



State Water Resources Control Board

May 10, 2024

Debbie-Ann Reese, Acting Secretary
Federal Regulatory Energy Commission

Sent via e-file to Federal Energy Regulatory Commission Docket for Project Nos. 2179 and 2467

**Merced River and Merced Falls Hydroelectric Projects
Merced and Mariposa Counties
Merced River and tributaries**

NOTICE OF ORDER SETTING ASIDE WATER QUALITY CERTIFICATION AND UPDATE ON CERTIFICATION PROCEEDINGS AND REQUEST FOR PROPONENT TO COMPLY WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

Dear Acting Secretary Reese:

The California State Water Resources Control Board (State Water Board or Board) provides this letter to notify the Federal Energy Regulatory Commission (FERC) and other interested parties of the State Water Board's adoption of an order setting aside the water quality certification (certification) for Merced Irrigation District's (Merced ID) Merced River Hydroelectric Project (FERC Project No. 2179) and Merced Falls Hydroelectric Project (FERC Project No. 2467) (collectively Merced Projects) on procedural grounds. The order (State Water Board Order WQ 2024-0046) adopted by the Board on May 7, 2024, is attached for reference. The Board also provides an update on certification proceedings for the Merced Projects and requests that FERC direct Merced ID to promptly comply with its responsibilities as lead agency under the California Environmental Quality Act (CEQA).

Adoption of Order Setting Aside Certification

As brief background, Merced ID submitted requests for certification to the Board on April 24, 2018. The Board denied these requests without prejudice on April 22, 2019, noting that Merced ID is the CEQA lead agency but had not begun the CEQA process. Following a change in state law affecting the Board's ability to issue certifications prior to the completion of CEQA (Cal. Water Code § 13160(b)(2)) and Merced ID's petition asking FERC to find that the Board had waived its certification authority for relicensing of the Merced Projects, the State Water Board released a draft certification on June 17, 2020 and issued a final certification on July 31, 2020.

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

Acting Secretary Reese

- 2 -

May 10, 2024

On September 27, 2023, the United States Environmental Protection Agency (USEPA) promulgated the Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule). 88 Fed. Reg. 66,558 (Sept. 27, 2023). In the preamble accompanying the 2023 Rule, USEPA provided, for the first time, an interpretation of section 401 of the federal Clean Water Act that disallows issuance of a certification in the absence of a currently pending request for certification. *Id.* at p. 66,583.

In light of USEPA's new interpretation, on March 11, 2024, the State Water Board provided notice to FERC, Merced ID, and interested persons, of the opportunity to submit comments on a proposed order setting aside the certification issued on July 31, 2020 for hydropower project licenses for the Merced Projects and of the Board's consideration of the proposed order at its May 7, 2024 Board meeting.

On May 7, 2024, the Board adopted State Water Board Order WQ 2024-0046 and set aside the Board's July 31, 2020 Water Quality Certification for the Merced Projects.¹ State Water Board Order WQ 2024-0046 also dismissed the pending petitions for reconsideration of this certification.

Update on Certification Proceedings and Request for Merced ID to Comply with CEQA

On July 11, 2023, FERC acknowledged that the State Water Board had not waived its certification authority for the Merced Projects and instructed Merced ID to file within 60 days (1) copies of requests for certification, (2) a copy of valid certifications, or (3) evidence of waiver of the Board's certification authority. On September 1, 2023, Merced ID requested an extension of time until December 11, 2023; FERC granted this request on September 12, 2023. On December 11, 2023, Merced ID requested an additional extension until April 15, 2024, stating its intent to commence the CEQA process in January 2024 and plan to submit a request for certification to the Board in early to mid-April 2024; FERC granted this extension request on December 18, 2023.

On April 15, 2024, Merced ID submitted requests for certification for the Merced Projects to the Board's Executive Director. The State Water Board is currently in the process of evaluating whether these requests for certification meet California's requirements for complete applications, and, if they do meet the applicable requirements, the Board will act on these requests for certification by April 15, 2025. If Merced ID's requests for certification do not meet California's requirements for applications for certification, the Board will promptly advise Merced ID of any deficiencies so that complete applications can be submitted.

¹ State Water Board Order WQ 2024-0046 also set aside the certification issued on August 14, 2020 for Nevada Irrigation District's Yuba-Bear Hydroelectric Project (FERC Project No. 2266) and the certification issued on January 15, 2021 for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581). The Board has filed similar notices in the FERC dockets for those projects.

Acting Secretary Reese

- 3 -

May 10, 2024

Merced ID has not yet initiated its CEQA process for the Merced Projects. As the CEQA lead agency for relicensing of the Merced Projects, Merced ID is responsible for preparing and adopting appropriate environmental documentation assessing the potential environmental impacts and mitigation measures or alternatives to avoid or lessen adverse impacts. See Cal. Pub. Res. Code §§ 21006, 21080; Cal. Code Regs. tit. 14., §§ 15002, 15004. A CEQA lead agency's failure to meet CEQA's requirements, such as preparing environmental documentation, may be grounds for denial of a certification request without prejudice. Cal. Code Regs. tit. 23, §§ 3836(c), 3837(b)(2). Moreover, the California Supreme Court has recognized that a public agency's decision to accept a hydropower license containing specific terms is a discretionary decision that requires CEQA compliance. *County of Butte v. Dep't of Water Res.*, 13 Cal. 5th 612, 623 (2022). Section 6 of the Federal Power Act (16 U.S.C. § 799) requires that hydropower licenses be conditioned upon acceptance by the licensee of all terms and conditions prescribed by FERC. A California public agency licensee's delay in initiating CEQA or failure to comply with CEQA has the potential to delay or prohibit this acceptance. The State Water Board respectfully requests that FERC also direct Merced ID to diligently initiate and comply with CEQA.

If you have questions regarding this letter, please contact Oscar Biondi by email to: oscar.biondi@waterboards.ca.gov or phone call to: (916) 323-9387.

Sincerely,



Oscar Biondi
Senior Water Resources Engineer
Water Quality Certification Program
Division of Water Rights

Attachment: State Water Resources Control Board Order WQ 2024-0046, In the Matter of the 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, Nevada Irrigation District's Yuba-Bear Hydroelectric Project, and Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project

ec: Patrick Pulupa, Executive Officer
Central Valley Regional Water Quality Control Board
Email: Patrick.Pulupa@waterboards.ca.gov

Sahrye Cohen, Wetland Section Manager
U.S. EPA, Region 9
Email: R9cwa401@epa.gov

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQ 2024-0046**

IN THE MATTER OF THE
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)

ORDER SETTING ASIDE WATER QUALITY CERTIFICATIONS

BY THE BOARD:

I. INTRODUCTION

On September 27, 2023, the United States Environmental Protection Agency (USEPA) promulgated the Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule). (88 Fed.Reg. 66558 (Sept. 27, 2023).) In the preamble accompanying the 2023 Rule, USEPA provided, for the first time, an interpretation of section 401 of the federal Clean Water Act that precludes certifying authorities such as the State Water Resources Control Board (State Water Board or Board) from issuing a water quality certification (certification) in the absence of a currently pending request for certification. (*Id.* at p. 66583.)¹

¹ USEPA made a "pre-publication version" of the preamble and final rule available on its website on September 14, 2023.

