



DENNIS J. HERRERA
City Attorney

YVONNE R. MERÉ
MATTHEW D. GOLDBERG
Deputy City Attorneys
Complex and Affirmative Litigation Team

MEMORANDUM

TO: President Walton and Honorable Members of the Board of Supervisors
FROM: Yvonne R. Meré, Chief of Complex & Affirmative Litigation
Matthew D. Goldberg, Deputy City Attorney
CC: Acting General Manager Michael Carlin, San Francisco Public Utilities Commission
DATE: May 25, 2021
RE: May 25, 2021 Board of Supervisors Agenda Item # 40 (File # 210577)
Invitation for Closed Session Briefing

The agenda for the May 25, 2021 meeting of the Board of Supervisors includes a resolution for adoption without reference to committee titled “Urging the San Francisco Public Utilities Commission to Pause Litigation Against the State Water Resources Control Board.” We understand this resolution pertains to *City and County of San Francisco v. California State Water Resources Control Board et al.*, which our office filed on May 14, 2021 in Tuolumne County Superior Court. The lawsuit challenges the State Water Resources Control Board’s (“State Water Board”) issuance of a water quality certification that, if upheld, would have severe impacts on San Francisco’s water supply. Because the proposed resolution takes a position on a pending lawsuit brought by the City and County of San Francisco (“the City”), we would welcome the opportunity to provide the Board with a closed session briefing on this pending litigation before the Board considers the resolution for adoption.

Background on Bay-Delta Plan Amendment and Litigation

On January 10, 2019, San Francisco and others filed a petition and complaint (“Bay-Delta Plan Lawsuit”) in Tuolumne County Superior Court against the State Water Board challenging its December 2018 adoption of the water quality control plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary (“Bay-Delta Plan Amendment”). The action has since been coordinated in Sacramento County with dozens of other similar challenges. (*State Water Board Cases* (Super. Ct. Sac. County, JCCP No. 5013).) The Bay-Delta Plan Amendment focused exclusively on the San Joaquin River watershed, and included a new requirement of 40% unimpaired flow from February through June from each of the Merced, Tuolumne, and Stanislaus Rivers. As we explain in our Bay-Delta Plan Lawsuit, the 40% unimpaired flow requirement in the Bay-Delta Plan Amendment would devastate San Francisco’s water supply during drought, and the State failed to analyze those effects. To date, the court has yet to rule on the merits of the case, and the State Water Board has not implemented the Bay-Delta Plan Amendment. Instead, San Francisco has been participating in negotiations with the State for a “Voluntary Agreement” under which San Francisco—and its partners on the river—would

MEMORANDUM

TO: President Walton and Honorable Members of the Board of Supervisors
DATE: May 21, 2021
PAGE: 2

provide additional flows and non-flow measures (like habitat restoration) to improve outcomes for fish species. These negotiations are ongoing.

The 2021 Water Quality Certification

The Modesto Irrigation District and Turlock Irrigation District (“the Districts”) own and operate two hydroelectric projects on the Tuolumne River. On January 15, 2021, the Executive Director of the State Water Board issued a water quality certification pursuant to section 401 of the Clean Water Act (the “Certification”) as part of the Federal Energy Regulatory Commission’s (FERC’s) re-licensing of these hydroelectric projects. That license may remain in effect for up to 50 years. Although San Francisco is not a licensee, it stands to be impacted dramatically by the outcome of the FERC licensing proceeding because the Districts’ water rights on the Tuolumne River are senior to San Francisco’s rights.

Accordingly, on May 14, 2021, San Francisco filed a lawsuit seeking an order from the court directing the State Water Board to set aside and vacate the Certification, and withdraw it from the FERC record. (See Petition and Complaint filed May 14, 2021 and attached as Exhibit A.) San Francisco filed the lawsuit in Tuolumne County because state law requires that this action be filed where the project “discharges” are made.

Rationale for the New Litigation

This new litigation is necessary to protect San Francisco’s interests for several reasons, including the following.

First, the Certification includes “flow conditions,” which—by virtue of agreements between San Francisco and the Districts—could result in the near-total depletion of San Francisco’s water supplies during periods of drought. Notably, the Certification imposes much stricter and more onerous flow conditions upon San Francisco than those established in the Bay-Delta Plan Amendment that the City is already challenging in court. In essence, the State through the Certification attempts to make an end-run around San Francisco’s Bay Delta Plan Lawsuit before any court has had the opportunity to rule on the validity of the Bay Delta Plan Amendment.

