board to exercise its statutorily recognized duties with respect to Section 401 water quality certification, including responding to the Districts' Petition. Intervention should be granted in view of the State Water Board's statutory responsibilities to protect the quality of waters of the state in the public interest.<sup>6</sup> The State Water Board is designated as the state water

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<sup>5</sup> See, e.g., FERC eLibrary no. 20200707-3071 (Commission Notice of Petition for Declaratory Order regarding Pine Creek Mine [FERC Project 12532] continuing Commission policy and practice of allowing a state water quality and water rights agency to become an intervenor by right under the noticed petition). *But see, id.* at n. 1, suggesting that any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures that provides justification by reference to the factors set forth in Rule 214(d). The Commission may limit a late intervenor's participation to the issues raised in the petition for declaratory order. 18 C.F.R. § 385.214(d)(3)(i).

<sup>6</sup> See *Swanson Min. Corp. & Walter M. Gleason*, 22 FERC P 61184, 61319 (1983) [FERC Project No. 5677-000] granting late intervention to the California Resources Agency to exercise its statutorily recognized duties and as necessary to protect the public interest. See also, *Swanson Min. Corp. v. Federal Energy Regulatory Comm'n*, 790 F.2d 96, 105 (D.C. Cir. 1986) (the Commission properly granted late intervention to enable the California Resources Agency to exercise its statutorily recognized duty to protect fish, wildlife and other environmental concerns).

pollution control agency for all purposes stated in the Clean Water Act. Cal. Wat. Code § 13160(a). Only the State Water Board has authority to issue water quality certification in California for a hydroelectric facility. Cal. Wat. Code § 13160(b); *see* Cal. Code Regs. tit. 23, § 3855(b)(1)(B) (requiring applications for certification associated with a hydroelectric facility subject to FERC licensing to be filed with the Board's executive director).

Third, the State Water Board is the target of the Districts' Petition. In purpose and practical effect, the Districts seek a declaratory order against the State Water Board. Considering such an order without allowing the State Water Board to participate would be manifestly unfair and call into question the legitimacy of any order adverse to the Board's position. While other parties with an interest in protecting water quality have an interest in supporting the State Water Board's position, no other party can adequately represent the Board's interest in preserving its statutory authority.

Fourth, the State Water Board had good cause for not filing a notice of intervention or motion to intervene in response to the Commission's 2017 Notice of Application. At that time, the State Water Board reasonably believed that the State's interest and responsibility to safeguard water quality would be protected through Section 401 certification. Absent any reason to believe that the State Water Board's authority to deny or condition would be put in jeopardy, so long as it issued or denied certification within the one year certification period, the Board was not on notice that its interest could be affected. Indeed, Commission precedent at that time held that withdrawal and resubmittal of applications for certification avoids waiver. The *Hoopa* decision did not issue until 2019, nearly two years later. The State Water Board had no



reason to anticipate the *Hoopa* decision or that the Commission subsequently would expand the holding of the *Hoopa* decision beyond the narrow facts of the case to determine that withdrawal and submittal without an explicit agreement constitutes waiver, let alone that the Commission would be asked to extend that interpretation to hold, contrary to the plain language of the Clean Water Act, that a denial constitutes waiver.

Moreover, the State Water Board could not reasonably anticipate the forum in which this issue is being raised. As discussed further below, judicial precedent has been clear that review of a state's decision to issue or deny certification is in state court when it precedes issuance of the federal license or permit. "Such a decision presumably turns on questions of substantive state environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence." *Keating v. FERC*. 927 F.2d 616, 622 (D.C. Cir. 1991) (*Keating*). The Commission has authority to review whether a denial was issued before expiration of the one-year period from when the request for certification was filed, but it has no authority to review whether the denial was appropriate or proper. The State Water Board had no reason to anticipate that its interest, and the interest of the State of California, in having the denial of certification reviewed in State court, not before a federal agency, would be affected.

Fifth, good cause is also shown by the State Water Board's active and ongoing participation in these licensing proceedings. In accordance with the Memorandum of Understanding executed between the Commission and the State Water Board on November 19, 2013, on January 29, 2018, State Water Board staff provided general

comments and preliminary terms and conditions and in response to the Commission's November 30, 2017, Notice of Application. FERC eLibrary no. 20180129-5393; *see also* FERC eLibrary no. 20200707-3000 at 1020-1024 (State Water Board comments and preliminary terms and conditions included in Final EIS, Attach. F).

