

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the matter of:

**State Water Resources Control Board's
Limited Own Motion Reconsideration of
Water Quality Certifications For**

**Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls
Hydroelectric Project (Federal Energy Regulatory Commission Project Nos. 2179 and
2467)**

**Nevada Irrigation District's Yuba-Bear Hydroelectric Project (Federal Energy Regulatory
Commission Project No. 2266), and**

**Turlock Irrigation District's And Modesto Irrigation District's Don Pedro Hydroelectric
Project and La Grange Hydroelectric Project (Federal Energy Regulatory Commission
Project Nos. 2299 and 14581)**

**RESPONSE OF CONSERVATION GROUPS
IN SUPPORT OF THE PROPOSED ORDER SETTING ASIDE WATER QUALITY
CERTIFICATIONS FOR FERC PROJECT NOS. 2179, 2467, 2266, 2299, AND 14581**

I. Introduction

Friends of the River, California Sportfishing Protection Alliance, American Rivers, American Whitewater, Central Sierra Environmental Resource Center, Gold Country Fly Fishers, Golden West Women Flyfishers, Merced River Conservation Committee, Northern California Council Fly Fishers International, Sierra Club Mother Lode Chapter, South Yuba River Citizens League, Trout Unlimited, and Tuolumne River Trust (collectively, "Conservation Organizations") respectfully comment in support of the State Water Resources Control Board's (Board) Proposed Order Setting Aside Water Quality Certifications (Proposed Order). The Board announced the Proposed Order in a notice dated March 11, 2024.

In September 2023, the U.S. Environmental Protection Agency (USEPA) issued the final Clean Water Act Section 401 Water Quality Certification Improvement Rule ("USEPA's 2023 Rule"). The USEPA's 2023 Rule, which became effective on November 27, 2023, includes a new interpretation of appropriate water quality certification procedure that prevents certifying authorities, such as the Board, from issuing water quality certifications without a pending request for certification. While believing its prior certifications were issued legally, the Board defers to the USEPA's 2023 Rule, and therefore, proposes to set aside the water quality certifications for the Merced River Hydroelectric Project (Federal Energy Regulatory Commission (FERC) P-

2179), Merced Falls Hydroelectric Project (FERC P-2467), Yuba-Bear Hydroelectric Project (FERC P-2266), Don Pedro Hydroelectric Project (FERC P-2290), and La Grange Hydroelectric Project (FERC P-14581). Conservation Organizations support the Board's Proposed Order.

II. Background

As noted in the Proposed Order, Conservation Groups have a long-standing interest in the matters of the Proposed Order. Each signatory to this letter is party to at least one of the FERC relicensing proceedings for the hydroelectric projects listed above, and some are party to all. Some of the Conservation Organizations also intervened in legal efforts by Merced Irrigation District, Nevada Irrigation District, Turlock Irrigation District, and Modesto Irrigation District (irrigation districts) to undermine the state's 401 authority.

On July 31, 2020, the Board issued the final Water Quality Certification (WQC) for the relicensing of Nevada Irrigation District's (NID) Yuba-Bear Hydroelectric Project, FERC Project 2266. NID submitted its first request for certification on March 15, 2012 and a final request for certification of projects on January 29, 2018. On August 14, 2020, the Board issued the final WQC for the Yuba-Bear Project. On September 10, 2020, NID filed a petition for reconsideration of the Yuba-Bear WQC. On March 5, 2024, Conservation Organizations responded in opposition to NID's petition for reconsideration.¹

On November 30, 2020, the Board issued a single draft WQC for the Modesto Irrigation District and Turlock Irrigation District's Don Pedro and La Grange hydroelectric projects (FERC Projects 2299 and 14581). On December 21, 2020, Conservation Organizations filed comments on the draft WQC.² The Board issued the final WQC on January 15, 2021. Conservation Organizations ("Tuolumne River Trust et al.") petitioned the State Water Board for reconsideration of the final WQC for the Don Pedro and La Grange projects on February 16, 2021.³ On January 7, 2022, Conservation Organizations commented on the petitions for reconsideration and requested that the Board deny reconsideration as requested by the Modesto and Turlock irrigation districts, the City and County of San Francisco, and the Bay Area Water Supply and Conservation Agency, and grant reconsideration as requested by Conservation Organizations.

¹ Signatories to the March 5, 2024 comment letter included Foothills Water Network, California Sportfishing Protection Alliance, American Whitewater, Friends of the River, Sierra Club Motherlode Chapter, and South Yuba River Citizens League. All signatories are intervenors in the Yuba Bear Hydroelectric Project relicensing proceeding.

