

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

Turlock Irrigation District and Modesto Irrigation District))))	Don Pedro Hydroelectric Project (P-2299-082) La Grange Hydroelectric Project (P-14851-002)
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**CONSERVATION GROUPS’ SUPPLEMENTAL COMMENTS IN OPPOSITION TO
THE PETITION FOR DECLARATORY ORDER OF TURLOCK AND MODESTO
IRRIGATION DISTRICTS 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 Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (collectively, “Conservation Groups”) submit these supplemental comments in opposition to the “Petition for Declaratory Order of Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification” (“Petition”). These comments supplement the 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, filed November 2, 2020 (“November 2, 2020 Comment Letter”) and attached hereto as Appendix A. 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-2299-082) and the original licensing of the La Grange (P-14581-002) Hydroelectric Projects.¹

Conservation Groups are parties to the relicensing and licensing proceedings for both projects.² Conservation Groups oppose waiver of Section 401 certification for the relicensing of the Don Pedro Project and the licensing of the La Grange Project.

¹ 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.

² 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.

I. Description of Commenters

Conservation Groups seek to protect the non-developmental values of the river and to ensure that the Commission's decision and the Districts' implementation with regard to the projects are in the public interest. Conservation Groups have a strong interest in adequate and equitable protection, mitigation and enhancement measures for fish and wildlife, as well as the protection of recreation and water quality. In addition, Conservation Groups have a strong interest in the Commission's equal consideration of power and non-power values when evaluating hydro projects pursuant to the Federal Power Act. Conservation Groups have party status in these dockets and all sub dockets pursuant to their unopposed motions to intervene herein, filed January 23, 2018.³

II. 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.⁴ 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.⁵

On January 24, 2019, the State Water Board denied both applications without prejudice.⁶

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.⁷

On April 22, 2019, the Districts reapplied for Section 401 certification of each of the projects.⁸

On April 20, 2020, the State Water Board denied both applications without prejudice.⁹

Conservation Groups' Motions to Intervene, filed January 23, 2018, were not opposed. Party status is therefore automatically granted per 18 C.F.R. § 385.214.

³ 18 C.F.R. § 385.214

⁴ 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).

⁵ *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.").

⁶ See letter from Eileen Sobeck to Steve Boyd, TID, and John Davids, MID (Jan. 24, 2019), eLibrary no. 20190206-0011.

⁷ 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.

⁸ 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).

⁹ See letter from Eileen Sobeck to Steve Boyd, TID, and John Davids, MID (Apr. 20, 2020).

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.¹⁰ 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 refiled its certification requests, or whether, and on what basis, it believes that the Water Board has waived certification.”¹¹

On July 20, 2020, the Districts reapplied for Section 401 certification of each of their projects.¹² 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.”¹³

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-.”¹⁴

On November 2, 2020, Conservation Groups filed “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

¹⁰ 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 (Jul. 7, 2020), eLibrary no. 20200707-3000.

¹¹ *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 (Jul. 15, 2020), eLibrary no. 20200715-3014, p. 2.

¹² *See* letters from Michael I. Cooke and John B. Davids to Eileen Soback (Jul. 20, 2020), eLibrary no. 20200720-5169 (Don Pedro), eLibrary no 20200720-5170 (La Grange).

¹³ *Id.*, p. 2.

¹⁴ 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-” (Oct. 29, 2020), eLibrary no. 20201029-5212 (State Water Board MOI).

and La Grange Hydroelectric Projects.”¹⁵ As stated above, these comments supplement the Conservation Groups’ November 2, 2020 Comment Letter, attached hereto as Appendix A.

On November 6, 2020, the Commission issued “Notice of Petition for Declaratory Order,” noting that “Any person wishing to comment on the Districts’ petition may do so,” and “The Districts’ request is part of the licensing proceedings in Project Nos. 2299-082 and 14581-002. Thus, any person that intervened in either licensing proceeding is already a party.” As previously mentioned, Conservation Groups have intervened in both Project Nos. 2299-082 and 14581-002. Further, the Commission welcomes further interventions to this proceeding pursuant to Rules 211 and 214 of the Commission’s Rules of Practice and Procedure.