Finally, existing parties will not experience prejudice or additional burdens from permitting the intervention. Nor will any disruption of the proceeding result. The Districts attempt to circumvent the State Water Board's authority to issue water quality certification. The State Water Board is seeking intervention as soon as possible after the issue of water quality certification authority has been raised in this proceeding and before the Commission has given any consideration to this issue. The State Water Board is not seeking to reopen any issue that has already been decided in this proceeding and no party has reasonably relied on any representation by the State Water Board or the Commission that certification has been waived for the Projects.

In light of the foregoing, the State Water Board respectfully requests that the Commission unconditionally confirm, recognize, or grant party and intervenor status to the State Water Board in this proceeding. The issues raised in the Petition—Section 401 water quality certification—encompass the primary interests and concerns of the State Water Board. Limiting the State Water Board's scope of participation as intervenor would be unsupported by the Commission's Rules, the Commission's practice and precedent in similar petitions, and the circumstances of this proceeding. Considering the Districts' Petition without allowing the participation of the affected state agency, the State Water Board, would be a clear abuse of discretion and would also raise important issues of state-federal relations and the fairness of Commission procedures.

Accordingly, in accordance with Rule 203, Rule 2010(c), and Rule 2101, 18 C.F.R. §§ 385.203, 385.2010(c), and 385.2101, the State Water Board respectfully requests that the following designees be added to the official service list for the Projects docket, including all sub-dockets:

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**IV. DENIAL OF CERTIFICATION DOES NOT SUPPORT FINDING OF WAIVER UNDER THE *HOOPA* DECISION OR ANY OTHER BASIS**

Based on the holding in the *Hoopa* decision and FERC decisions interpreting that decision, the Districts contend that the State Water Board has waived its water quality certification authority. The Districts suggest that the State Water Board's denial without prejudice of the applications for water quality certification is akin to the "withdrawal-and-resubmission scheme" invalidated in *Hoopa* and inconsistent with Section 401(a). The Districts overreach. *Hoopa* does not provide a basis for determining that the State Water Board's denial of the Districts' applications for water quality certification is a failure or refusal to act that results in waiver of certification. Nor is there any other basis

to conclude that denial without prejudice is the legal equivalent of waiver.

**A. The *Hoopa* Holding Does Not Apply**

Contrary to Districts' contention, this proceeding is materially different from the proceeding at issue in the *Hoopa* case because the State Water Board and the Districts did not agree to a "coordinated withdrawal-and-resubmittal scheme" in order to hold the Districts' applications for water quality certification in abeyance indefinitely. *Hoopa*, 913 F.3d at 1103. Unlike the facts in the *Hoopa* case, the record in this case shows that: (1) there is no withdrawal-and-resubmittal; (2) there is no formal written agreement between the State Water Board and the Districts that explicitly requires abeyance of state permitting reviews; and (3) there is no "coordinated . . . scheme" to indefinitely delay or otherwise put on hold the State Water Board's processing of the Districts' requests for certification. The limited holding of *Hoopa* has no application to these facts.

The most significant distinction between this case and the *Hoopa* case is the absence of any withdrawals and resubmittals in this case. The Districts request that denial be deemed by the Commission as effecting waiver under Section 401 in the same manner as an impermissible "withdraw-and-resubmit" scheme. But *Hoopa* does not address a situation in which a state denies water quality certification without prejudice and an applicant thereafter submits another request. *Hoopa* specifically addresses a "single issue": an applicant's repeated withdrawal and resubmittal of a request for certification pursuant to an agreement with the state. *Hoopa*, 913 F.3d at 1103.

As explained in Section IV B., below, treating a denial as a waiver would be inconsistent with the plain language of the Clean Water Act. If certification has been denied, the Commission cannot issue a license. Once certification has been denied, and unless that denial is reversed pursuant to an administrative appeal or judicial review, the

federal permit or license cannot be issued absent a later issuance of certification or waiver based on a later filed request. And in this regard, there is no meaningful distinction between a denial expressly stated to be without prejudice and one that is not. No denial, on either substantive or procedural grounds, precludes later issuance of the federal permit or license if the state later issues certification, even if there has been no change in the application or supporting information. In this sense, all denials, including those based on an express determination that the project will violate water quality standards, are without prejudice. And all denials, including those issued without prejudice, bar issuance of the federal permit or license unless the state later issues certification or waives certification on a later filed request.