² Conservation Organizations filing comments included the Tuolumne River Trust, Friends of the River, California Sportfishing Protection Alliance, American Whitewater, Sierra Club Mother Lode Chapter, American Rivers, Trout Unlimited, Tuolumne River Conservancy, Golden West Women Flyfishers, Central Sierra Environmental Resource Center, and the Merced River Conservation Committee. All commenters were intervenors in the Don Pedro and La Grange licensing proceedings except Sierra Club Mother Lode Chapter; FERC granted the Chapter late intervention regarding the efforts of the licensees to waive the WQC.

³ Petitioners were Tuolumne River Trust, California Sportfishing Protection Alliance, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers, Central Sierra Environmental Resource Center, Tuolumne River Conservancy, and Sierra Club Mother Lode Chapter.

On July 17, 2020, the Board issued a WQC for the Yuba River Development Project (YRDP). FERC Project 2246. The Board issued an amended final WQC on December 15, 2020. Yuba County Water Agency (YCWA) petitioned for reconsideration of the WQC for the YRDP on August 14, 2020. Conservation Organizations filed a response in opposition to YCWA's petition for reconsideration with the Board on November 17, 2020.⁴ On January 14, 2021, Conservation Organizations submitted a petition for reconsideration of the final WQC that was issued by the Board on December 15, 2020.⁵

On July 31, 2020, the Board issued the final WQC for the relicensing of Merced Irrigation District's (Merced ID) Merced River Project and Merced Falls Hydroelectric Project, FERC projects 2179 and 2467. Merced Irrigation District (Merced ID) petitioned for reconsideration on August 28, 2020. Conservation Groups filed a response in opposition to Merced ID's petition for reconsideration on November 18, 2022.⁶

On June 28, 2022, a superior court in Fresno issued an order ruling the WQC for the YRDP invalid because there had been no request for certification pending at the time the Board issued the WQC. On August 4, 2022, the state court entered judgment and issued a writ directing the Board to set aside and vacate the July 17, 2020 certification for relicensing of the YRDP and State Water Board Order WQ 2020-0043. The Board has appealed the order of the superior court. To our knowledge, no date has been set for trial before the California Court of Appeal.

III. Conservation Organizations support the Proposed Order.

Conservation Organizations support the Proposed Order. If adopted, the Proposed Order will resolve the delay and uncertainty bound up in the Board's pending appeal before the California Court of Appeal. In addition, the USEPA 2023 Rule provides clarity regarding many issues that were previously contested in various petitions for reconsideration and pleadings in state court. This clarity offers the Board the opportunity to make revisions that will increase the legal defensibility of the WQCs.

Conservation Organizations do not reach this decision lightly. Conservation Organizations largely supported the three WQCs in question. In addition, Conservation Organizations have invested over a decade of intensive effort and expense in each of these

⁴ Signatories of the November 17, 2020 letter included California Sportfishing Protection Alliance, Friends of the River, the Sierra Club Mother Lode Chapter, Trout Unlimited and South Yuba River Citizens League. All signatories are formal intervenors and participated in the relicensing of the Yuba River Development Project filed under the aegis of the Foothills Water Network and include Adventure Connection, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Gold Country Fly Fishers, Nevada City Rancheria, Northern California Council Federation of Fly Fishers, Sierra Club, South Yuba River Citizens League, Tributary Whitewater Tours and Trout Unlimited.

⁵ Conservation Organizations that submitted a Petition for Reconsideration on January 14, 2021 included California Sportfishing Protection Alliance, Friends of the River, the Sierra Club Mother Lode Chapter, Trout Unlimited and South Yuba River Citizens League.

⁶ See Response of Conservation Groups in Opposition to the Petition for Reconsideration of Merced Irrigation District for the Water Quality Certification of Merced River and Merced Falls Hydroelectric Projects, November 18, 2022. Signatories of this letter included Merced River Conservation Committee, California Sportfishing Protection Alliance, Golden West Women Flyfishers, Friends of the River, American Rivers, American Whitewater, Northern California Council Fly Fishers International, and the Sierra Club Tehipite Chapter.

licensing proceedings. Conservation Organizations have also invested significant effort in advocating for appropriately protective water quality conditions for inclusion in the WQCs, including a petition for reconsideration addressing certain aspects of the WQC for the Don Pedro and La Grange proceedings. However, given the need for certainty and closure in the relicensing of the irrigation districts' projects, and the potential environmental and recreational benefits that stand in abeyance awaiting completion of the certification and licensing processes, Conservation Organizations support the Proposed Order.