Second, the Certification represents an unprecedented attempt by the State Water Board to grant itself authority to micromanage San Francisco’s water supply for what could be half a century. Unrelated to any *flow* conditions, the Certification also includes *oversight* conditions that exceed the State Water Board’s jurisdiction. This is particularly important here because these conditions are part of a FERC license, which, as mentioned above, could remain in effect for up to 50 years.

Third, the State Water Board’s process for issuing the certification was procedurally deficient. The certification exceeds the State’s authority and violates San Francisco’s due process rights. The conditions are also unsupported by sufficient evidence and findings. It would establish untenable precedent to allow the State Water Board to operate in this manner.

MEMORANDUM

TO: President Walton and Honorable Members of the Board of Supervisors
DATE: May 21, 2021
PAGE: 3

Again, we would welcome the opportunity to meet with you in closed session and provide additional, confidential details about the nature and basis of this action and answer questions you may have.

Encl. Exhibit A: Petition and Complaint filed May 14, 2021

EXHIBIT A

1 DENNIS J. HERRERA, State Bar No. 139669
City Attorney
2 RONALD P. FLYNN, State Bar No. 184186
Chief Deputy City Attorney
3 YVONNE R. MERÉ, State Bar No. 173594
Chief of Complex & Affirmative Litigation
4 MATTHEW D. GOLDBERG, State Bar No. 240776
BRIAN F. CROSSMAN, State Bar No. 241703
5 REBECCA A. BERS, State Bar No. 287111
NICHOLAS WHIPPS, State Bar No. 306865
6 Deputy City Attorneys
Fox Plaza
7 1390 Market Street, 7th Floor
San Francisco, California 94102-5408
8 Telephone: (415) 554-3800
E-Mail: matthew.goldberg@sfcityatty.org

9 Attorneys for Plaintiff and Petitioner
10 CITY AND COUNTY OF SAN FRANCISCO

11 Exempt from Filing Fees
12 Gov. Code, § 6103

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF TUOLUMNE

15 UNLIMITED JURISDICTION

16 CITY AND COUNTY OF SAN
17 FRANCISCO, by and through its PUBLIC
UTILITIES COMMISSION,

18 Petitioner and Plaintiff,

19 vs.

20 CALIFORNIA STATE WATER
21 RESOURCES CONTROL BOARD; EILEEN
SOBECK, in her official capacity as Executive
22 Director of the California State Water
Resources Control Board; and DOES 1
through 50, inclusive,

23 Respondents and Defendants.
24 _____

25 Modesto Irrigation District, a public agency;
26 Turlock Irrigation District, a public agency,

27 Real Parties in Interest.
28 _____

Case No. _____

**PETITION FOR WRIT OF
ADMINISTRATIVE MANDAMUS**
(Water Code, § 13330; Public Resources Code, §
21168; Code of Civil Procedure, § 1094.5)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION3

PARTIES5

JURISDICTION AND VENUE6

STANDING7

NOTICE (PUBLIC RESOURCES CODE, § 21167.5).....7

ATTORNEYS’ FEES8

FACTUAL AND LEGAL BACKGROUND8

 A. About the Projects.....8

 B. Federal Hydroelectric Project Relicensing9

 C. Clean Water Act Section 401 Water Quality Certification.....10

FIRST CAUSE OF ACTION12

 (Violation of California Environmental Quality Act).....12

SECOND CAUSE OF ACTION13

 (Violations of Clean Water Act).....13

THIRD CAUSE OF ACTION18

 (Violation of the Supremacy Clause of the United States Constitution)18

FOURTH CAUSE OF ACTION19

 (Violation of the Porter-Cologne Water Quality Control Act)19

FIFTH CAUSE OF ACTION22

 (Violation of California’s Constitution).....22

SIXTH CAUSE OF ACTION23

 (Failure to Consider Relevant Evidence; Issuance of Water Quality Certification
 Containing Conditions Unsupported by Findings and Findings Unsupported by
 Evidence)23