Indeed, Commission precedent applying and extending *Hoopa* has recognized the distinction between the withdrawals and resubmittals at issue in those proceedings and the denial of certification. In response to arguments that withdrawal and resubmittal was an appropriate procedure where the State Water Board lacked information needed to issue certification, the Commission explained that, prior to and upon receipt of each withdrawal, the Board “had the option of denying certification within the one year it was afforded under the [Clean Water Act].”<sup>7</sup> The Commission stated that, “to the extent the California Board does not have sufficient information to issue a water quality certification, as it claims here, it has a remedy—it can deny certification.”<sup>8</sup> That is precisely what the State Water Board did in this proceeding – it denied certification.

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<sup>7</sup> *Southern California Edison Company*, 170 FERC ¶ 61,135, P 25 (2020) [ FERC Project Nos. 67-133, 120-028, 2085-020, 2086-039, 2174-017, & 2175-021].

<sup>8</sup> *South Feather Water and Power Agency*, 171 FERC ¶ 61,242, P 31 (2020) [FERC Project No. 2088-068].

Also significant is the lack of a formal written agreement that explicitly requires delay of water quality certification in this case. The Districts do not, and cannot, produce a written agreement similar to the one at issue in *Hoopa*. They do not dispute that such an agreement, written or otherwise, does not exist. There is no agreement or intent to indefinitely delay or otherwise hold in abeyance the State Water Board's processing of their requests for certification.

Instead, the Districts reach far beyond the narrow scope of *Hoopa* and speculate that the State Water Board unilaterally has engaged in a "coordinated scheme" of issuing denials without prejudice for the sole purpose of extending the statutory deadline set forth in the Clean Water Act. The Districts cite to the Commission's prior Section 401 waiver proceedings in which the Commission determined that, unlike in *Hoopa*, an explicit agreement between the applicant and the State Water Board was not necessary to find waiver when an applicant withdrew and resubmitted its application. Petition at 15. In those proceedings, the Commission strayed far from the facts of *Hoopa* by dispensing not only with the need for a formal written agreement but also eliminating any requirement that withdrawal and resubmittal be pursuant to that agreement. The Commission has not attempted to bridge the factual disparity between the written abeyance agreement considered in *Hoopa* and the bare record of withdrawal and resubmittal letters in other proceedings, in which it has construed the acceptance of a withdrawal and resubmittal of a request as the "agreement" required by *Hoopa*.

The Districts nonetheless suggest that the State Water Board intentionally coordinated a scheme for purposes of extending the statutory deadline by encouraging the Districts to resubmit additional requests for certification, accepting identical subsequent

requests for certification, and declaring that such requests had restarted the statutory deadline. Petition at 15. The Districts mischaracterize the State Water Board's letters, which denied the Districts' applications without prejudice. The fact that the letters explained, as a courtesy, that the Districts could submit a new request for certification does not amount to a coordinated scheme to evade the statutory deadline. Such correspondence does not demonstrate anything but the State Water Board's adherence with applicable law while continuing to work proactively with the applicant to identify potential regulatory options related to a particular project. Providing such information is routine across the State Water Board's programs and is good public policy and customer service. Regardless, the State Water Board has no control over whether and how an applicant chooses to pursue a particular option. The Districts unilaterally and voluntarily submitted their applications for certification to the State Water Board. The State Water Board, by its own regulations, must act on a request for certification before the federal period for certification expires. Cal. Code Regs. tit. 23, § 3859. The facts of this proceeding are very different from the facts that the court found objectionable in *Hoopa*, where the court found that the parties had explicitly agreed to delay certification through a written agreement providing for withdrawal and resubmittal.

Another critical distinction between this proceeding and *Hoopa* concerns the status of the Districts' applications for water quality certification. In *Hoopa*, the court decried the parties' agreement to effectively shelve applications for water quality certification that the court found were "complete and ready for review . . . ." *Hoopa*, 913 Fed.3d. at 1105. In this proceeding, by contrast, the State Water Board could not

determine compliance with water quality standards from the applications.<sup>9</sup> When the State Water Board denied the applications without prejudice in 2019, the Commission had not completed its NEPA analysis for the Projects and the Districts, as lead agencies for Projects, had not begun the CEQA process. At that time, the State Water Board could not determine compliance with water quality standards and issue water quality certification until environmental documentation had been prepared evaluating the potential environmental impacts of the proposed project and any feasible mitigation measures, as required by CEQA. The State Water Board informed the Districts of these deficiencies upon receipt of the first requests for water quality certification and in subsequent correspondence. Petition, Attach. B. Additionally, in subsequent years, the State Water Board notified the Districts that the proposed activity does not comply with applicable water quality standards and other appropriate requirements of state law. *Id.*