In light of USEPA's new interpretation, this order sets aside the following three certifications for hydropower project licenses issued by the Board's Executive Director when there was no currently pending request for certification, where the Board had previously received a request for certification, that request had either been denied or withdrawn, and the project proponent was still actively pursuing a federal hydropower license:²

- Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls Hydroelectric Project (Federal Energy Regulatory Commission [FERC] Project Nos. 2179 and 2467), issued on July 31, 2020;
- Water Quality Certification for Nevada Irrigation District's Yuba-Bear Hydroelectric Project (FERC Project No. 2266), issued on August 14, 2020; and
- Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581), issued on January 15, 2021.³

As discussed in sections III.D through III.F of this order, the Board received timely petitions for reconsideration of these certifications. Due to these certifications being set aside by this order, there is no longer any action of the Board to be reconsidered. Therefore, to avoid the unnecessary expenditure of resources, this order also dismisses the following petitions for reconsideration:

- Merced Irrigation District's August 28, 2020 Petition for Reconsideration of the July 31, 2020 Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls Hydroelectric Project (FERC Project Nos. 2179 and 2467);
- Gallo Vineyards, Inc. and G3 Enterprises, Inc.'s August 31, 2020 Petition for Reconsideration of the July 31, 2020 Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls Hydroelectric Project (FERC Project Nos. 2179 and 2467);
- Nevada Irrigation District's September 10, 2020 Petition for Reconsideration of the August 14, 2020 Water Quality Certification for Nevada Irrigation District's Yuba-Bear Hydroelectric Project (FERC Project No. 2266);

² Issuance of certifications for classes of activities is not at issue in this proceeding and this order does not express any opinion on the procedural requirements for general certifications. (See Cal. Code Regs., tit. 23, § 3861.)

³ For reasons discussed in section III.G, this order does not take any action related to the Water Quality Certification for Yuba County Water Agency's Yuba River Development Project (FERC Project No. 2246), issued on July 17, 2020 and amended by State Water Board Order WQ 2020-0043 on December 15, 2020.

- Turlock Irrigation District's and Modesto Irrigation District's February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581);
- City and County of San Francisco's, on behalf of the San Francisco Public Utilities Commission, February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581);
- Bay Area Water Supply and Conservation Agency's February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581); and
- 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's February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581).

II. RECONSIDERATION AUTHORITY

The State Water Board may amend its decisions on its own motion, as set forth in California Code of Regulations, title 23, section 3867, subdivision (b)(1), which provides:

The state board and the executive director, when acting as the state board's designee, may undertake such reconsideration on their own motion. They shall notify the applicant (if any), the federal agency, and all interested persons known to the state board or executive director and give those notified the opportunity to submit information and comments before taking a final reconsideration action (as listed in Subsection 3869(a) of this Chapter).

The State Water Board provided notice to the applicants, the federal agency—here, FERC—and all interested persons by notice issued on March 11, 2024.

The State Water Board is authorized to take a variety of actions on reconsideration. California Code of Regulations, title 23, section 3869, subdivision (a) provides:

Following examination of the petition and any necessary portion of the record, the state board or executive director, when acting as the state board's designee, may:

- (1) refuse to reconsider the action or failure to act of the executive director (state board only), regional board, or executive officer if the petition fails to raise substantial issues that are appropriate for reconsideration;
- (2) deny the petition upon a finding that the original action or failure to act was appropriate and proper;
- (3) set aside or modify, if possible, the previous action or take new appropriate action; or
- (4) direct the executive director (state board only), executive officer, or regional board to take appropriate action.

III. LEGAL AND PROCEDURAL BACKGROUND

A. CLEAN WATER ACT AND SECTION 401

Congress enacted the federal Clean Water Act (33 U.S.C. §§ 1251-1389) to “restore and maintain” the quality of the nation’s waters. (33 U.S.C. § 1251(a).) Cooperative federalism is the foundation of the Clean Water Act. “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” (33 U.S.C. § 1251(b).) Congress intended states to serve as the “prime bulwark in the effort to abate water pollution.” (*United States v. Puerto Rico* (1st Cir. 1983) 721 F.2d 832, 838; *Waterkeepers Chesapeake v. FERC* (D.C. Cir. 2022) 56 F.4th 45, 47 [quoting and citing *Keating v. FERC* (D.C. Cir. 1991) 927 F.2d 616, 622].) The Clean Water Act relies on states and other certifying authorities to establish and revise water quality standards, reduce point source pollution, and issue certifications to fulfill its purpose of restoring and maintaining water quality. (33 U.S.C. §§ 1313, 1342, 1341, 1251(a).)

Congress first created a water quality certification requirement in 1970, granting states⁴ certification authority after federal licensing and permitting agencies failed to assure that federally approved projects complied with water quality standards. (Water Quality Improvement Act of 1970, § 21(b), Pub.L. No. 91-224 (Apr. 3, 1970) 84 Stat. 91, 108-110.) This requirement ensures that “[no] polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s].” (*S.D. Warren Co. v. Maine Board of Environmental Protection* (2006) 547 U.S. 370, 386 [quoting 116 Cong. Rec. 8984 (1970) (Sen. Muskie)].) The certification requirement is codified in section 401 of the Clean Water Act (Section 401). (33 U.S.C. § 1341.)

Section 401 requires any applicant for a federal license or permit that may result in a discharge into waters of the United States to provide the licensing or permitting federal agency with certification that the project will comply with water quality requirements. (*Id.*, § 1341(a)(1), (d).) Certifying authorities, such as states and authorized Tribes, may issue certifications with conditions implementing Clean Water Act requirements,

⁴ Through the “treatment as a State” process, authorized Tribes may also act as certifying authorities for the purposes of Section 401. (33 U.S.C. § 1377(e).)

including the requirements of section 303 of the Clean Water Act for water quality standards and implementation plans, or to implement “any other appropriate requirement of State law.” (*Id.*, § 1341(d).) Section 401 further provides that certification conditions shall become conditions of any federal license or permit for the project. (*Ibid.*) If a certifying authority denies certification, the federal agency cannot issue a license or permit approving the project. (*Id.*, § 1341(a)(1).) Section 401 requires that a certifying authority act on a request for certification in “a reasonable period of time (which shall not exceed one year)”;⁵ the failure or refusal to act within this time constitutes waiver of certification authority for the project. (*Ibid.*) The waiver provision is intended to prevent certifying authorities from “indefinitely delaying a federal licensing proceeding” and “to ensure that ‘sheer inactivity by the State . . . will not frustrate the Federal application.’” (*Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 972 [quoting H.R.Rep. No. 91-940, 2d Sess., p. 55 (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 2712, 2741].)