On November 20, 2020, the Districts filed “Formal Withdrawal of Requests for Water Quality Certification” for Project Nos. 2299 and 14581.¹⁶

On November 30, 2020, the Districts filed “Answer of Turlock Irrigation District and Modesto Irrigation District to Comments on Petition for Waiver of Water Quality Certification.”¹⁷ The Districts do not oppose the comments of Conservation Groups¹⁸ and do not oppose the interventions of Conservation Groups or the State Water Board in their Comments.

On November 30, 2020, the State Water Board filed a Draft Water Quality Certification for the projects.¹⁹

On December 4, 2020, the State Water Board filed “California State Water Resources Control Board’s Notice Of Intervention, Motion To Intervene, and Comments On Turlock Irrigation District’s And Modesto Irrigation District’s Petition For Declaratory Order.”²⁰

¹⁵ Conservation Groups, “Conservation Groups’ Motion to Intervene in Opposition to the Petition for Declaratory Order or Turlock Irrigation District and Modesto Irrigation District Requesting Waiver of Water Quality Certification for the Don Pedro and La Grange Hydroelectric Projects” (Nov. 2, 2020), eLibrary no. 20201102-5205.

¹⁶ Turlock Irrigation District & Modesto Irrigation District, “Re: Copy of Formal Withdrawal of Requests for Water Quality Certification Before the California State Water Resources Control Board” (Nov. 20, 2020), eLibrary no. 20201120-5247 (Withdrawal of Request for Certification).

¹⁷ Turlock Irrigation District & Modesto Irrigation District, “Answer of Turlock Irrigation District and Modesto Irrigation District to Comments on Petition for Waiver of Water Quality Certification,” (Nov. 30, 2020), eLibrary no. 20201130-5352.

¹⁸ Conservation Groups are already interveners to this docket and all subdockets pursuant to 18 C.F.R. § 385.214.

¹⁹ State Water Board, November 30, 2020, “Public Comment Period for Draft Water Quality Certification: Turlock Irrigation District’s and Modesto Irrigation District’s Don Pedro and La Grange Hydroelectric Projects Federal Energy Regulatory Commission Project Nos. 2299 & 14581,” eLibrary no. 20201201-5044.

²⁰ State Water Board, December 4, 2020, California State Water Resources Control Board’s Notice Of Intervention, Motion To Intervene, and Comments On Turlock Irrigation District’s And Modesto Irrigation District’s Petition For Declaratory Order,” eLibrary no. 20201204-5143.

III. Supplemental Comments

A. **The Districts' Relicensing and Licensing Applications Must be Dismissed because the Districts Have No Pending Application for Water Quality Certification.**

On April 20, 2020, the State Water Board denied the Districts' applications for water quality certification. On July 15, 2020, the Commission sent a letter to the Districts stating that the Commission may dismiss license applications 90 days after denials of Section 401 certification.²¹ On July 20, 2020, the Districts reapplied for water quality certification of each of their projects.²² On November 20, 2020, the Districts withdrew the requests for water quality certification before the State Water Board submitted on July 20, 2020.²³

Pursuant to longstanding Commission precedent, the Commission should now dismiss the Districts' relicensing and licensing applications.²⁴ Since 1988, it has been the Commission's clear policy that if a license applicant's request for water quality certification is denied, the Commission will dismiss the license application unless, within 90 days, the applicant reports that it has filed a timely appeal of the denial, or another certification request, or both.²⁵ Here, there is no dispute that the Districts (1) have not timely appealed the State Water Board's Denial and (2) are no longer pursuing a certification request.

The Commission, in *Creamer and Noble Energy, Inc.*,²⁶ found that if the request for certification is denied, then, unless an appeal of the denial is pending, the Commission will dismiss the license application. Here, as discussed, a request for certification was denied by the State Water Board. There is neither a timely appeal of such denial nor an active certification request, over 231 days after the denial of such request for certification – well over the reasonable 90-day reapplication threshold long established by the Commission.