Although the Districts' letters resubmitting its requests for certification were similar to one another, that in no way indicates that the letters fully encapsulated the scope and details of such requests, or that the process was static. The record highlights that, since the Districts' initial certification requests in 2018, the Projects have undergone continuing evaluation, the development of additional information, and environmental review and public comment, including the Commission's issuance of a Draft EIS in 2019 and the State Water Board's comments on the document, the State Water Board's submittal of preliminary certification terms and conditions to the Commission in 2019,

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<sup>9</sup> The Districts were informed when they submitted their applications that the State Water Board must evaluate the Projects' environmental effects before determining that the Projects will protect beneficial uses. *See, e.g.*, Petition, Attach. B at 54 ("The State Water Board must analyze potential Project-related environmental effects to the Tuolumne River prior to making a determination that continued operation of the Projects will be protective of the designated beneficial uses of the watershed.")



and issuance of the Final EIS this year. The record indicates that there were outstanding issues requiring further resolution prior to licensing, as well as the need for corresponding findings, terms, or conditions incorporated into any license issued by the Commission.

The unique context of the *Hoopa* case matters. In *Hoopa*, the Court expressly declined to determine how “different a request must be to constitute a ‘new request’ such that it restarts the one-year clock.” *Hoopa*, 913 F.3d at 1104. The “case present[ed] the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification.” *Id.* The written agreement in that case made it “clear that PacifiCorp never intended to submit a ‘new request.’” *Id.* Here, there is no such written (or even implied) agreement and, thus, the context in which the court discussed the resubmission of “the same one-page letter . . . for more than a decade” does not exist. *Id.* (Italics omitted.) In *Hoopa*, the “water quality certification request had been complete and ready for review for more than a decade” and the court feared that, “if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.” *Id.* In contrast to the facts in *Hoopa*, the record here reflects an ongoing and dynamic license proceeding. The State Water Board’s efforts and actions cannot legally or reasonably be characterized as contractual or non-contractual idleness, or “dalliance and delay,” that delayed Commission action on the application. *Id.*; Petition at 31.

Moreover, the potential for indefinite delay that concerned the *Hoopa* court is not present here. A 2020 amendment to California Water Code section 13160 now allows the State Water Board to issue certifications before completion of environmental review

required under CEQA.<sup>10</sup> Before this amendment took effect on June 29, 2020, compliance with CEQA was necessary to grant certification. *See* Cal. Public Resources Code § 21080(a); Cal. Code Regs. tit. 14, § 15021(a). The 2020 amendment to California Water Code section 13160 now will allow the State Water Board to act on an application for certification before CEQA review is complete. Thus, the State Water Board is no longer faced with the situation where state law prevents it from issuing certification because the environmental document required under CEQA is not complete, but it is then at risk of have the federal permitting or licensing agency impose a waiver based on the delay in issuing certification.<sup>11</sup>

In short, this proceeding bears no resemblance to *Hoopa*. There has been no withdrawal and resubmittal, and there has been no agreement or “scheme,” formal or otherwise, to put certification hold indefinitely.

**B. The Districts’ Allegations of a “Deny-and-Reapply” or “Deny-and-Resubmit” Scheme Since 2019 Are Unsubstantiated and Meritless**

The Districts suggest that the State Water Board’s denial without prejudice of

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<sup>10</sup> The State Water Board can issue certification before CEQA review is complete if it finds that “waiting until completion of that environmental review to issue the certificate or statement poses a substantial risk of waiver.” Cal. Wat. Code § 13160(b)(2). The State Water Board may make this finding based on the potential that the federal permitting or licensing agency might consider certification to be waived, even if so doing would be improper.