The State Water Board is the state agency responsible for Section 401 certification in California. (Wat. Code, § 13160.) The State Water Board has delegated authority to act on requests for certification to the Executive Director. (Cal. Code Regs., tit. 23, § 3838, subd. (a); see also State Water Board Resolutions 2023-0036 & 2012-0061.)

B. HYDROPOWER PROJECT LICENSING

FERC licenses hydropower projects not owned or operated by the federal government pursuant to the Federal Power Act (16 U.S.C. § 791a et seq.).⁵ (16 U.S.C. § 797(e).) As most hydropower projects involve potential discharges to waters of the United States, entities seeking hydropower licenses from FERC are generally required to obtain certifications. FERC’s regulations provide that the reasonable period of time for a certifying authority to act on a request for certification in the hydropower licensing context is one year. (18 C.F.R. §§ 4.34(b)(5)(iii), 5.23(b)(2).)

The maximum term of a federal hydropower license is 50 years. (16 U.S.C. § 799.) New hydropower licenses for previously licensed projects may have terms between 30 and 50 years; FERC has adopted a default license term of 40 years for hydropower projects. (16 U.S.C. § 808(e); 82 Fed.Reg. 49501 (Oct. 26, 2017).) A licensee must notify FERC of its intent to seek a new license and submit a license application several years before the expiration of an existing license. (16 U.S.C. § 808.) If an existing hydropower license expires before completion of the relicensing process, FERC may issue annual licenses with the same terms and conditions as the previously issued license. (*Id.*, § 808(a)(1); 18 C.F.R. § 16.18.)

⁵ Prior to 1977, FERC’s predecessor, the Federal Power Commission, exercised this authority.

C. CALIFORNIA ENVIRONMENTAL QUALITY ACT

The California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq., generally requires that the potential environmental effects of a proposed project must undergo an evaluation process before any public agency,⁶ including the State Water Board, may issue a discretionary approval, such as a water quality certification. (Pub. Resources Code, §§ 21006, 21080; Cal. Code Regs., tit. 14, §§ 15002, 15004.) Under CEQA, the lead agency is responsible for preparing and adopting the environmental impact report or other environmental documentation assessing the potential environmental impacts of the project and mitigation measures and alternatives to avoid or lessen adverse impacts. (Pub. Resources Code, §§ 21002, 21165; Cal. Code Regs., tit. 14, §§ 15050, 15051.) When another public agency is the CEQA lead agency for a project, the State Water Board is a CEQA responsible agency and must consider the environmental documentation prepared by the lead agency prior to making a decision on the project. (Cal. Code Regs., tit. 14, § 15096.) A lead agency's failure to meet CEQA's requirements, such as preparing environmental documentation, may be grounds for denial of a certification request without prejudice. (Cal. Code Regs., tit. 23, §§ 3836, subd. (c), 3837, subd. (b)(2).)

On June 29, 2020, Governor Newsom signed into law amendments to the Water Code that provide the State Water Board with the authority to issue certifications before completion of CEQA review, where waiting until completion of CEQA review presents a substantial risk of waiver of certification authority. (See Wat. Code, § 13160, subd. (b)(2), as amended by Stats. 2020, ch. 18, § 9.)

D. MERCED RIVER AND MERCED FALLS HYDROELECTRIC PROJECTS

Merced Irrigation District (Merced ID), a public agency, owns and operates the Merced River Hydroelectric Project (Merced River Project) and Merced Falls Hydroelectric Project (Merced Falls Project, collectively Merced Projects). Pacific Gas and Electric Company (PG&E) owned and operated the Merced Falls Project until March 2, 2017, when ownership was transferred to Merced ID. Merced ID has repeatedly stated its intent to be the CEQA lead agency for relicensing of the Merced River Project since 2014, and for relicensing of the Merced Falls Project since May 2017.

FERC's predecessor issued original federal hydropower licenses for the Merced River Project and Merced Falls Project in 1964 and 1969, respectively. The Merced Projects have been operating under annual licenses since 2014, when the original licenses expired. Merced ID and PG&E filed applications for new hydropower licenses for the Merced Projects with FERC in February 2012.

Merced ID and PG&E submitted requests for certification for relicensing of the Merced River Project and Merced Falls Project, respectively, to the Board in May 2014. Each year between 2015 and 2018, the owner(s) of the Merced Projects withdrew and

⁶ Under CEQA, a "public agency" includes any state, regional, and local agencies in California. (Pub. Resources Code, § 21063.)

resubmitted certification requests prior to the one-year deadline.⁷ On April 22, 2019, the State Water Board denied Merced ID's certification requests for the Merced Projects without prejudice, explaining that Merced ID, the CEQA lead agency for both projects, had not yet begun the CEQA process and that the Board could not issue the requested certifications prior to CEQA completion.

In May 2019, Merced ID petitioned FERC to find that the State Water Board had waived its certification authority for the relicensing of the Merced Projects. On June 17, 2020, the Board released a draft certification for the Merced Projects for public review and comment. On June 18, 2020, FERC granted Merced ID's request and issued an order finding that the Board had waived its certification authority with regard to relicensing of the Merced Projects, based on its determination that the Board was "complicit" in a withdrawal-and-resubmission scheme intended to avoid Section 401's one-year deadline. In July 2020, both the State Water Board and a group of conservation organizations filed timely requests for rehearing of FERC's order on waiver. On July 31, 2020, the Board issued a certification for relicensing of the Merced Projects, noting the June 29, 2020 change in state law affecting the Board's ability to issue certifications (Wat. Code, § 13160, subd. (b)(2)) and citing Merced ID's waiver petition and FERC's order on waiver as evincing a substantial risk of waiver if the Board were to wait for CEQA review to issue the certification. On August 20, 2020, FERC issued a notice of denial of rehearing by operation of law.

In October 2020, both the State Water Board and conservation organizations filed timely petitions for review of FERC's waiver and rehearing orders for the Merced Projects in the Ninth Circuit Court of Appeals. On August 4, 2022, the court issued an opinion vacating FERC's orders on waiver for the Merced Projects and remanding to FERC. (*State Water Board v. FERC* (9th Cir. 2022) 43 F.4th 920, 923.)⁸ The Ninth Circuit held that FERC's findings of coordination, upon which FERC based its waiver determinations, were not supported by substantial evidence in the record. (*Ibid.*) On July 11, 2023, FERC acknowledged that the Board had not waived its certification authority for the Merced Projects and instructed Merced ID to file within 60 days (1) copies of requests for certification, (2) a copy of valid certifications, or (3) evidence of waiver of the Board's certification authority. On September 1, 2023, Merced ID requested an extension of time until December 11, 2023; FERC granted this request on September 12, 2023. On December 11, 2023, Merced ID requested an additional

⁷ Withdrawal-and-resubmission of a certification request was a commonly used practice understood to start a new one-year period within which the certifying authority was required to act. (*California State Water Resources Control Board v. FERC* (9th Cir. 2022) 43 F.4th 920, 925, cert. den. *sub nom. Nevada Irrigation District v. California State Water Resources Control Board* (2023) 143 S.Ct. 2459 [216 L.Ed.2d 431] (hereafter *State Water Board v. FERC*.) FERC accepted this practice for many years. (*Id.* at pp. 925-926 [citing and quoting FERC orders issued between 1994 and 2018].)

