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Forest Issues Group



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Tuolumne River TRUST



Merced River Conservation Committee





May 11, 2020

The Honorable Governor Gavin Newsom
Governor of the State of California
State Capitol, Suite 1173
Sacramento, CA 95814

RE: 401 Water Quality Certifications for Hydroelectric Dam Relicensing

Dear Governor Newsom,

The undersigned organizations are committed to healthy watersheds and vibrant river ecosystems to support both California communities and wildlife. We applaud the efforts taken by your Administration to address the public health and economic impacts of the COVID-19 pandemic. Notwithstanding the overwhelming importance of the response to COVID-19, we write to urge your Administration to prioritize action on a present and urgent threat to California’s rivers, streams, and aquatic life – the waiver of Section 401 water quality certifications under the federal Clean Water Act. We specifically urge your Administration to (1) oppose federal regulatory changes that would remove or limit Section 401 water quality certifications from hydroelectric dam licensing or relicensing, (2) challenge pending and current waivers, and (3) urge state legislative action to defend the Clean Water Act and prevent future waivers of California’s authority to issue Section 401 water quality certifications.

The Federal Energy Regulatory Commission (FERC) has exclusive authority under the Federal Power Act to license most non-federal hydropower projects located on navigable waterways or federal lands, or connected to the interstate electric grid. These dams, however, greatly impact California’s rivers, and water quality certifications issued under Section 401 of the Clean Water Act by the state of California are also required before FERC licenses can be issued. Section 401 certifications are the state’s mechanism to ensure that these dams comply with the State Water Resources Control Board (State Water Board)’s protective water quality requirements.

Many FERC licenses now in effect for hydroelectric dams in California were granted prior to the adoption of the Clean Water Act in 1972. Section 401 water quality certifications offer a once-in-a-generation opportunity to improve river ecosystems and the health of fish populations in California, since FERC licenses run 30 to 50 years. Today, when there are multiple new FERC licenses pending in California, agencies of the federal government are attacking California’s ability to issue or deny Section 401 water quality certifications. If these federal efforts are successful, California will be excluded from ensuring that dams with wide-reaching impacts on river health meet state water quality standards when relicensed.

A January 2019 D.C. Circuit Court decision (*Hoopa Valley Tribe v. FERC*) found that the State Water Board and the Oregon Department of Environmental Quality had waived their right to issue Section 401 certifications for the Klamath River Project. The Court found that a written agreement to delay certification between the project operator and the states of California and Oregon, in order to complete settlement, violated the Clean Water Act’s requirement to complete certification in one year. The Court found that the practice of the Klamath applicant of withdrawing and resubmitting its applications prior to each one-year deadline, as required under this agreement, prevented FERC from exercising its authority to issue hydropower licenses. Since that time, FERC has applied an overly broad reading of this court decision and imposed a “bright line” interpretation of the one-year timeline.

In past years, FERC had encouraged and defended the practice of withdrawing and resubmitted applications for certification prior to expiration of the one-year deadline. This prevented a situation where the states would have to deny certification for lack of information or supporting documentation. However,

since the decision in *Hoopa Valley Tribe*, FERC has issued an expanding body of orders finding that failure of a state to act on an application for certification within a one-year deadline means that a state has waived its authority under the federal Clean Water Act. FERC has stated that the reason for a state's failure to act is irrelevant.

FERC policy, not statute, sets the point in the licensing process when the one-year clock starts. The point is early in the licensing process, long before federal environmental review has even begun. FERC's new strict interpretation of the timeline means that federal policy is now creating a situation in which the State Water Board will find it almost impossible to meet its statutory requirements under state law.

To make matters worse, the Trump administration's Environmental Protection Agency (U.S. EPA) has proposed new rules regarding Clean Water Act Section 401 that would cement the deadline and drastically roll back the scope of State Water Board's authority. Attorney General Becerra joined comments on the U.S. EPA rules with a coalition of other states, vigorously opposing this power grab by the federal Executive Branch that would wrest away the authority of both the states and federal Judiciary.

The threat of waiving California's authority to oversee and impose water quality protections for these dams is no longer theoretical – it is real and happening now. California cannot afford to wait to impose a solution – otherwise California risks the devastating impact of having hydroelectric dams operate unchecked and without adequate water quality protections for the next 40 to 50 years. We therefore urge your Administration to prioritize all possible courses of action to remedy this present and urgent issue, including but not limited to, (1) opposing federal regulatory changes that would remove or limit section 401 water quality certifications from hydroelectric dam licensing or relicensing, (2) challenging pending and current waivers, and (3) urging state legislative action to defend the Clean Water Act and prevent future waivers of California's authority in order to protect the health of California's rivers, fish, and communities for decades to come.

Sincerely,



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California Coastkeeper Alliance



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Executive Director
South Yuba River Citizens League
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Chris Shutes
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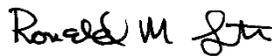
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