<sup>11</sup> There is no basis for the Districts’ claim that the 2020 amendments amount to a legislative recognition that denial without prejudice violates federal law. *See* Petition at 22-23. The legislation addresses delays in certification due to the need to complete CEQA documents, not denials of certification, which may be necessary for other reasons. As should be plain from the timing of the legislation, it was enacted in response to proposed U.S. EPA regulations. The proposed regulations encouraged states to update their regulations to avoid delays caused by multi-year environmental reviews, *see* 84 Fed. Reg. 44080, 44144 (Aug. 22, 2019). The preamble to adopted regulations, finalized June 1, 2020, for subsequent publication in the Federal Register, argues that certification should not be delayed based on the need for multi-year environmental reviews. 85 Fed. Reg. 42210, 42265 (July 13, 2020). While the State of California does not believe the U.S. EPA regulations are consistent with Section 401 and is pursuing litigation challenging the regulations, *State of California v. Wheeler* (N.D. Ca. Case No. 3:20-cv-4868, filed Jul. 21, 2020), their pendency at the time the 2020 amendments were enacted makes clear that the potential for delays pending completion of CEQA documents, and for federal agencies to impose waivers based on those delays, was the reason for enactment of the legislation.

their requests for certification constituted a failure or refusal to act and is a “tolling mechanism to extend unlawfully the statutory period for action.” Petition at 1. The argument is not supported by Section 401, which explicitly and unequivocally states, “No license or permit shall be granted if certification has been denied by the State . . . .” 33 U.S.C. § 1341(a)(1). There is no colorable support for the argument that denial without prejudice is the legal equivalent of a failure or refusal to act or waiver. The Districts, however, argue that the denial without prejudice is neither a “yes” or a “no.” Petition at 31. Rest assured, it’s a “no.”

The federal courts and the Commission have recognized denying a request without prejudice as the appropriate *action* where a State’s final decision on the request under Section 401 would be premature. *New York State Depart. of Environmental Conservation v. Federal Energy Regulatory Comm’n*, 884 F.3d 450, 455–56 (2018) (2nd Cir. *New York State*). *See also National Fuel Gas Supply Corporation Empire Pipeline, Inc.*, 164 FERC ¶ 61,084, P 45 (2018), citing *New York State* (“These options [including denying a request without prejudice] do not impede a state’s ability to work with an applicant to refile in accordance with the state’s requirements, preclude a state from assisting applicants with revising their submissions, do not harm the process of public notice and comment, and do not increase an applicant’s incentive to litigate.”). The Commission has “interpreted its own regulations to mean that a Section 401 waiver occurs where a State ‘has not denied or granted certification’ by the one-year date.” *Alcoa Power Generating Inc. v. FERC*. (D.C. Cir. 2011) 643 F.3d 963, 967 (*Alcoa Power*); 18 C.F.R. § 4.34(b)(5)(iii). “We note that, to the extent the California Board does not have sufficient information to issue a water quality certification, . . . it has a

remedy—it can deny certification.” *South Feather Water and Power Agency*, 171 FERC ¶ 61,242, P 31 (2020) [FERC Project No. 2088-068]. That is precisely the remedy the State Water Board selected. The State Water Board’s denial without prejudice of the Districts’ certification requests was the only appropriate action under the circumstances. *See* Cal. Code Regs. tit. 23, §§ 3836(c) (denial without prejudice is appropriate where “the federal period for certification will expire before the certifying agency can receive and properly review the necessary environmental documentation”) & 3837(b)(2) (denial without prejudice is appropriate where “compliance with water quality standards and other appropriate requirements is not yet necessarily determined, but the application suffers from some procedural inadequacy (e.g., failure to . . . meet CEQA requirements)”).

The Districts suggest that the Commission is obliged to determine the validity of the State Water Board’s denial without prejudice. They attack the State Water Board’s action on the grounds that the denial was without prejudice instead of based on the merits of the certification request. Petition at 28. Such an inquiry, however, would be inconsistent with the Commission’s past practices. As noted above, the Commission has noted that denial is an appropriate remedy where the State Water Board does not have sufficient information to issue certification. *South Feather Water and Power Agency*, 171 FERC ¶ 61,242, P 31 (2020) [FERC Project No. 2088-068]. In dismissing an application for original licensing upon denial without prejudice of the second request for certification, the Commission noted that its policy “does not distinguish between denials based on inadequate information and denials based on the technical merits of the

certification request.” *Rugraw, Inc.* (1999) 89 FERC ¶ 61063, 61205. There is no basis for the Commission to change its practices.