⁸ The Ninth Circuit consolidated six cases and vacated FERC orders finding waiver of the Board's certification authority for relicensing of the Merced Projects, the Yuba-Bear Hydroelectric Project, and the Yuba River Development Project.

extension until April 15, 2024, stating its intent to commence the CEQA process in January 2024 and plan to submit a request for certification to the Board in early to mid-April 2024; FERC granted this extension request on December 18, 2023. On April 15, 2024, Merced ID submitted requests for certification to the Board's Executive Director. Merced ID has not yet initiated its CEQA process for the Merced Projects.

In August 2020, timely petitions for reconsideration of the July 31, 2020 certification were filed by (1) Merced ID and (2) Gallo Vineyards, Inc. and G3 Enterprises, Inc. These two petitions for reconsideration remain pending. On November 25, 2020, Merced ID filed litigation in California state court challenging the certification; that litigation remains pending.

E. YUBA-BEAR HYDROELECTRIC PROJECT

Nevada Irrigation District (Nevada ID), a public agency, owns and operates the Yuba-Bear Hydroelectric Project (Yuba-Bear Project). FERC's predecessor issued the original federal hydropower license for the Yuba-Bear Project in 1963; this license expired in 2013 and the project has been operating under annual licenses since that time. Nevada ID filed an application for a new hydropower license with FERC in April 2011. Nevada ID is the CEQA lead agency for relicensing of the Yuba-Bear Project.

Nevada ID submitted a request for certification for relicensing of the Yuba-Bear Project to the State Water Board in March 2012, stating its intent to be the CEQA lead agency for relicensing. From 2013 to 2018, Nevada ID withdrew and resubmitted certification requests prior to the one-year deadline,⁹ maintaining its intent to be the CEQA lead agency. On January 25, 2019, the Board denied Nevada ID's 2018 certification request without prejudice, noting that Nevada ID, the CEQA lead agency, had not completed the CEQA process and that the Board could not issue a certification for relicensing of the project prior to CEQA completion.

In February 2019, Nevada ID filed a petition asking FERC to find that the State Water Board had waived its certification authority with regard to relicensing of the Yuba-Bear Project. On April 16, 2020, FERC granted Nevada ID's request and issued an order finding that the Board had waived its certification authority for relicensing of the Yuba-Bear Project, based on its determination that the Board "expected" Nevada ID to withdraw and resubmit its certification request to avoid Section 401's one-year deadline. In May 2020, both the State Water Board and a coalition of conservation groups filed timely requests for rehearing of FERC's order on waiver. On July 21, 2020, FERC issued an order addressing the arguments on rehearing and sustaining the finding of waiver in its April 16, 2020 order. On August 14, 2020, the State Water Board issued a certification for relicensing of the Yuba-Bear Project, noting the June 29, 2020 change in state law affecting the Board's ability to issue certifications (Wat. Code, § 13160, subd. (b)(2)) and citing Nevada ID's waiver petition and FERC's orders on waiver as

⁹ See fn. 7, *supra*.

showing the potential for waiver if the Board were to wait for CEQA review to issue the certification.

In August 2020, both the Board and the conservation groups filed timely petitions for review of FERC's waiver and rehearing orders for the Yuba-Bear Project in the Ninth Circuit Court of Appeals. On August 4, 2022, the Ninth Circuit vacated FERC's orders on waiver for the Yuba-Bear Project and remanded to FERC, holding that FERC's findings of coordination, the basis for FERC's waiver determinations, were not supported by substantial evidence. (*State Water Board v. FERC, supra*, 43 F.4th at p. 923.) On September 13, 2023, FERC acknowledged that the Board had not waived its certification authority for the Yuba-Bear Project and instructed Nevada ID to file within 60 days (1) a copy of a new request for certification, (2) a copy of a new certification, or (3) evidence of waiver of the Board's certification authority. On September 27, 2023, Nevada ID submitted a supplemental petition, asking FERC to find waiver of the Board's certification authority for relicensing of the Yuba-Bear Project. On February 15, 2024, FERC rejected Nevada ID's supplemental petition and ordered Nevada ID to file within 60 days (1) a copy of a new request for certification, (2) a copy of a new certification, or (3) evidence of waiver of the Board's certification authority. On March 8, 2024, Nevada ID filed a request for rehearing of FERC's February 15, 2024 order. On April 8, 2024, FERC issued a notice of denial of rehearing by operation of law and expressed its intent to address the request for rehearing in a future order. On April 8, 2024, Nevada ID filed a petition for review of FERC's 2024 orders in the Court of Appeals for the D.C. Circuit. On April 9, 2024, Nevada ID filed a request with FERC for an extension of time to file a copy of a new request for certification until 60 days after a final judicial decision that the Board did not waive its certification authority for relicensing of the Yuba-Bear Project. On April 12, 2024, the Board filed an opposition to Nevada ID's extension request, proposing instead a 30-day extension following either a FERC order addressing Nevada ID's request for rehearing or the Board's adoption of this order.

On September 10, 2020, Nevada ID filed a timely petition for reconsideration of the certification; this petition remains pending. On December 4, 2020, Nevada ID filed litigation in both federal and California state courts challenging the certification; those cases remain pending.

F. DON PEDRO HYDROELECTRIC PROJECT AND LA GRANGE HYDROELECTRIC PROJECT

Turlock Irrigation District and Modesto Irrigation District (collectively the Districts) are public agencies that jointly own and operate the Don Pedro Hydroelectric Project (Don Pedro Project). FERC's predecessor issued the original federal hydropower license for the Don Pedro Project in 1964; this project has been operating under annual licenses since the original license expired in 2016. The Districts filed an application for a new hydropower license for the Don Pedro Project with FERC in April 2014. The Districts are the CEQA lead agencies for relicensing of the Don Pedro Project.

The Districts also jointly own and operate the existing, unlicensed La Grange Hydroelectric Project (La Grange Project). In December 2012, FERC determined that the La Grange Project requires a federal hydropower license pursuant to the Federal Power Act. In 2017, the Districts filed an application for an original license for the La Grange Project with FERC. The Districts are the CEQA lead agencies for licensing of the La Grange Project.

The Districts submitted requests for certification for relicensing of the Don Pedro Project and licensing the La Grange Project to the State Water Board on January 26, 2018, stating their intent to be the CEQA lead agencies for both projects. On January 24, 2019, the Board denied these requests without prejudice, explaining that the Districts, the CEQA lead agencies for both the Don Pedro Project relicensing and La Grange Project licensing, had not yet begun the CEQA process and that the Board could not issue a certification prior to completion of the CEQA process. On April 22, 2019, the Districts again submitted requests for certification, maintaining their role as CEQA lead agencies. The Board denied these requests without prejudice on April 20, 2020, again noting that the Districts had not begun CEQA and compliance with CEQA was required before the Board could issue a certification.