SEVENTH CAUSE OF ACTION24

 (Violation of Water Rights Priorities).....24

EIGHTH CAUSE OF ACTION26

 (Violation of Due Process Rights)26

NINTH CAUSE OF ACTION27

 (Improper Delegation of Authority to Executive Director)27

PRAYER FOR RELIEF28

1 Petitioner City and County of San Francisco (“San Francisco”), acting by and through its San
2 Francisco Public Utilities Commission, petitions this court for a writ of mandate, pursuant to Code of
3 Civil Procedure section 1094.5 (“Petition”) against Respondents State Water Resources Control Board
4 (“State Water Board”) and its Executive Director Eileen Sobeck, named in her official capacity
5 (collectively, “Respondents”), and alleges as follows:

6 INTRODUCTION

7 1. With its longstanding water rights on the Tuolumne River, San Francisco has spent
8 over a century developing and managing the Hetch Hetchy Regional Water System, which features a
9 complex series of reservoirs, tunnels, pipelines, and treatment systems stretching from the Sierra
10 Nevada mountains to the Pacific Ocean. Today, as the third largest municipal utility in California, San
11 Francisco delivers high-quality drinking water to over 2.8 million residents and businesses,
12 predominantly in Alameda, Santa Clara, San Mateo, and San Francisco counties. Eighty-five percent
13 of San Francisco’s total water supplies are sourced from the Tuolumne River.

14 2. Real Parties in Interest Modesto Irrigation District and Turlock Irrigation District
15 (collectively, the “Districts”) hold water rights on the Tuolumne River, and own and operate the Don
16 Pedro and La Grange hydroelectric projects (“Project” or “Projects”) on the Tuolumne River.

17 3. On January 15, 2021—in the course of the Federal Regulatory Energy Commission
18 (FERC) relicensing of the Projects—the Executive Director of the State Water Board issued a water
19 quality certification pursuant to section 401 of the Clean Water Act (the “Certification” or the
20 “January 15, 2021 Certification”).¹ A copy of the Certification is attached hereto as Exhibit A.

21 4. The Certification includes an array of draconian conditions, including “flow
22 conditions,” which—by virtue of longstanding agreements between San Francisco and the Districts—
23 could result in the near-total depletion of San Francisco’s water supplies during periods of drought.²
24

25 ¹ These certifications, generally, are referred to as “water quality certifications” or “401 certifications.”

26 ² In presenting the water supply, environmental, and socioeconomic effects from certain
27 interpretations of the Raker Act and the operative 1966 Agreement with the Districts (“Fourth
28 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 State Water Board, FERC,
courts of competent jurisdiction, or in any other context.

1 This would have devastating, long-term socioeconomic and environmental impacts on the 2.8 million
2 Bay Area residents and businesses who rely on these water supplies.

3 5. The Certification is not just harmful; it is also illegal. It exceeds the State Water
4 Board’s jurisdiction and is contrary to the law in a variety of respects.

5 6. First, the State Water Board failed to comply with the California Environmental Quality
6 Act (CEQA) before issuing the Certification. The CEQA exemption on which the Certification relies
7 is not applicable here because there was no “substantial risk of waiver” of the one-year deadline under
8 the Clean Water Act at the time the Executive Director issued the Certification. (Wat. Code, § 13160,
9 subd. (b)(2).)

10 7. Second, the Certification violates section 401 of the Clean Water Act by imposing
11 conditions that are unrelated to water quality impacts caused by the Projects’ discharges and are not
12 based on any nexus between discharges from the Projects and water quality requirements. The
13 Certification further violates the Clean Water Act by authorizing State Water Board staff to control
14 operations of the Projects through staff approval and enforcement of numerous as yet undefined
15 “plans” designed to dictate nearly every aspect of the Districts’ reservoir operations. Such plans would
16 be created, reviewed, and approved only after adoption of the FERC licenses for the Projects, thereby
17 making State Water Board staff the final arbiter of most facets of the Projects’ operations. Moreover,
18 compliance with several of the State Water Board’s conditions is required at locations that are dozens
19 of miles from the Projects’ point-source discharges. These compliance points are located beyond
20 FERC’s regulatory jurisdiction and are so far downstream that the Projects are incapable of
21 meaningfully controlling flows to meet the conditions.