More importantly, and as discussed further below, the validity of a state decision to deny or grant certification turns on questions of state law, and not by reference to federal law. *Keating*, 927 F.2d at 622. Section 401 does not grant authority to the Commission to inquire into the substantive grounds for an agency’s decision to deny certification. The primary cases cited by the Districts do not support their argument that the Commission has an obligation to determine “whether the State Water Board’s denial is valid as a matter of federal law” as “simply another way of asking whether waiver has occurred.” Petition at 26. While a “water quality certification is reviewable in federal court to the extent Section 401 itself imposes requirements that a State must satisfy in order for a certification to be a” certification required by Section 401, *Alcoa Power*, 643 F.3d at 971, neither case cited by the Districts involved the Commission’s review of a State’s decision to deny certification. Petition at 24-26.

To the contrary, both cases involved state certifications issued pursuant to Section 401. The issue in *City of Tacoma, Washington v. FERC* 460 F.3d 53 (D.C. Cir. 2006) (*Tacoma*) was whether the State of Washington had complied with state public notice requirements where public notice had been called into question. The court did not suggest that the Commission should resolve disputes over state procedures, “for doing so would require FERC to construe state law.” *Id.* at 68. Instead, the court explained, the Commission’s obligation was to obtain “some minimal confirmation” of the state’s compliance with its procedures, “at least in a case where compliance has been called into question.” *Id.* In *Alcoa Power, supra*, the question was whether the State of North

Carolina acted on, or waived, a certification request when it issued a certification with an “effective” clause. The court determined that the certification allowed the Commission to proceed with licensing regardless of the “effective” clause and there was no waiver. *Alcoa Power*, 643 F.3d at 974. These cases do not support, and in fact they contradict, the Districts’ request to the Commission to delve into the basis for the State Water Board’s denial.

By arguing that an agency’s denial of certification is limited to “substantive denials of certification on the merits,” the Districts baldly attempt to insert language and intent into Section 401 that does not exist. Petition at 30. The plain language of Section 401 contains no such limitation. To argue that, somehow, the order of selected sentences in Section 401(a)(1), in which waiver is discussed first, creates a level of legal import and that the waiver provisions would be removed from the statute if non-substantive denials were allowed is not consistent with tenets of statutory construction. *See* Petition at 30-31. The cardinal canon of statutory construction, which the Supreme Court has “stated time and again,” is “that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat. Bank v. Germain* 503 U.S. 249, 253–254 (1992). Section 401(a)(1) provides that no license or permit shall be granted if the state denies certification. There is no basis for reading restrictions into the section.

Similarly, the Districts assert that the State Water Board’s denials are “not final administrative actions and thus are not reviewable in California courts.” Petition at 29. There is no basis for concluding that denial without prejudice is not a final agency action subject to exhaustion of administrative remedies and judicial review. The applicable

state statute and regulations contain no such words of limitation. Cal. Code Regs. tit. 23, § 3867(a)(1); Cal. Water Code § 13330.

It also appears that the Districts attempt to create their own rule where, if the State Water Board finds a request for certification to be complete, then it cannot issue a denial without prejudice. Petition at 29. The Districts' stark assertion is unsupported. The State Water Board's regulations expressly authorize denial without prejudice where compliance with water quality standards and other appropriate requirements are not necessarily determined, but the application suffers from a procedural inadequacy. Cal. Code Regs. tit. 23, 3837(b)(2). *see also, id.*, 3856(f) (although not required for a complete application, the agency shall be provided with valid CEQA documentation). An application that is deemed complete does not necessarily provide the State Water Board with the information it needs to determine compliance with water quality standards or appropriate requirements of state law.

The Districts states no basis for the Commission to declare that the State Water Board waived certification by denying their requests for certification within one year of their filing. The Districts' decision to then submit a new certification request and not to timely petition the State Water Board for reconsideration, abandon the proposed Projects, or take another action in response to the denial without prejudice, was their own. The State Water Board intends to act on the Districts' currently pending applications for certification request within the one-year period.

#### **V. THE DISTRICTS HAVE FAILED TO EXHAUST ADMINISTRATIVE AND JUDICIAL REMEDIES**

The Clean Water Act embodies congressional intent to preserve and protect the primary responsibilities of the states. 33 U.S.C. § 1251(b). This respect for state laws

and state institutions is particularly strong in Section 401, which provides that each state shall adopt its own procedures. *Id.* at § 1341(a)(1). California has adopted administrative procedures for water quality certification that include procedures for administrative reconsideration, not just to review final certification, but for review of any action or failure to act as part of the certification process. Any subsequent judicial review of a state’s decision to issue or deny certification is in state court. Cal. Water Code § 13330.