Without active applications for water quality certification outside of this 90-day grace period, the Districts' relicensing and licensing applications cannot proceed and should be dismissed by the Commission.

²¹ 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 (Jul. 15, 2020), eLibrary no. 20200715-3014, p. 2.

²² See letters from Michael I. Cooke and John B. Davids to Eileen Sobeck (Jul. 20, 2020), eLibrary no. 20200720-5169 (Don Pedro), eLibrary no 20200720-5170 (La Grange).

²³ Withdrawal of Request for Certification, *supra*.

²⁴ *Swift River Co.*, 41 FERC ¶ 61,146 (1987).

²⁵ *Creamer and Noble Energy, Inc.*, Project No. 10847-003, Order Denying Rehearing (Oct. 12, 2000).

²⁶ 93 FERC ¶ 61,044, *Creamer and Noble Energy, Inc.*, Project No. 10847-003 (Oct. 12, 2000).

B. Alternatively, 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.

The Commission should first and foremost dismiss the Districts’ relicensing and licensing applications as, pursuant to clear Commission policy, there is currently no pending application for water quality certification, or appeal on a decision thereof, before the Commission. Alternatively, the Commission should deny the Districts’ request for waiver of water quality certification and require the Districts to reapply for certification forthwith.

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.” (emphasis added). Section 401(a)(1) requires a 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.²⁷ By issuing such denials within one year of the Districts’ applications, the State Water Board has timely acted.²⁸ Denial of state certification is one of four acceptable state actions anticipated by the authors of the CWA²⁹ and is accepted by the Environmental Protection Agency’s (“EPA”) new regulations.³⁰ 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. The CWA is clear: “No license or certification shall be granted if certification has been denied by the State.”³¹

²⁷ *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court “must enforce plain and unambiguous statutory language according to its terms”); *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”).

²⁸ *See also* 18 C.F.R. § 4.34 (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).

²⁹ 33 U.S.C. § 1341.

³⁰ 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. 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.

³¹ 33 U.S.C. § 1341(a)(1).

a. Denial is denial.

The Commission does not distinguish between denials based on inadequate information and denials based on the technical merits of the certification request.³² Denial is denial, an act expressly authorized by the CWA, and taken here by the State Water Board within one year of an application for water quality certification.

For example, if 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 block any project that may eventually have been successful, rendering the certification procedurally flawed and leaving project proponents with only “one bite at the apple.” 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.³³

If the Commission were to agree with the Districts, it would effectively write an acceptable action – “denied” – out of the CWA. However, it is already clear that the Commission does not subscribe to the Districts’ flawed reading of the CWA.

The Commission’s own regulations confirm that denying certification is an acceptable action. In 1987, the Commission promulgated subsections 4.34(b)(5)(iii) and 5.23(b)(2) of its regulations governing hydropower licensing proceedings to provide that a certifying agency may deny or grant certification within one year after the date it receives a certification request.³⁴ Here, that is just what occurred: the State Water Board denied the Districts’ certification request within one year, consistent with the Commission’s own regulations.

Further, in recent Commission precedent (*see* Order on Waiver of Water Quality Certification, Yuba County Water Agency³⁵), 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.³⁶

³² *Rugraw, Inc.*, Project No. 11157-002, Order Denying Rehearing (Oct. 18, 1999).

³³ State Water Board MOI, pp. 31-33. In *Creamer and Noble Energy*, the Commission made clear that an applicant must proceed with CEQA analysis prior to receiving water quality certification for a project.

³⁴ Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, Order No. 464, 52 Fed. Reg. 5446 (Feb. 23, 1987), FERC Stats. & Regs. ¶ 30,730 (1987); as discussed in <https://www.federalregister.gov/documents/2020/10/19/2020-20327/waiver-of-the-water-quality-certification-requirements-of-section-401a1-of-the-clean-water-act#footnote-12-p66288>.

