



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

Chris Shutes, FERC Projects Director

1608 Francisco St., Berkeley, CA 94703

Tel: (510) 421-2405 E-mail: blancapaloma@msn.com

Web: www.calsport.org

March 9, 2021

Sophie Maxwell, President
San Francisco Public Utilities Commission
525 Golden Gate Avenue, 13th Floor
San Francisco, CA 94012
commission@sfwater.org
Via electronic mail

Re: Comments of California Sportfishing Protection Alliance on City and County of San Francisco's February 16, 2021 Petition for Reconsideration of the Water Quality Certification for the FERC licensing of the Don Pedro and La Grange hydroelectric projects

Dear President Maxwell and members of the Commission:

We are writing out of deep concern and disappointment in the lead role of the San Francisco Public Utilities Commission (SFPUC or Commission) in the Petition for Reconsideration of the Water Quality Certification (Certification or WQC) for the FERC licensing of the Don Pedro and La Grange hydroelectric projects (Petition). The City and County of San Francisco (CCSF) filed the Petition with the State Water Resources Control Board (State Water Board) on February 16, 2021, in opposition to the Certification the State Water Board issued on January 15, 2021. Michael Carlin, Acting SFPUC General Manager, is listed in the Petition as the "Petitioner's Contact."

The goal of the Petition is to prevent the State of California from requiring improved flows in the lower Tuolumne River.

The Petition invokes the unlawful rollbacks in the Trump administration's 2020 Rule regarding Section 401 of the Clean Water Act. The Trump-era Rule would limit the authority of states to place conditions on federal licenses and permits, including those for hydropower projects. The State of California and 18 other states have filed suit to overturn this unlawful Rule. *On his first day in office*, President Biden rescinded ex-President Trump's Executive Order 13868, the Order that initiated the process to create this unlawful new Rule.

The use of the Trumpian Rule is central to the Petition. Citing directly to that Rule, the petition argues: "[T]he proper scope of Section 401 certification is to condition the *discharge*

from a federally licensed or permitted activity, *as opposed to the activity as a whole.*¹ Following ex-President Trump’s EPA, the petition would limit state authority regarding federal licenses to prohibiting release of contaminants into water. It is thus completely accurate to say that CCSF’s Petition for Reconsideration relies directly on one of ex-President Trump’s rollbacks of foundational environmental law.

Equally objectionable in CCSF’s Petition is how it prioritizes attacking the environment first, before it considers other means of securing San Francisco’s water supply. The Petition states in footnote 1:

The analysis in this Petition assumes a 51.7 percent flow contribution by San Francisco. ,, In presenting the potential water supply, environmental, and socioeconomic effects from certain interpretations of the Raker Act and the Fourth Agreement, San Francisco does not waive arguments it may have about how the Raker Act or Fourth Agreement should or will be interpreted in future proceedings before the SWRCB, FERC, courts of competent jurisdiction, or in any other context.

To our knowledge, SFPUC staff has never tried to affirmatively resolve potential water supply shortages that might result from the Bay-Delta Plan or from the Certification. Instead, SFPUC and CCSF have argued that the Tuolumne River doesn’t need very much water, based on the flawed science of the “Tuolumne River Voluntary Agreement.” If CCSF and the SFPUC have recourse to negotiation or legal remedies to reduce their liability for increased flow in the Tuolumne River, they should start working on those remedies now.

The Petition on page 30 says that the proposed Tuolumne River Voluntary Agreement (TRVA) may “serve as a substitute to the WQC.” This is incorrect both substantively and legally. But even more disappointing is that the most progressive city in the country proposes to achieve such substitution by joining ex-President Trump’s attack on the Clean Water Act. It is one thing to say that this or that Condition, or even many Conditions, is unreasonable and needs to be changed. It is quite another to join an attack on a law because of disagreement on how it is applied.

¹ The Petition states on page 11:

Contrary to federal regulations, the WQC [Certification] conditions the “activity as a whole,” and not just Project discharges. (Final WQC at 13). The U.S. Environmental Protection Agency (“EPA”)’s final rule issued in July 2020 [the Trumpian Rule] provides that states are *not* authorized to condition “the activity as a whole, once the threshold condition, the existence of a discharge, is satisfied.” (EPA, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 at 42233-34, 42251-52 (July 13, 2020) (“EPA Final Rule”). Rather, the proper scope of Section 401 certification is to condition “the *discharge* from a federally licensed or permitted activity, *as opposed to the activity as a whole.*” (*Id.* at 42251 (emphasis added)).

The language “activity as a whole” comes directly out of the most important U.S. Supreme Court Case involving Section 401 of the Clean Water Act: *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (*Jefferson PUD*) (511 U.S. 700) (1994). In that ruling, the Supreme Court said at page 711: “Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.” The Trump Administration’s goal in the new Rule was specifically to overturn *Jefferson PUD*’s broad application of Section 401 of the Clean Water Act.

The Commission should take stock of its position: in supporting the Petition, SFPUC is advocating weakening the Clean Water Act for everyone in order to get its way on one issue.

CSPA requests that the Commission disavow policies and legal positions that rely on ex-President Trump's environmental rollbacks. Additionally, we request that the Commission support new staff leadership that will seek solutions that don't rely on shortchanging the environment. Finally, we request that the Commission direct staff to work with stakeholders to develop alternative strategies for addressing the Bay-Delta Plan and the Certification, and dry year sequences in particular.

Thank you for considering our concerns.

Respectfully submitted,



Chris Shutes
FERC Projects Director
Water Rights Advocate
California Sportfishing Protection Alliance