The Districts never requested reconsideration of, or otherwise challenged, any action or failure to act by the State Water Board, despite the clear availability of an administrative remedy to do so. California Code of Regulations, title 23, section 3867(a)(1), provides that “an aggrieved person may petition the state board to reconsider *an action or failure to act* taken by the executive director . . . .” Italics added. *See id.* §§ 3838(a) (delegating authority to the executive director to issue or deny certification), 3859(a) (requiring executive director to issue or deny certification before the period for certification expires); *see also* Cal. Water Code § 13330(a) (authorizing judicial review after remedy of administrative reconsideration is exhausted). When the executive director denied certification for the Projects, the Districts never pursued, let alone suggested, any different course of action, instead choosing to submit new requests for certification, including their current request filed in July 2020. By failing to exhaust their administrative remedies regarding the State Water Board’s denials without prejudice, the Districts have waived any rights to now allege waiver on those bases. *U.S. v. Superior Court*, 19 Cal. 2d 189, 194 (Cal. 1941); *Abelleira v. District Court of Appeal, Third Dist.*, 17 Cal. 2d 280, 293 (Cal. 1941). Declaratory relief will not be issued to a party that has



failed to exhaust its administrative remedies. *Contractors' State License Bd. v. Superior Court*, 28 Cal. App. 5th 771, 780–82 (Cal. Ct. App. 2018); cf. *Ross v. Blake*, 136 S.Ct. 1850 (2016) (requiring exhaustion of available state administrative remedies where required by statute before federal court review).

Exhaustion of administrative remedies is a procedural prerequisite to review on the merits, so fundamental that it is often referred to as jurisdictional. *See, e.g., State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 791 (Cal. Ct. App. 2006). This reflects the importance of ensuring that, before an administrative agency's actions or failures to act are reviewed for compliance with applicable law, the administrative agency has a fair opportunity to consider and respond to any issues that may be raised as part of that review.

“The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decision-making body “is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief . . . the Board will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so.””

*Id.* at 794, quoting *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal.App.4th 342, 384 (Cal. Ct. App. 2001); *see Smith v. Berryhill*, 139 S.Ct. 1765, 1779 (2019) (“Fundamental principles of administrative law, however, teach that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question.”).

The Clean Water Act provides for a system that respects the States' water quality concerns. “In *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 386 (2006), the Supreme Court construed States' Section 401 certification authority broadly to admit few restrictions on a State's authority to reject or condition

certification.” *Alcoa Power*, 643 F.3d at 971. Section 401 gives states “the power to block, for environmental reasons, local water projects that might otherwise win federal approval.” *Keating*, 927 F.2d at 622. The “validity of a state’s decision to grant or deny a request for certification in the first instance, before any federal license or permit has yet been issued,” “turns on questions of substantive state environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.” *Id.* For this reason, in most cases, if a party seeks to challenge a state certification issued pursuant to Section 401, it must do so through the state courts. *Id.*; *Tacoma*, 460 F.3d at 67. A water quality certification is reviewable in federal court, however, at least to the extent Section 401 itself imposes requirements that a state must satisfy in order for a certification to be a “certification required by this section,” 33 U.S.C. § 1341(a)(1), such as procedures for public notice. *Alcoa Power*, 643 F.3d at 971. Such basic procedures are not at issue here.

Under California law, the denial of certification is final and not subject to collateral attack. Yet the Districts’ Petition now seeks to transmogrify a final and no longer reviewable denial into a waiver. Granting the Petition would amount to a clear federal overreach.

Respect for these principles, and for the role of the state under Section 401, dictates that the Commission should not decide the merits of whether certification has been waived, but should dismiss the Petition for the applicants’ repeated, conscious failure to exercise, let alone exhaust, available administrative and judicial remedies.

## **VI. THE DISTRICTS ARE NOT ENTITLED TO DECLARATORY RELIEF DUE TO THEIR UNCLEAR HANDS**

Under the equitable doctrine of unclean hands, parties such as the Districts asking for equitable relief “ ‘must come with clean hands.’ “ *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015), quoting *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Unclean hands is an applicable consideration in Commission proceedings. *Rocky Mountain Natural Gas Co. v. Federal Energy Regulatory Comm’n*, 114 F.3d 297, 299 (D.C. Cir. 1997). Section 401’s one-year water quality certification period is subject to equitable defenses. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982) (Title VII timeliness deadlines are not jurisdictional); *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F.Supp.2d 168, 176-77 (D.D.C. 2006) (Coastal Zone Management Act’s statutory waiver deadline was “subject to waiver, estoppel and equitable tolling.”).