22 8. Third, by exceeding the scope of its authority under the Clean Water Act, the State
23 Water Board’s conduct is preempted by the Federal Power Act, which assigns to FERC—not the
24 State—the exclusive authority to govern the construction, operation, and maintenance of new and
25 existing hydropower projects.

26 9. Fourth, the State Water Board violates the Porter-Cologne Water Quality Control Act,
27 California water rights laws, and the California Constitution because the Certification (1) fails to
28 adequately consider and balance beneficial uses, (2) unlawfully attempts to implement the objectives

1 and Program of Implementation contained in the December 2018 amendment to the Water Quality
2 Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta Plan”),
3 and (3) fails to protect the Districts’ and San Francisco’s water rights.

4 10. Fifth, the Certification includes conditions that are unsupported by findings, and
5 findings that are unsupported by evidence in the record.

6 11. Sixth, the process by which the State Water Board issued the Certification, which
7 infringes upon San Francisco vested property rights, violates San Francisco’s constitutional due
8 process rights.

9 12. Seventh, notwithstanding the State Water Board’s exclusive, statutory authority to issue
10 water quality certifications (Wat. Code, § 13160), the State Water Board improperly delegated
11 authority to issue the Certification to the State Water Board’s Executive Director.

12 13. San Francisco asks this court to issue a writ of mandate directing Respondents to set
13 aside and vacate the Certification, and withdraw it from the FERC record. Such a writ is necessary to
14 ensure the unlawfully adopted Certification containing unlawful conditions do not deprive millions of
15 Bay Area residents and businesses of a substantial portion of San Francisco’s water supply.

16 **PARTIES**

17 14. Petitioner San Francisco is a municipal corporation organized and existing under and
18 by virtue of the laws of the State of California, and is a charter city and county. San Francisco holds
19 pre-1914 water rights, and owns and operates several large water storage, hydropower production, and
20 conveyance facilities within the Tuolumne River watershed. The San Francisco Public Utilities
21 Commission is a division of the City and County of San Francisco created by the San Francisco City
22 Charter and has charge of the construction, management, supervision, maintenance, extension,
23 operation, use, and control of all of San Francisco’s water and Hetch Hetchy Power supplies and
24 related utility infrastructure.

25 15. Respondent State Water Board is an agency of the State of California, created under the
26 laws and regulations of the State of California. It responsible for the orderly and efficient
27 administration of California’s water resources. (Wat. Code, §§ 174, 175.) The State Water Board is
28 designated as the state water pollution control agency for all purposes identified in the Federal Water

1 Pollution Control Act (33 U.S.C. § 1251 et seq. (“Clean Water Act”)) and any other existing or
2 subsequently enacted federal water quality control law. (Wat. Code, § 13160, subd. (a).) The State
3 Water Board is authorized to issue the certification required by section 401 of the Clean Water Act to
4 applicants of federal licenses or permits for activities that may result in any discharge into navigable
5 waters. (Wat. Code, § 13160, subd. (b).)

6 16. Respondent Eileen Sobeck is the Executive Director of the State Water Board. In her
7 capacity as Executive Director of the State Water Board, Ms. Sobeck issued and signed the January
8 15, 2021 Certification. Ms. Sobeck is being sued in her official capacity only.

9 17. San Francisco is unaware of the true names or capacities of the Respondents fictitiously
10 sued herein as Does 1 through 50, inclusive, and therefore sues these Respondents by such fictitious
11 names. San Francisco will amend this Petition to set forth their true names and capacities when the
12 same have been ascertained. San Francisco is informed and believes, and thereon alleges, that each of
13 said fictitiously named Respondents is responsible in some manner for the events and actions as
14 hereinafter alleged, and/or has some interest in the subject of this Petition, by reason of which said
15 fictitiously named Respondents are subject to the relief prayed for herein.

16 18. Real Party in Interest Modesto Irrigation District is a California irrigation district
17 established under the Irrigation District Law (Wat. Code, § 20500 et seq.) and holds water rights on
18 the Tuolumne River. Modesto Irrigation District is also an owner and licensee of the Don Pedro
19 Hydroelectric Project No. 2299 and an owner of the La Grange Hydroelectric Project No. 14581.