³⁵ 171 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).

³⁶ *Id.*

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”.³⁷ 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 grant their certification request. The State Water Board affirmatively acted in response: it denied certification.³⁸ 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.”³⁹ Absent CEQA compliance, the State Water Board must deny certification.⁴⁰

The Districts, however, appear to be living in a different universe, in which they believe “the Board’s letters have not identified a single study or datum missing from the Districts’ application.”⁴¹ The Districts are sophisticated parties represented by counsel, who, presumably, should be able to render themselves familiar with the law and regulatory procedures of the *only* state in which they operate. Yet, given the Districts’ apparent inability to understand the requirements of California law, the State Water Board spells it out:

Issuance of a certification is a discretionary action under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The Districts are the lead agency for the purpose of CEQA compliance and have not yet begun the CEQA process for the project. As a responsible agency, the State Water Board relies on the environmental document prepared by the lead agency but makes its own determination as to whether and with what conditions to grant the certification, taking into consideration the information provided in the lead agency’s document. (Pub. Resources Code, §§ 21080.1, subd. (a), 21002.1, subd. (d).)⁴² (emphasis added).

In case the Districts remain perplexed as to the studies or data missing from their applications before the State Water Board: it is, at a very minimum, compliance with the CEQA process. Absent compliance, the Districts’ applications for relicensing and licensing were properly denied by the State Water Board.

The Districts also appear to be under the illusion that “a State cannot be said to ‘act’ under Section 401” when it makes “no judgment on the merits.” Putting aside the obvious argument that failure to provide a state agency with a complete substantive application renders impossible a “judgments on the merits,” the Commission’s precedent makes clear that the Commission does not distinguish between denials based on inadequate information and denials based on the technical merits of the certification request.⁴³ As such “no judgment on the merits,” as the Districts clearly seem to want, is required.

³⁷ *Id.*

³⁸ See letter from Eileen Sobeck to Steve Boyd, TID, and John Davids, MID (Apr. 20, 2020).

³⁹ *Id.*; Cal. Code Regs. tit. 23, § 3837.

⁴⁰ Cal. Code Regs. tit. 23, §§ 3836(c), 3837(b)(2).

⁴¹ Districts’ Answer to Comments on Petition, p. 6.

⁴² State Water Board, August 18, 2020 Letter to TID & MID at 2.

⁴³ *Rugraw, Inc.*, Project No. 11157-002, Order Denying Rehearing (Oct. 18, 1999).

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.⁴⁴ A state or tribal certifying authority must (a) grant, (b) grant with conditions, (c) deny or (d) waive the decision.⁴⁵ Here, the State Water Board has acted by denying the Districts' application, 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)⁴⁶ or deny an application for cause.⁴⁷ New York has similar regulations.⁴⁸ 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.⁴⁹ In 2020, New York denied the same project for cause because of a continued failure to show compliance with their water quality requirements.⁵⁰

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."⁵¹ 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").⁵² This denial under 'substantive SEPA' was upheld on appeal to the Pollution Control Hearings Board⁵³ and through two subsequent appeals.⁵⁴ 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.

⁴⁴ As stated above, Conservation Groups challenge the validity of EPA's August 1, 2020 Final Rule.

⁴⁵ Final Rule at 145.

⁴⁶ As is the case here.

⁴⁷ Cal. Code Regs. tit. 23, § 3837.

⁴⁸ N.Y. Comp. Codes R. & Regs. tit. 6, § 621.10.

⁴⁹ 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.

⁵⁰ 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 default 500-foot mixing zone), https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcd denial05152020.pdf.

⁵¹ Final Rule at 160.

⁵² Maia Bellon, *Section 401 Certification Denial* (2017), <https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acc-a-d8277e1ad237.pdf>.

⁵³ *Millennium Bulk Terminals Longview, LLC v. Wash. State Dep't of Ecology*, PCHB No. 17-090, 2018 WA ENV LEXIS 43 (Aug. 15, 2018).