Here, the Districts come to the Commission with unclean hands. The Districts’ Petition implies that the State Water Board’s denials without prejudice and the Districts’ resubmittals of their own requests for certification are part of an unlawful tolling scheme to delay the Commission’s action. These allegations are untrue and unsubstantiated. The Districts’ own failure to prepare the environmental documentation under CEQA that they, as lead agencies, are required to prepare is one of the reasons that the State Water Board denied certification without prejudice. Cal. Pub. Res. Code § 21080.1; Cal. Code Regs. tit. 14, § 15050. Nonetheless, with the hopes of obtaining a favorable decision from both the State Water Board and the Commission, the Districts elected to resubmit requests for certification to induce the State Water Board to continue working on the water quality

certification decision.<sup>12</sup> Even after *Hoopa* was decided in January 2019, the Districts filed their second requests for certification. The State Water Board appropriately denied the Districts' requests for certification without prejudice. The Districts have never petitioned the State Water Board for reconsideration of the denials of certification without prejudice.

Notwithstanding the fact that the Districts had not completed their own necessary work for the Projects, they now seek relief from the Commission less than three months after requesting certification in July 2020. It is notable that the Districts seek such relief only after legislation took effect in June 2020 that authorized the State Water to issue a certification before completion of environmental review under CEQA. Cal. Wat. Code § 13160(b). The Districts' conduct and actions do not reflect the story they are now attempting to tell and their characterization of the history of water quality certification for the Projects ignores the impacts their own actions had on the State Water Board's processes. The Districts should not be allowed to benefit by their inaction on CEQA compliance and their own actions in submitting requests for certification.<sup>13</sup>

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<sup>12</sup> See Petition, Attach. A, at 43 (Districts' stated purpose of the third request for water quality certification was to ensure that the Districts' October 11, 2017 license application "remains in good standing before FERC").

<sup>13</sup> As explained above, the Districts' own inaction has impeded the State Water Board's ability to conduct proper review and conditioning of the Projects. Under the Commission's own precedent, the prospect of indefinite delay of the federal licensing proceedings due to the Districts' lack of diligence requires dismissal of the La Grange Project original license application because the State Water Board has denied certification twice and the Districts have not appealed the denials. The Commission has held that it will dismiss an application for original licensing upon denial of the second request for water quality certification, unless appeal of the first denial is still pending. *City of Harrisburg, Pennsylvania* 43 FERC ¶ 61438, 62095 (1988); *City of Harrisburg, Pennsylvania* 45 FERC ¶ 61053 (1988). This policy applies even when the second denial was without prejudice. See *Rugraw, Inc.* 89 FERC ¶ 61287 (1999); *Rugraw, Inc.* 89 FERC ¶ 61063, 61205 (1999) ("Our policy does not distinguish between denials based on inadequate information and denials based on the technical merits of the certification request."). The State Water Board does not advocate this outcome at this time for several reasons, including that it appears inconsistent with the rule preserving administrative and judicial remedies to the states, but merely notes the existence of such precedent.

The State Water Board denied the applications for certification without prejudice to assure that it did not waive its certification authority for failure or refusal to act before it was able to complete proper review, analysis, and conditioning of the Projects. The State Water Board intends to act by issuing certification within the one-year time period. In the interest of equity and justice, the Districts should not stand to benefit by selectively raising new, unsubstantiated claims to avoid certification conditions intended to ensure that the Projects will comply with applicable federal and state laws for the protection of water quality and beneficial uses of water.

## **VII. CONCLUSION**

For the above reasons, the State Water Board requests confirmation of its status as party and intervenor in this proceeding. Also for the above reasons, the State Water Board respectfully requests that the Commission deny the Districts' Petition.

Submitted on this 29th day of October, 2020.

*/s/ Erin K.L. Mahaney*

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## Certificate of Service

I hereby certify that I have this day filed electronically with the Federal Energy Regulatory Commission (FERC) and served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding (Don Pedro Hydroelectric Project, FERC Project No. 2299, and La Grange Hydroelectric Project, FERC Project No. 14581).

Dated at Sacramento, California this 29<sup>th</sup> day of October, 2020.

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