On July 15, 2020, FERC requested the Districts to promptly notify FERC regarding the status of the certification process. On July 20, 2020, the Districts once again submitted requests for certification to the Board and notified FERC of these requests. In October 2020, the Districts petitioned FERC to find that the State Water Board had waived its certification authority for the relicensing of the Don Pedro Project and the licensing of the La Grange Project. Subsequently, by letter dated November 19, 2020, the Districts withdrew their requests for certification, citing their argument that the Board had waived its certification authority for the Don Pedro Project and La Grange Project. However, the Districts did not withdraw their applications pending before FERC or their request that FERC find waiver. On November 30, 2020, the State Water Board released a draft certification for the Don Pedro Project and La Grange Project for public review and comment. On January 15, 2021, the Board issued a certification for relicensing of the Don Pedro Project and licensing of the La Grange Project. The certification noted the June 29, 2020 change in state law affecting the Board's ability to issue certifications (Wat. Code, § 13160, subd. (b)(2)) and cited the Districts' waiver petition as evincing a substantial risk of waiver if the Board were to wait for CEQA review to issue the certification for these projects.

On January 19, 2021, FERC issued an order denying the Districts' waiver petition and concluding that the Board had not waived its certification authority for relicensing of the Don Pedro Project and licensing of the La Grange Project. FERC found that in denying the Districts' 2018 and 2019 requests for certification without prejudice, the Board had acted within the meaning of Section 401. On February 18, 2021, the Districts requested rehearing of FERC's order denying the Districts' petition for waiver. On May 21, 2021, FERC issued an order addressing the arguments on rehearing and sustained the findings and reasoning in its January 19, 2021 order, again concluding that the Board had not waived its certification authority. On May 21, 2021, the Districts filed a petition

for review of FERC's orders in the Court of Appeals for the D.C. Circuit. On June 17, 2022, the D.C. Circuit issued an opinion holding that the Board did not waive its certification authority. (*Turlock Irrigation District v. FERC* (D.C. Cir. 2022) 36 F.4th 1179, 1183, cert. den. (2023) 143 S.Ct. 1746 [215 L.Ed.2d 648].)

In February 2021, timely petitions for reconsideration of the January 15, 2021 certification were filed by (1) the Districts, (2) the City and County of San Francisco, on behalf of the San Francisco Public Utilities Commission, (3) the Bay Area Water Supply and Conservation Agency, and (4) a coalition of non-governmental organizations composed of the 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. The Districts' petition for reconsideration requested that the State Water Board stay the certification during the period the Board considers their petition. On March 15, 2021, the State Water Board's Executive Director issued an order denying this request for stay. (State Water Board Order [WQ 2021-0007-EXEC.](#)) These four petitions for reconsideration remain pending. In May 2021, the Districts and the City and County of San Francisco filed litigation in California state court; that litigation remains pending.

G. YUBA RIVER DEVELOPMENT PROJECT

Yuba County Water Agency¹⁰ (YCWA), a public agency, owns and operates the Yuba River Development Project (YRDP). FERC's predecessor issued the original federal hydropower license for the YRDP in 1963; the project has been operating under annual licenses since the original license expired in 2016. YCWA filed an application for a new hydropower license with FERC for the YRDP in April 2014. YCWA is the CEQA lead agency for relicensing of the YRDP.

YCWA submitted a request for certification for relicensing of the YRDP to the State Water Board on August 24, 2017, stating its intent to be the CEQA lead agency. On August 3, 2018, YCWA withdrew and resubmitted its certification request,¹¹ maintaining its intent to be the CEQA lead agency. On July 31, 2019, the Board denied YCWA's certification request without prejudice, explaining that YCWA, the CEQA lead agency, had not begun the CEQA process and that the Board could not issue a certification for relicensing the YRDP prior to CEQA completion.

In August 2019, YCWA filed a petition asking FERC to find that the State Water Board had waived its certification authority for the relicensing of the YRDP. On May 21, 2020, FERC granted YCWA's request and issued an order finding that the Board had waived its certification authority with regard to relicensing of the YRDP, based on "coordination" between the Board and YCWA to withdraw and resubmit its certification request in order to avoid Section 401's one-year deadline. On June 22, 2020, both the State Water

¹⁰ Doing business as Yuba Water Agency.

¹¹ See fn. 7, *supra*.

Board and the Foothills Water Network, a coalition of conservation groups, filed requests for rehearing of FERC's order on waiver; the Board's request included a draft certification. On July 13, 2020, YCWA sent the Board's Executive Director a letter, asserting that it had no active request for certification and withdrawing and cancelling any active request for certification. However, YCWA did not withdraw its application pending before FERC or its request that FERC find waiver. On July 17, 2020, the State Water Board issued a certification for relicensing of the YRDP, noting the June 29, 2020 change in state law affecting the Board's ability to issue certifications (Wat. Code, § 13160, subd. (b)(2)) and citing YCWA's waiver petition and FERC's order on waiver as showing the potential for waiver if the Board were to wait for CEQA review to issue the certification. On July 21, 2020, FERC issued an order denying rehearing and affirming the finding of waiver in its May 21, 2020 order.

In September 2020, both the Board and conservation groups filed timely petitions for review of FERC's waiver and rehearing orders for the YRDP in the Ninth Circuit Court of Appeals. On August 4, 2022, the Ninth Circuit vacated FERC's orders on waiver for relicensing of the YRDP and remanded to FERC, holding that FERC's findings of coordination, the basis of FERC's waiver determinations, were not supported by substantial evidence. (*State Water Board v. FERC*, *supra*, 43 F.4th at p. 923.) On June 26, 2023, FERC acknowledged that the Board had not waived its certification authority for the YRDP and instructed YCWA to file within 60 days (1) a copy of a request for certification, (2) a copy of a valid certification, or (3) evidence of waiver of the Board's certification authority. On July 27, 2023, YCWA requested an extension of time until March 1, 2024; FERC granted this request on August 22, 2023. On February 20, 2024, YCWA requested an additional extension until September 1, 2024; FERC granted this extension request on March 26, 2024.

Meanwhile, on August 14, 2020, despite Condition 23 of the July 17, 2020 certification, YCWA filed a petition for reconsideration. Condition 23 provided that unless or until an official order overturned FERC's May 2020 order finding waiver of the Board's certification authority for YRDP relicensing, the certification for YRDP relicensing issued on July 17, 2020 was not a final action for the purposes of reconsideration or administrative review. To provide clarity and allow interested parties to seek administrative review, on December 15, 2020, the Board, acting on its own motion, amended Condition 23 of the YRDP certification to enable proceeding on reconsideration. (State Water Board Order [WQ 2020-0043](#).) The Board's amendment of Condition 23 allowed the filing of petitions for reconsideration and specified that such petitions or amendments to previously filed petitions for reconsideration were due within 30 days. (*Id.* at p. 8.) In January 2021, timely petitions for reconsideration of the certification for YRDP relicensing were filed by (1) YCWA, (2) the California Department of Fish and Wildlife, and (3) a coalition of non-governmental organizations composed of the California Sportfishing Protection Alliance, South Yuba River Citizens League, Friends of the River, Trout Unlimited, and Sierra Club Mother Load Chapter. The Board held a staff workshop on technical items raised in the petitions on September 17, 2021. On January 11, 2022, YCWA requested that the State Water Board hold its petition for reconsideration in abeyance; the Board denied this request on March 1, 2022. (State

Water Board Order [WQ 2022-0012](#).) These three petitions for reconsideration remain pending, but have been stayed due to litigation events, as described below.

