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December 3, 2020

VIA E-MAIL

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000
commentletters@waterboards.ca.gov

Re: Merced Irrigation District's Comments to State Water Resources Control Board's Limited Motion for Reconsideration of the Water Quality Certification for the Yuba River Development Project (FERC Project No. 2246)

Dear Ms. Townsend:

This office represents the Merced Irrigation District ("MID"). On behalf of MID we submit these comments to the State Water Resources Control Board's ("Water Board") Limited Motion for Reconsideration of the Water Quality Certification for Yuba County Water Agency's ("YCWA") Yuba River Development Project. In its reconsideration motion, the Water Board proposes to amend condition 23 of the Clean Water Act Section 401 water quality certification issued for the relicensing of the Yuba River Development Project.

MID has an interest in the reconsideration proceeding because MID and YCWA find themselves in similar circumstances in which the State Water Board's Executive Director has issued water quality certifications for federal relicensing proceedings on staffs' own initiative and without a pending application. These actions are in violation of the Clean Water Act, the Porter-Cologne Water Quality Act and applicable state and federal regulations. This pending reconsideration motion is a continuation in a chain of unlawful water quality certification actions by Water Board staff, and, ultimately, the Water Board; a course of action that is incumbent on this Board to correct.

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In MID's case, on April 22, 2019, the Water Board's Executive Director issued a *denial* of water quality certification applications for the relicensing of MID's Merced River Hydroelectric Project No. 2179 and Merced Falls Hydroelectric Project No. 2467 ("Projects"). MID thereafter did not submit new applications for water quality certifications. Instead, on May 22, 2019, MID sought a waiver determination from the Federal Energy Regulatory Commission ("FERC"). On June 17, 2020, with no application for certification pending, Ms. Sobeck, in her capacity as Executive Director, issued a draft water quality certification for the Projects for public comment. At that point, the Water Board was aware that the FERC had on its agenda the waiver finding for the next day. Indeed, the next day, June 18, 2020, FERC issued an order finding that the Water Board waived its authority under Section 401 of the Clean Water Act to issue a water quality certification for the relicensing of MID's Projects by failing to act within the statutory one-year deadline. (171 FERC ¶ 61,240.) Without a pending application and with full knowledge of FERC's waiver order, Ms. Sobeck then issued a final water quality certification for the relicensing of MID's Projects on July 31, 2020, as she did in the case of YCWA on July 17, 2020.

The Water Board's authority to issue Section 401 water quality certifications is initiated by, and limited to, the filing of an application for water quality certification. (33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 121.1(c), 121.5; 23 Cal. Code Regs. §§ 3830-3838, 3855-3861.) The Water Board's regulations do not authorize or contemplate issuance of a water quality certification without a complete application for certification. (23 Cal. Code Regs. §§ 3830-3838, 3855-3861.) Section 3859, "Action on an Application", provides that: "After review of the application, all relevant data, and any recommendations of a regional board, other state and federal agencies, and any interested person, the state board, the executive director, when acting as the state board's designee, or executive officer, as provided in Subsection (c) of this Section, shall issue certification or deny certification for any discharge resulting from a pertinent activity before the federal period for certification expires." (23 Cal. Code Regs. § 3859(a).) Further, the State Water Board's own standard conditions for water quality certification (23 Cal. Code Regs. § 3860(b)) states: "Certification is not intended and shall not be construed to apply to any activity involving a hydroelectric facility and requiring a FERC license or an amendment to a FERC license *unless the pertinent certification application was filed pursuant to Subsection 3855(b) of this Chapter* and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought." (emphasis added.) No applicable law or regulation authorizes the Water Board to conduct water quality certifications proceedings, or issue a final water quality certification, for a relicensing proceeding in the absence of a pending application for certification.

Moreover, with respect to YCWA's and MID's relicensing proceedings, Water Board staff instituted its own interpretation of the applicable statutes and regulations granting itself the authority to issue water quality certifications in the absence of applications, without direction and oversight from the Water Board. In effect, Water Board staffs' actions are akin to an unlawful underground regulation. An unwritten agency interpretation or policy that applies generally and interprets the law is a "regulation" and is invalid if not adopted in compliance with the California

Jeanine Townsend
State Water Resources Control Board
December 3, 2020
Page 3

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Administrative Procedures Act. (See *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal. 4th 324, 332-336.) Here, the unfettered actions of Water Board staff in granting itself the ability to issue water quality certifications, on behalf of the Water Board, in the absence of pending applications, were in excess of any authorizing statutes, regulations or even policy directive of the Water Board.

Based on the foregoing, the current motion for reconsideration is a continuation of the unlawful actions of Water Board staff, seeking to amend a water quality certification issued in violation of due process, administrative procedures, and applicable law and regulations. As such, the Water Board should dismiss the pending motion for reconsideration, and direct its Executive Director to rescind and/or vacate the water quality certification unlawfully issued for YCWA's relicensing proceeding, as well as the water quality certifications issued for the relicensing proceedings of other entities in similar circumstances.

Very truly yours,



Jolie-Anne S. Ansley

JSA

cc: Phillip R. McMurray, Merced Irrigation District