⁵⁴ *Millennium 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>.

California's Permit Streamlining Act controls the timing of an application for Section 401 certification in California.⁵⁵ Any applicant seeking a federal license or permit where the proposed activity may result in a discharge to surface water is required to obtain state certification. In California, the State Water Board, Division of Water Rights, oversees the Water Quality Certification Program. Within 30 days of an application's receipt, the agency must determine and transmit to the applicant whether the application is complete.⁵⁶ If the application is incomplete and is resubmitted, a new 30-day review period begins.⁵⁷ If the application is deemed incomplete a second time, the agency must specify in detail the incomplete parts and the information required to complete the application.⁵⁸

After an application is deemed complete, a public notice period must be held for a minimum of 21 days.⁵⁹ After the public notice period, an application may be denied without prejudice if (1) supplemental information necessary for approving the certification is not received on time or (2) supplemental information necessary for approving a certification is not received before the federal clock expires.⁶⁰ The applicant must also comply with CEQA, minimize adverse impacts to water quality and mitigate impacts that cannot be eliminated.⁶¹

2. 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."⁶²

The Supreme Court has addressed the legislative history of Section 401.⁶³ The Court emphasized, "State certifications under § 401 are essential in the scheme to preserve state authority

⁵⁵ Cal. Gov't Code § 65920; *see also* Michael Lauffer, *Processing Applications for Development Permits Under the Permit Streamlining Act* (2013),

https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/psaoccmemo.pdf.

⁵⁶ Cal. Gov't Code § 65943.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Cal. Code Regs. tit 23, § 3858.

⁶⁰ *Conceptual Water Board 401 Certification Process*,

https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/401_flowchart_permitprocess.pdf.

⁶¹ *Id.*; *see also* Division of Water Rights Water Quality Certification Program Overview,

https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/wqcertprog_overview.pdf.

⁶² S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735.

⁶³ *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

to address the broad range of pollution,” and quoted Senator Edmund Muskie’s 1970 speech on the floor of the Senate in doing so:

“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).”⁶⁴

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. “The water quality standards program is limited in its success. After five years, many States do not have approved standards. Officials are still working to establish relationships between pollutants and water uses. Time schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards.”⁶⁵

The one-year limitation was not designed to remove state control where a state actively engages in the certification process, as is the case here.

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 “state” right out of the CWA, in contradiction with clear congressional intent to foster state engagement in the licensing process.

3. The Districts Come to the Commission with Unclean Hands.

The Districts come to the Commission with “unclean hands.” 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

The record shows that the State Water Board has diligently and timely acted in processing and responding to each of the Districts’ applications. Contrary to the Districts’ assertions, the current delays in the water quality certification 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.⁶⁶ The

⁶⁴ *Id.*

⁶⁵ S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675.

⁶⁶ State Water Board, Public Comment Period for Draft Water Quality Certification – Turlock Irrigation District’s and Modesto Irrigation District’s Don Pedro and La Grange Hydroelectric Projects Federal Energy Regulatory Commission Project Nos. 2299 & 14581 at 2: “The Districts’ compliance with CEQA and preparation of environmental analyses, however, is (and has been) fully within the Districts’ control.”

July 2020 legislative change to the State Water Board’s regulations cited in the Districts’ Petition,⁶⁷ 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. On November 30, 2020, that process began with the State Water Board’s issuance of a Draft Water Quality Certification for public comment.⁶⁸

The Districts are seeking waiver now, following (1) nearly three years of inaction in conducting a CEQA analysis and (2) recently withdrawing their applications for water quality certification, which amounts to “willful act[s] . . . which rightfully can be said to transgress equitable standards of conduct.”⁶⁹ These actions, in conjunction with the Districts’ current waiver request, “‘taint [MWL] with inequitableness or bad faith relative to the matter in which [it] seeks relief.’”⁷⁰ Therefore, the Districts’ requested relief – waiver – must be denied under the doctrine of unclean hands.