On November 13, 2020, YCWA filed litigation in both federal¹² and California state courts challenging the certification for relicensing of the YRDP. On April 15, 2022, YCWA filed a motion in state court seeking judgment on one cause of action. On June 28, 2022, the state court issued an order ruling in YCWA's favor. 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. On August 24, 2022, the State Water Board appealed the state trial court's order and judgment, which were stayed due to Code of Civil Procedure section 916, subdivision (a). In addition, Code of Civil Procedure section 1094.5, subdivision (g) stayed the July 17, 2020 certification and any further proceedings on it, including reconsideration, during the pendency of the Board's state court appeal. As the State Water Board's appeal remains pending and the appellate court has not lifted this stay, the Board may not take any action related to the July 17, 2020 certification for YRDP relicensing, including the pending petitions for reconsideration.

IV. DISCUSSION

A. FEDERAL AGENCY RULEMAKING AND USEPA'S 2023 RULE

The federal Administrative Procedure Act (APA) specifies the procedures federal agencies must use when they engage in rulemaking. (5 U.S.C. § 553.) The APA provides for two types of rules: legislative rules and interpretive rules. (*Ibid.*; *Perez v. Mortgage Bankers Ass'n* (2015) 575 U.S. 92, 96-97.)¹³ Legislative rules must be issued using the APA's notice-and-comment process and "have the force and effect of law." (*Perez*, at p. 96 (cleaned up).) Interpretive rules, in contrast, are generally exempt from the notice-and-comment requirement, but "do not have the force and effect of law and are not accorded that weight" by courts. (5 U.S.C. § 553(b)(A); *Perez*, at p. 97 (cleaned up).) The "critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." (*Perez*, at p. 97 (cleaned up).) Interpretive rules "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required." (*POET Biorefining, LLC v. Environmental Protection Agency* (D.C. Cir. 2020) 970 F.3d 392, 407 (cleaned up).)

¹² The federal court case has been stayed since October 27, 2021. (*Yuba County Water Agency v. Sobeck* (E.D.Cal. Oct. 27, 2021, No. 2:21-cv-00861) (order granting motion for stay).)

¹³ The APA uses the term "interpretative rules," but the term "interpretive rules" is used more commonly today. (5 U.S.C. § 553(b)(A); *Perez, supra*, 575 U.S. at p. 96, fn. 1.)

On June 2, 2021, USEPA provided notice of its intent to “reconsider and revise” regulations it promulgated in 2020, the Clean Water Act Section 401 Certification Rule¹⁴ (2020 Rule). (86 Fed.Reg. 29541 (June 2, 2021).) USEPA’s June 2021 notice stated that it planned to revise the 2020 Rule to “better align[] with the cooperative federalism principles that have been central to the effective implementation of the Clean Water Act” and invited written comments on how to revise the 2020 Rule. (*Ibid.*)

On June 9, 2022, USEPA published proposed amendments to water quality certification regulations in 40 Code of Federal Regulations part 121, as well as conforming amendments to parts 122 and 124 (Draft Rule). (87 Fed.Reg. 35318 (June 9, 2022).) In addition to the Draft Rule, this publication included a preamble discussing multiple aspects of Section 401 and soliciting written comments on the Draft Rule. (*Ibid.*)

USEPA published the 2023 Rule, the final text of the amended regulations, along with a preamble in the Federal Register on September 27, 2023. (88 Fed.Reg. 66558 (Sept. 27, 2023).) The 2023 Rule became effective on November 27, 2023. (*Ibid.*)

B. USEPA’S INTERPRETATION

In the preamble accompanying the 2023 Rule, USEPA set forth an interpretation of Section 401 that certifying authorities are precluded from issuing a certification in the absence of a pending request for certification. (88 Fed.Reg. at p. 66583 (Sept. 27, 2023).) The preamble to the 2023 Rule states:

A few commenters recommended allowing certifying authorities to issue certification decisions in the absence of a request for certification. For purposes of section 401, EPA does not agree that a [Clean Water Act] section 401 certification can be issued in the absence of a project proponent requesting certification for a Federal license or permit that may result in any discharge into waters of the United States. See section IV.A in this preamble for further discussion on when certification is required. [Fn. omitted.] Similarly, if the certifying authority never received a request for certification or if the request for certification or Federal license or permit application was withdrawn, then the certifying authority is no longer responsible for acting on the request for certification because the pre-requisite “request” is absent.

(*Ibid.*)

The interpretation set forth above meets the criteria of an interpretive rule. In expressing its disagreement with commenters, USEPA advised the public that it interprets Section 401 to require a pending request for certification in order for a certifying authority to issue a certification. Additionally, USEPA’s interpretation does not impose a new requirement on project proponents, as Section 401 already requires them to obtain a certification and contemplates the submission of a request for certification. (See 33 U.S.C. § 1341(a)(1).)

¹⁴ 85 Fed.Reg. 42210 (July 13, 2020).

As USEPA is the agency charged with administering the Clean Water Act, its statutory interpretations are accorded special weight. (33 U.S.C. § 1251(d); see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 844 (*Chevron*)). The following section explores whether this particular interpretation may be entitled to deference.

C. CHEVRON DEFERENCE TO USEPA'S INTERPRETATION

Congress entrusted USEPA with the administration of the Clean Water Act and invested it with rulemaking authority. (33 U.S.C. §§ 1251(d), 1361(a).) Because USEPA's interpretation is prefaced by the phrase "For purposes of section 401" and does not reference USEPA regulations, it appears to be USEPA's interpretation of Section 401. (See 88 Fed.Reg. at p. 66583 (Sept. 27, 2023).)

Under the *Chevron* doctrine, a federal agency's interpretation of a statute it administers is entitled to deference by a reviewing court if (1) the statute is "silent or ambiguous with respect to the specific issue," and (2) the agency's interpretation is reasonable or "permissible." (*Chevron, supra*, 467 U.S. at pp. 843-844.) Deference means a court defers to the agency's construction of the statute, rather than engaging in an analysis of the best construction or imposing its own views of the statute. (*Id.* at p. 844.) A rule issued using the notice-and-comment process by an agency authorized to make rules with the force of law qualifies for *Chevron* deference, but rules issued through more informal processes may also be eligible. (*U.S. v. Mead Corp.* (2001) 533 U.S. 218, 226-227, 230-231; *Barnhart v. Walton* (2002) 535 U.S. 212, 221-222.)