20 19. Real Party in Interest Turlock Irrigation District is a California irrigation district
21 established under the Irrigation District Law (Wat. Code, § 20500 et seq.) and holds water rights on
22 the Tuolumne River. Turlock Irrigation District is also an owner and licensee of the Don Pedro
23 Hydroelectric Project No. 2299 and an owner of the La Grange Hydroelectric Project No. 14581.

24 **JURISDICTION AND VENUE**

25 20. This court has jurisdiction pursuant to Water Code section 13330; Code of Civil
26 Procedure section 1094.5; Public Resources Code section 21168; and article I, section 7 and article X,
27 section 2 of the California Constitution.

1 **ATTORNEYS' FEES**

2 26. San Francisco brings this action to enforce important public rights affecting the public
3 interest. San Francisco's water supply operations and power generation capacities would be adversely
4 impacted by implementation of the challenged January 15, 2021 Certification. Issuance of the
5 requested relief will confer a significant benefit to the millions of residents and businesses in the San
6 Francisco Bay Area that rely upon San Francisco's water system. Issuance of the requested relief will
7 also result in wider, indirect economic impacts within the San Francisco Bay Area, as well as the
8 general public, by requiring their appointed officials to comply with applicable federal and state
9 statutes and regulations in the issuance of water quality certifications. Enforcement is necessary to
10 ensure that San Francisco's customers—and the wider public—will not suffer the increased costs and
11 burdens associated with the State Water Board's failure to properly comply with applicable laws and
12 regulations. San Francisco will be entitled to an award of reasonable attorneys' fees pursuant to Code
13 of Civil Procedure section 1021.5.

14 27. Because the Certification was the result of arbitrary or capricious action or conduct by
15 the State Water Board and its Executive Director in her official capacity, San Francisco is also entitled
16 to and seeks recovery of its reasonable attorneys' fees under Government Code section 800.

17 **FACTUAL AND LEGAL BACKGROUND**

18 **A. About the Projects**

19 28. The 168-megawatt Don Pedro Project (FERC Project No. 2299) is located on the
20 Tuolumne River in Tuolumne County, California. The Don Pedro Project is powered by water stored
21 in the New Don Pedro Reservoir, which has a storage capacity of 2.03 million acre-feet. New Don
22 Pedro Reservoir is used for a variety of purposes, including for hydropower generation; municipal,
23 agricultural, environmental, and recreational uses; and flood control.

24 29. The 4.7-megawatt La Grange Project (FERC Project No. 14581) is located on the
25 Tuolumne River in Stanislaus and Tuolumne Counties, California, approximately 2.5 miles
26 downstream of the Don Pedro Project. The La Grange Project is powered by water stored in the La
27 Grange Diversion Dam, which has a 400-acre-foot storage capacity. Water discharged from the New
28 Don Pedro Reservoir flows downstream to the La Grange Diversion Dam.

1 30. San Francisco owns and operates water storage facilities upstream of the New Don
2 Pedro Reservoir, including Cherry Reservoir (up to 273,300 acre-feet of storage), Eleanor Reservoir
3 (up to 27,100 acre-feet of storage), and Hetch Hetchy Reservoir (up to 360,400 acre-feet of storage).
4 In addition, through the Fourth Agreement, its operative 1966 agreement with the Districts, San
5 Francisco claims a contractual right to up to 570,000 acre-feet of storage capacity³ in a “water bank”
6 in New Don Pedro Reservoir that allows San Francisco to “credit” and “debit” water attributed to its
7 water rights.

8 **B. Federal Hydroelectric Project Relicensing**

9 31. Congress enacted the Federal Power Act in 1935 (and its predecessor statute, the
10 Federal Water Power Act in 1920) to secure the comprehensive development of the nation’s water
11 resources. (16 U.S.C. § 791a et seq.; *First Iowa Hydro-Electric Cooperative v. Federal Power*
12 *Commission* (1946) 328 U.S. 152, 170-171, 180-181.)

13 32. Under the Federal Power Act, FERC has exclusive authority to issue licenses
14 authorizing the construction, operation, and maintenance of new and existing hydropower projects
15 (such as the Don Pedro Hydroelectric and La Grange Hydroelectric Projects). (16 U.S.C. §§ 791a et
16 seq., 797(e), 808, 817.)