Conservation Organizations further support expedited issuance of future WQCs for these projects following Board receipt of the requisite requests for certification. We recommend generally that the new WQCs be consistent with previous comments by Conservation Organizations and that the Board carefully comply with all procedural requirements.

Additionally, Conservation Organizations recommend that the Board: (1) expedite communication of its decision on the Proposed Order to FERC, and (2) request that FERC order the licensees to request certification for the projects at issue within 30 days.

As we have stated repeatedly in comments in the record, we believe that the threat of waiver of certification for these projects continues to be a clear and present danger. Indeed, it is our understanding that NID is actively seeking waiver of the WQC for the Yuba-Bear Project today.

Therefore, the Board should not hesitate to proceed under Water Code § 13160 (b)(2) if each respective licensee has not completed CEQA by the time the Board is prepared (within one year of request for certification) to issue a new WQC.⁷

We look forward to completion of the Board's water quality certification process and the issuance of new FERC licenses for each of these licensing proceedings.

Respectfully submitted this 9th day of April, 2024.

⁷ In June of 2020, the California legislature enacted Water Code § 13160 (b)(2) to allow the State Water Board to issue a water quality certification in advance of the completion of the CEQA process, "if the state board determines that waiting until completion of that environmental review to issue the certificate or statement poses a substantial risk of waiver of the state board's certification authority under the Federal Water Pollution Control Act or any other federal water quality control law." By adopting section 13160, the California State Legislature specifically sought to prevent waiver of its Clean Water Act § 401 authority where an applicant's certification request was incomplete due to a lack of CEQA documentation. The 2023 USEPA Rule upholds state authority to reopen issued certifications where the certification request is incomplete (40 CFR § 121.10).

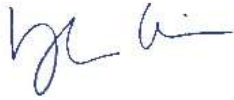


Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance
1608 Francisco St., Berkeley, CA 94703
(510) 421-2405
blancapaloma@msn.com



Keiko Mertz
Policy Director
Friends of the River
3336 Bradshaw Rd., Suite 335
Sacramento, CA 95827
(916) 442-3155 x 220
keiko@friendsoftheriver.org

Jann Dorman
Executive Director
Friends of the River
3336 Bradshaw Rd., Suite 335
Sacramento, CA 95827
(916) 442-3155 x 220
janndorman@friendsoftheriver.org



Meghan Quinn
California Dam Removal Program Director
American Rivers
120 Union St.
Nevada City, CA 95959
(510) 295-5422
mquinn@americanrivers.org



Theresa L. Lorejo-Simsiman
California Stewardship Director
American Whitewater
(916) 835-1460
theresa@americanwhitewater.org



John Buckley
Executive Director
CSERC
P.O. Box 396
Twain Harte, CA 95383
(209) 586-7440
johnb@cserc.org



Frank Rinella
Conservation Education Chair
Gold Country Fly Fishers
P.O. Box 1017
Meadow Vista, CA 95722
(530) 906-4116
sierraguide@sbcglobal.net



Cindy M. Charles

Cindy M. Charles
Conservation Chair
Golden West Women Flyfishers
1140 Rhode Island St.
San Francisco, CA 94103
cindy@ccharles.net



Merced River
Conservation Committee

Michael Martin

Michael Martin, Ph.D.
Director
Merced River Conservation Committee
PO Box 2216, Mariposa, CA 95338
(209) 966-6406
mmartin@sti.net

C. Mark Rockwell, DL

Mark Rockwell
President and VP Conservation
Northern California Council,
Fly Fishers International
5033 Yaple Ave.
Santa Barbara, CA 93111
(530) 559-5759
mrockwell1945@gmail.com



**SIERRA
CLUB**

MOTHER LODGE

S — W —

Sean Wirth
Conservation Chair
Mother Lode Chapter, Sierra Club
909 12th Streer Suite 203
Sacramento, CA 95814
wirthsocranes@yahoo.com



A handwritten signature in black ink, appearing to read "A. Zettler-Mann".

Aaron Zettler-Mann
Executive Director
South Yuba River Citizens League
313 Railroad Avenue, Suite 101
Nevada City, CA 95959
(530) 265-5961
aaron@yubariver.org



A handwritten signature in blue ink, appearing to read "Brian J. Johnson".

Brian J. Johnson
Senior Policy Advisor, Western Water and Climate
Trout Unlimited
5950 Doyle Street, Suite 2
Emeryville, CA 94608
(510) 528-4772
bjohnson@tu.org



TRT

Patrick Koepele

Patrick Koepele
Executive Director
Tuolumne River Trust
patrick@tuolumne.org