4. Laches Precludes Waiver.

The Districts’ undue delay in undertaking the CEQA analysis necessitates its denial under the doctrine of laches. Laches is “an equitable defense based on the . . . maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who sleep on their rights). It bars a plaintiff’s equitable claim where [the plaintiff] is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.”⁷¹

Laches exists where there is an “unreasonable lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay.”⁷² Laches applies here because the Districts’ unreasonable delay in undertaking the required CEQA analysis prejudices the State Water Board. The State Water Board, as it made clear to the Districts, “relies on the environmental document [CEQA analysis] prepared by the lead agency . . . taking into consideration the information provided in the lead agency’s document.” Almost three years following the Districts’ application for water quality certification, the Districts still appear to have no intention of beginning a statutorily mandated process upon which their applications for water quality certification are incumbent.

As with unclean hands, the Districts’ request for waiver should be barred by laches.

⁶⁷ 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).

⁶⁸ State Water Board, November 30, 2020, “Public Comment Period for Draft Water Quality Certification: Turlock Irrigation District’s and Modesto Irrigation District’s Don Pedro and La Grange Hydroelectric Projects Federal Energy Regulatory Commission Project Nos. 2299 & 14581,” eLibrary no. 20201201-5044.

⁶⁹ See *Starr Farm Beach Campowners’ Ass’n v. Boylan*, 174 Vt. 503, 506, 811 A.2d 155, 160 (2002), cited in *ChooseCo, LLC v. Lean Forward Media, Inc.*, 364 F. App’x 670, 671-72 (2d Cir. 2010).

⁷⁰ See *Holm v. First Unum Life Ins. Co.*, 7 F. App’x 40, 41 (2d Cir. 2001) (citation omitted).

⁷¹ *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997) (citation omitted); see also *Ransom v. Bebernitz*, 172 Vt. 423, 433, 782 A.2d 1155, 1162 (2001) (“[l]aches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right. . . . The delay must be unexcused and prejudicial.”) (citation omitted).

⁷² *King v. Innovation Books*, 976 F.2d 824, 832 (2d Cir. 1992).

C. Conservation Groups Support the Sierra Club's Motion to Intervene.

On December 7, 2020, the Sierra Club moved to intervene in response to the Districts' Petition and in these licensing proceedings. Conservation Groups support the Sierra Club's motion to intervene. The Sierra Club is uniquely positioned to offer the Commission insight and helpful intervention on matters of national interest, considering the Commission's work in licensing proceedings throughout the country, and in California.⁷³

The Sierra Club is further an active party commenting on and litigating in opposition to the EPA's adoption of the new Section 401 Final Rule. The Sierra Club has expertise in many matters within the licensing and waiver proceeding, and its participation in these relicensing and licensing proceedings is in the public interest. Conservation Groups support the Sierra Club's motion to intervene.

IV. Conclusion

The Districts have no pending applications for water quality certification, following the Districts' formal withdrawal on November 20, 2020 of the Districts' July 20, 2020 application for water quality certification. The Districts are in clear violation of Commission policy, and the Districts' relicensing and licensing application must therefore be dismissed.

Alternatively, the Commission should find that the State Water Board has *not* waived Clean Water Act § 401 Water Quality Certification for the relicensing of the Don Pedro and La Grange Projects and should require the Districts to reapply for certification forthwith.

Respectfully submitted this 7th day of December, 2020



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⁷³ For example, the Sierra Club is party to the FERC proceedings on the Yuba-Bear Rivers, the Yuba River Development Project and the Merced River, to name a few.



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

Turlock Irrigation District and Modesto Irrigation District)))))	Don Pedro Hydroelectric Project (P-2299-082) La Grange Hydroelectric Project (P-14851-002)
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Certificate of Service

I hereby certify that I have this day served the foregoing document, Conservation Groups' Supplemental Comments 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 7th day of December, 2020.