17 33. Once an initial FERC license is set to expire, the project operator must apply for a new
18 license through the relicensing process. (16 U.S.C. § 808(a).) During relicensing, FERC evaluates the
19 project and determines whether continued project operation is in the public interest and, if so, under
20 what conditions. (*Ibid.*) Section 10(a) of the Federal Power Act authorizes FERC to issue licenses
21 subject to the conditions that FERC deems best suited for power development and other public uses of
22 the waters. (16 U.S.C. § 803(a).)

23 34. The Don Pedro Project was first licensed for operation on March 10, 1964. The
24 Districts timely filed an application for license reissuance on April 28, 2014. The Districts’ original
25 license for the Don Pedro Project expired on April 30, 2016. The Don Pedro Project remains on a

26 _____
27 ³ Under the Fourth Agreement, San Francisco has a right to up to an additional 170,000 acre-feet of
28 variable water bank storage capacity that it may use during any time that such additional storage is not
reserved for flood control purposes, for a possible total of up to 740,000 acre-feet of storage.

1 year-to-year license based on the terms in the expired license while the FERC relicensing proceeding
2 continues.

3 35. The La Grange Project has never been operated under a FERC license. On December
4 19, 2012, FERC determined the Districts were required to obtain a license for the La Grange Project.
5 Accordingly, the Districts filed an original application for a FERC license on October 11, 2017.

6 36. On January 29, 2018, San Francisco sought and was later granted intervention in the
7 FERC proceedings for the Projects.

8 37. Since intervening, San Francisco has consistently participated in the FERC relicensing
9 proceedings. On March 15, 2018 and May 22, 2018, San Francisco submitted Reply Comments and
10 Supplemental Comments, respectively, to FERC. On April 12, 2019, San Francisco submitted
11 comments in response to FERC's filing of its Draft Environmental Impact Statement. On February 3,
12 2020, San Francisco submitted comments to FERC replying to the Districts' comments, which were
13 made in response to FERC staff's September 17, 2019 request for additional information.

14 38. On July 20, 2020, FERC issued a Final Environmental Impact Statement (FEIS) for the
15 Projects. Among other findings and conclusions, the FEIS rejected the Bay-Delta Plan Unimpaired
16 Flow Objective on the basis that it does not appropriately balance power and non-power values
17 associated with the operation of the Projects.

18 **C. Clean Water Act Section 401 Water Quality Certification**

19 39. The Clean Water Act requires states to develop water quality standards for all intrastate
20 waters. (33 U.S.C. § 1313.) The Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et
21 seq.) is the principal law governing water quality regulation in California. It establishes a
22 comprehensive statewide program for water quality control administered by the State Water Board and
23 nine regional boards.

24 40. Under the Porter-Cologne Water Quality Control Act, the State Water Board may adopt
25 water quality control plans as required by the Clean Water Act. (Wat. Code, § 13170.) Such plans shall
26 ensure the reasonable protection of beneficial uses and the prevention of nuisance. (Wat. Code, §§
27 13170, 13241.)

1 41. Pursuant to section 401 of the Clean Water Act, unless the state waives its authority,
2 any applicant for a federal license or permit to conduct an activity that may result in a discharge into
3 navigable waters must obtain a water quality certification from the state in which the discharge
4 originates. Water quality certifications are required to set forth limitations and requirements necessary
5 to assure that an applicant for a federal license or permit will comply with any applicable effluent
6 limitations and other limitations under section 1311 or 1312 of the Clean Water Act, standards of
7 performance under section 1316 of the Clean Water Act, and with any other appropriate requirement
8 of State law set forth in such certification, which shall become a condition on the Federal license or
9 permit. (33 U.S.C. § 1341(d).)

10 42. After a state issues a valid water quality certification for a hydroelectric facility subject
11 to certain conditions, FERC must include those conditions in its license.

12 43. After two prior rounds of applications were denied without prejudice, the Districts
13 submitted a third round of applications requesting certification on July 20, 2020. The Districts
14 withdrew these applications on November 19, 2020.

15 44. Nevertheless, on November 30, 2020, Ann Marie Ore, Water Quality Certification
16 Program Manager, Division of Water Rights, issued a Draft Water Quality Certification for the
17 Projects, and invited public comment. San Francisco timely submitted comments on the Draft Water
18 Quality Certification on January 4, 2021.