Here, the question in the first step of *Chevron* is whether the text of Section 401 unambiguously resolves the question of whether there must be a pending request for certification at the time a certifying authority issues a certification. It does not. Section 401(a)(1) refers to "applications for certification," and requires certifying authorities to establish procedures for public notices of all applications and public hearings in connection with "specific applications." (33 U.S.C. § 1341(a)(1).) Section 401(a)(1) also refers to a "request for certification," providing that a certifying authority's failure or refusal to act on a request within a reasonable period of time after receipt of such a request constitutes waiver. (*Ibid.*) Section 401(a)(1) contains two express prohibitions on action, both of which constrain the federal agency's ability to issue a license or permit. (*Ibid.* [prohibiting issuance of a federal license or permit until certification or waiver, and barring issuance of a federal license or permit when a certifying authority has denied certification].) None of these provisions compel the interpretation that a certifying authority can or cannot issue a certification unless a request for certification has been received and remains pending. Thus, Congress has not "directly addressed the precise question at issue," and the *Chevron* process proceeds to the second step. (See *Chevron, supra*, 467 U.S. at p. 843.)

Regarding the second inquiry under *Chevron*, whether USEPA's interpretation is permissible, the language of Section 401 neither compels nor forecloses USEPA's interpretation. Section 401(a)(1) provides that a certifying authority's receipt of a request

for certification is the trigger for one aspect of Section 401, the reasonable period of time. (33 U.S.C. § 1341(a)(1).) Thus, it is not unreasonable to consider a request for certification as a necessary initiating event for other aspects of Section 401. The goal of the Clean Water Act and Section 401, to restore and maintain water quality, may not be well served by USEPA's interpretation in the context of relicensing, where a project may continue to operate under an outdated license while certification and relicensing are delayed by the project proponent's failure to file or withdrawal of a request for certification. But the vast majority of requests for certification involve federal permits for discharge of dredged or fill material that will not be initiated until the permit is issued. In those circumstances, restoring and maintaining water quality may be served by ensuring that the certifying authority has adequate information, including a complete application and the information provided by any required environmental analysis of or public comment on that application, to evaluate the water quality impacts of the project. As discussed in section IV.D below, USEPA's interpretation is one of at least two interpretations of Section 401 that could be found permissible under the second step of *Chevron*. (See *Chevron, supra*, 467 U.S. at p. 843.)

As Section 401 does not speak to the specific question of whether a pending request for certification is required for a certifying authority to issue a certification, and USEPA's interpretation is permissible, USEPA's interpretation may be entitled to *Chevron* deference.

D. STATE WATER BOARD'S INTERPRETATION AND CERTIFICATION ACTIONS

The State Water Board has interpreted Section 401 as allowing the issuance of a certification without a pending request where the certifying authority has previously received a request for certification, either the certifying authority had previously denied that request or the project proponent had withdrawn it, and the federal licensing or permitting proceedings remain ongoing. The State Water Board considered this to be the better interpretation of Section 401 considering the text and purpose of Section 401 and the Clean Water Act, as well as the past interpretations and practices of USEPA and FERC.

As discussed in section IV.C of this order, the text of Section 401 does not address whether there must be a pending request for certification at the time a certifying authority issues a certification. Section 401 does not compel the conclusion that issuance of a certification can only occur when there is a pending request for certification. None of the provisions of Section 401 speak to the situation presented in the certifications at issue here, where the Board had previously received a request for certification, the Board had previously denied that request or the project proponent had withdrawn it, but the project proponent was still actively pursuing a FERC license and therefore still in need of a certification.

The purpose of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. § 1251(a).) The purpose of Section 401 is to preserve state authority to address water quality and ensure federally licensed or permitted projects do not violate water quality standards or other appropriate requirements by providing states and other certifying authorities the opportunity to assess and prevent adverse water quality impacts prior to the issuance of a federal license or permit. (*S.D. Warren Co. v. Maine Board of Environmental Protection, supra*, 547 U.S. at p. 386 [quoting 116 Cong. Rec. 8984 (1970) (Sen. Muskie)].) To ensure that “sheer inactivity” by certifying authorities does not unduly delay federal licensing and permitting processes, Congress included the waiver provision requiring certifying authorities to act within a “reasonable period of time (which shall not exceed one year)” after a project proponent makes a request for certification. (H.R.Rep. No 91-940, 2d Sess., p. 55 (1970), reprinted in U.S. Code Cong. & Admin. News 2712, 2741; 33 U.S.C. § 1341(a)(1).) Consistent with cooperative federalism, Section 401 allows certifying authorities to establish their own procedures for certification. Section 401 requires certifying authorities to establish procedures for public notice and procedures for public hearings where the certifying authority deems appropriate (33 U.S.C. § 1341(a)(1)), but otherwise sets no express requirements or limits on what information certifying authorities may require or what procedures they may follow.

The State Water Board’s interpretation, allowing issuance of a certification in the absence of a pending request, is consistent with the policy of Section 401 of allowing certifying authorities to set their own procedures and with the goal of avoiding unnecessary delay. Allowing issuance of a certification without waiting for a renewed request would enable federal licenses and permits to be issued sooner, ensuring that certification conditions protecting water quality are in effect sooner.¹⁵

Allowing certification without a pending request is also consistent with USEPA’s longstanding interpretation. USEPA has promulgated regulations implementing Section 401 only three times: in 1971, 2020, and 2023. (36 Fed.Reg. 8563 (May 8, 1971); 85 Fed.Reg. 42210 (July 13, 2020); 88 Fed.Reg. 66558 (Sept. 27, 2023).) Under the 1971 regulations, certifying authorities could issue a certification based solely on information the project proponent submitted to the federal licensing or permitting agency. (40 C.F.R. § 121.2(a)(2) (2019).) The 1971 regulations applied to all certifications at issue in this order.¹⁶ The 2023 Rule applies to the State

¹⁵ The existence of a previous request for certification, invoking the certifying authority’s procedures for public notice, helps further the Clean Water Act’s goal of promoting public participation. (See 33 U.S.C. §§ 1251(e), 1341(a).)

¹⁶ The 2020 Rule became effective on September 11, 2020, and USEPA guidance issued prior to that date distinguished requests for certification submitted or being processed by certifying authorities prior to the 2020 Rule’s effective date, which “should continue to be processed in accordance with existing law,” from certification requests submitted after the 2020 Rule’s effective date, which should be processed in accordance with the 2020 Rule. (85 Fed.Reg. 42210 (July 13, 2020); U.S.

Water Board's ongoing certification actions, however, including actions on reconsideration of certifications issued before the 2023 Rule took effect. (88 Fed.Reg. at p. 66655 (Sept. 27, 2023).)