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APPENDIX A

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

Turlock Irrigation District and Modesto Irrigation District))))	Don Pedro Hydroelectric Project (P-2299-) La Grange Hydroelectric Project (P-14851-)
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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.¹

Conservation Groups are parties to the relicensing proceedings for both projects.² 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.

¹ 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.

² 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.³ 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.⁴

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

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.⁶

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

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

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.⁹ 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

³ *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).

⁴ *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.”)

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

⁶ 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

⁷ *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).

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

⁹ 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.”¹⁰

On July 20, 2020, the Districts re-applied for Section 401 certification of each of their projects.¹¹ 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.”¹²

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”).¹³

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.

¹⁰ 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.

¹¹ 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).

¹² *Id.*, p. 2.

¹³ 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.”¹⁴

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-2079-079.¹⁵ 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.¹⁶

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-606-027.¹⁷ 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.¹⁸

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-).¹⁹ FERC issued a notice of the petition July 6, 2019, prior to the expiration of the standard 30-day time period for answers.²⁰ 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.

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

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

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

¹⁷ 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.

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

¹⁹ 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.

²⁰ 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),²¹ 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.²² 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),²³ and issued an Order on waiver on June 16, 2020.²⁴

Yuba County Water Agency (“YCWA”) filed a request for waiver of certification for its Yuba River Development Project on August 22, 2019.²⁵ 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.²⁶ 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.”²⁷

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.

²¹ 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.

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

²³ 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.

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

²⁵ 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.

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

²⁷ *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.²⁸ Denial of state certification is one of four acceptable state actions anticipated by the authors of the CWA²⁹ and is accepted by the EPA's new Final Rule.³⁰ 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.³¹

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

²⁸ 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).

²⁹ 33 U.S.C. § 1341

³⁰ 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.

³¹ 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.³²

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”.³³ 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.³⁴ 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.”³⁵ Absent CEQA compliance, the State Water Board must deny certification.³⁶ 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.”³⁷

The Supreme Court has addressed the legislative history of Section 401.³⁸ 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:

³² 171 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).

³³ *Id.*

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

³⁵ *Id.*; Cal. Code Regs. tit. 23, § 3837.

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

³⁷ 1972 U.S.C.C.A.N. 3668, 3735

³⁸ *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).”³⁹

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.⁴⁰ A state or tribal certifying authority must (a) grant, (b) grant with conditions, (c) deny, or (d) waive the decision.⁴¹ 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.⁴² New York has similar regulations.⁴³ 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.⁴⁴ In 2020, New York denied the same project for cause because of a continued failure to show compliance with their water quality requirements.⁴⁵

³⁹ *Id.*

⁴⁰ 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.

⁴¹ Final Rule at 145.

⁴² Cal. Code Regs. tit. 23, § 3837.

⁴³ N.Y. Comp. Codes R. & Regs. tit. 6, § 621.10.

⁴⁴ 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.

⁴⁵ 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.”⁴⁶ 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”).⁴⁷ This denial under ‘substantive SEPA’ was upheld on appeal to the Pollution Control Hearings Board⁴⁸ and through two subsequent appeals.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵²
- 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.⁵³

default 500-foot mixing zone),

https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcd denial05152020.pdf.

⁴⁶ Final Rule at 160.

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

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

⁴⁹ *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>

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

⁵¹ State Water Board MOI, *op. cit.*

⁵² *Id.*, pp. 9-14.

⁵³ *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 401.⁵⁴
- 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.⁵⁵

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,⁵⁶ 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.

⁵⁴ *Id.*, pp. 22-27.

⁵⁵ *Id.*, pp. 31-33.

⁵⁶ *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 2nd day of November, 2020.



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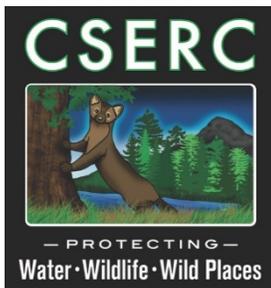
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**BEFORE THE
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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

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 2nd day of November, 2020.



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