FERC's regulations and practices also contemplated a certifying authority issuing a certification before a request for certification. FERC's regulations require that within 60 days of FERC issuing a notice that the application is ready for environmental analysis, a hydroelectric project proponent must provide FERC either (1) a water quality certification; (2) a copy of the request for certification and evidence of the date it was received by the certifying authority; or (3) evidence of waiver. (18 C.F.R. §§ 4.34(b)(5), 5.23(b)(1).) Under FERC's regulations, the project proponent would only be required to submit a request for certification if the certifying authority had not already issued a certification or waived. Thus, these FERC regulations imply that a certifying authority may issue a certification prior to receiving a request for certification. In addition, FERC has acknowledged that a certifying authority may exercise its Section 401 authority before receiving a request for certification by upholding a blanket waiver issued prior to receiving a particular request. (*Gustavus Elec. Co.* (Oct. 29, 2004) 109 FERC ¶ 61105, 61461.)

This was the information before the State Water Board at the time it issued the certifications at issue in this order. The State Water Board is not aware of USEPA ever having previously stated that a certifying authority lacks the ability to issue a certification in the absence of a pending request for certification. As USEPA's interpretation indicates, it was published in response to comments submitted on the June 2022 Draft Rule. USEPA did not discuss this particular issue in the Draft Rule, the preamble to the Draft Rule, or, to the Board's knowledge, in any other document prior to the preamble accompanying the 2023 Rule.

At the time the State Water Board issued these certifications, it had previously received a request for certification for the licensing of each of these hydropower projects. These requests were subsequently either withdrawn or denied because CEQA was not complete, and the licensing application remained pending. Although each of the project proponents were pursuing waiver allegations, waiver proceedings or appeals remained pending.

E. THE STATE WATER BOARD DEFERS TO USEPA'S INTERPRETATION

Although the State Water Board believes its interpretation of Section 401 was appropriate at the time the certifications discussed in this order were issued and remains a reasonable interpretation of Section 401, USEPA's new interpretation amounts to a major change in circumstances. As discussed in section IV.C USEPA's interpretation is likely entitled to deference under *Chevron*.

Environmental Protection Agency, Clean Water Act Section 401 Certification Final Rule Fact Sheet (June 2020) p. 2.)

It also appears likely that courts will give substantial weight to USEPA's interpretation and give little or no weight to the State Water Board's view, even if federal agencies are given less deference than under *Chevron*. As USEPA is the agency Congress charged with administering the Clean Water Act, only its statutory interpretations are accorded special weight. (33 U.S.C. § 1251(d).) A certifying authority's "interpretation of a federal statute does not receive deference unless the federal agency charged with administering that statute has expressly approved the state's interpretation and implementation." (*New York State Department of Environmental Conservation v. FERC* (2d Cir. 2018) 884 F.3d 450, 455 [finding that USEPA had not spoken on the issue in question, according no deference to the interpretations of FERC or the state certifying authority, and interpreting Section 401 de novo].) And here, USEPA has explicitly disagreed with the State Water Board's interpretation that Section 401 does not bar a certifying authority from issuing certification decisions when the application for a federal license or permit is still pending and the request for certification is withdrawn. (88 Fed.Reg. at p. 66583 (Sept. 27, 2023).)

For these reasons, although the State Water Board believes its issuance of the certifications at issue was proper and its interpretation of Section 401 remains reasonable, in light of USEPA's recently stated interpretation, the State Water Board defers to USEPA's new interpretation and sets aside these certifications.

Due to these certifications being set aside by this order, there is no longer any action of the Board to be reconsidered. While the State Water Board anticipates receiving requests for certification for the licensing of these projects in the future, the Board's future actions are neither bound nor determined by the set-aside certifications. Therefore, to avoid the unnecessary expenditure of resources to revisit certification actions and conditions that have been set aside and may never become effective, the Board also finds it appropriate to dismiss the pending petitions for reconsideration of these certifications.

V. CONCLUSION

Due to USEPA's newly stated interpretation that Section 401 of the Clean Water Act precludes certifying authorities from issuing a certification in the absence of a currently pending request for certification, we act on our own motion and set aside the certifications previously issued by the State Water Board for hydropower licensing of (1) the Merced River Project and Merced Falls Project, (2) the Yuba-Bear Project, and (3) the Don Pedro Project and La Grange Project. In light of these certifications being set aside, and to prevent the unnecessary expenditure of resources on issues related to these set-aside certifications, it is also appropriate to dismiss the pending petitions for reconsideration of these three certifications. This order takes no action on the certification issued by the State Water Board for hydropower licensing of the YRDP, or the pending petitions for reconsideration of that certification.

VI. ORDER

IT IS HEREBY ORDERED THAT

1. The following water quality certifications are set aside:
 - a. Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls Hydroelectric Project (FERC Project Nos. 2179 and 2467), issued by the State Water Resources Control Board on July 31, 2020;
 - b. Water Quality Certification for Nevada Irrigation District's Yuba-Bear Hydroelectric Project (FERC Project No. 2266), issued by the State Water Resources Control Board on August 14, 2020; and
 - c. Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581), issued by the State Water Resources Control Board on January 15, 2021.
2. The following petitions for reconsideration are dismissed:
 - a. Merced Irrigation District's August 28, 2020 Petition for Reconsideration of the July 31, 2020 Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls Hydroelectric Project (FERC Project Nos. 2179 and 2467);
 - b. Gallo Vineyards, Inc. and G3 Enterprises, Inc.'s August 31, 2020 Petition for Reconsideration of the July 31, 2020 Water Quality Certification for Merced Irrigation District's Merced River Hydroelectric Project and Merced Falls Hydroelectric Project (FERC Project Nos. 2179 and 2467);
 - c. Nevada Irrigation District's September 10, 2020 Petition for Reconsideration of the August 14, 2020 Water Quality Certification for Nevada Irrigation District's Yuba-Bear Hydroelectric Project (FERC Project No. 2266);
 - d. Turlock Irrigation District's and Modesto Irrigation District's February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581);
 - e. City and County of San Francisco's, on behalf of the San Francisco Public Utilities Commission, February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District's and Modesto Irrigation District's Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581);

- f. Bay Area Water Supply and Conservation Agency’s February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District’s and Modesto Irrigation District’s Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581); and
- g. 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’s February 16, 2021 Petition for Reconsideration of the January 15, 2021 Water Quality Certification for Turlock Irrigation District’s and Modesto Irrigation District’s Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (FERC Project Nos. 2299 and 14581).

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 7, 2024.

AYE: Vice Chair Dorene D’Adamo
 Board Member Sean Maguire
 Board Member Laurel Firestone
 Board Member Nichole Morgan

NAY: None

ABSENT: Chair E. Joaquin Esquivel

ABSTAIN: None


 Courtney Tyler
 Clerk to the Board

Certificate of Service

I hereby certify that I have this day filed electronically with the Federal Energy Regulatory Commission and served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 10th day of May 2024.

 Digitally signed by Adam
Cohen
Date: 2024.05.10 15:22:39
-07'00'
Water Boards

Adam Cohen
Senior Environmental Scientist
Division of Water Rights
State Water Resources Control Board
Adam.Cohen@waterboards.ca.gov

Document Content(s)

Merced_combined.pdf.....1