19 45. On January 15, 2021, Executive Director Sobeck issued the ostensibly final
20 Certification for the relicensing of the Projects.

21 46. On February 16, 2021, in accordance with Water Code section 13330 and California
22 Code of Regulations, title 23, section 3867, San Francisco timely filed a Petition for Reconsideration.
23 Concurrently with San Francisco's Petition for Reconsideration, San Francisco also submitted a
24 request for preparation of the administrative record.

25 47. On February 16, 2021, the Districts filed a Petition for Reconsideration and Request for
26 Stay.

27 48. The State Water Board failed to follow the law and its own regulations regarding
28 consideration of San Francisco's (or any other) Petition for Reconsideration in the following ways: (1)

1 the State Water Board has not produced a copy of the administrative record; (2) the State Water Board
2 failed to give written notice to the necessary and interested parties within twenty days of receipt of the
3 Petition (Cal. Code Regs., tit. 23, § 3867.1); and (3) the State Water Board failed to grant or deny San
4 Francisco's Petition for Reconsideration by April 15, 2021, the statutory 90-day deadline following
5 issuance of the January 15, 2021 Certification. (Wat. Code, § 13330, subd. (a).)

6 49. San Francisco has no plain, speedy, or adequate remedy at law other than the instant
7 Petition. San Francisco has exhausted all administrative remedies, and this action is timely filed.

8 **FIRST CAUSE OF ACTION**

9 **(Against All Respondents)**

10 **(Violation of California Environmental Quality Act)**

11 50. San Francisco realleges and incorporates, as though fully set forth herein, each and
12 every allegation of this Petition.

13 51. CEQA imposes detailed obligations on public agencies to review, analyze, and identify
14 the significant environmental effects of a proposed project and any feasible alternatives or mitigation
15 measures that will avoid or substantially lessen such significant effects. (Pub. Resources Code, §§
16 21002, 21002.1, 21080, subd. (a), 21081.)

17 52. The State Water Board is a public agency within the meaning of CEQA.

18 53. CEQA defines a project to include issuance of a permit, license, certificate, or other
19 entitlement for use by one or more public agencies. (Cal. Code Regs., tit. 14, § 15378.) Accordingly, a
20 401 certification meets the definition of a project that is subject to CEQA review.

21 54. The State Water Board failed to do any environmental review as required by CEQA
22 prior to, or in connection with, the issuance of the Certification.

23 55. The recent statutory amendments to Water Code section 13160 do not authorize the
24 State Water Board to skirt its CEQA obligations and issue a 401 certification without environmental
25 review.

26 56. On November 19, 2020, the Districts formally withdrew their only pending application
27 for certification. Because there was no pending certification request when the State Water Board's
28

1 Executive Director issued the January 15, 2021 Certification, there was no “substantial risk of waiver
2 of the state board’s certification authority.” (See Wat. Code, § 13160, subd. (b).)

3 57. Nor was there any “substantial risk of waiver” with respect to the Districts’ earlier
4 applications. The Districts first applied for a water quality certification in 2018 and then again in 2019.
5 State Water Board staff denied each application without prejudice, citing the need to complete
6 environmental review before issuance of a water quality certification. Because State Water Board staff
7 had already denied each application, there was no substantial risk of waiver of the State Water Board’s
8 certification authority. Indeed, in its October 29, 2020 filing before FERC, the State Water Board itself
9 argued that no waiver had occurred when it denied the Districts’ certification applications in 2019 and
10 2020, respectively. In its January 19, 2021 order denying the Districts’ petition for waiver, FERC
11 agreed with many of the arguments advanced by the State Water Board in its October 29, 2020 filing
12 as to why waiver had not occurred.

13 58. By failing to undertake CEQA review before issuance of the Certification, both
14 Executive Director Sobeck and the State Water Board failed to proceed in the manner required by law
15 and committed a prejudicial abuse of discretion.

16 **SECOND CAUSE OF ACTION**

17 **(Against All Respondents)**

18 **(Violations of Clean Water Act)**

19 59. San Francisco realleges and incorporates, as though fully set forth herein, each and
20 every allegation of this Petition.

21 60. The scope of the State Water Board’s authority under section 401 of the Clean Water
22 Act to condition the federal licenses for the Projects “is limited to assuring that a discharge from a
23 Federally licensed or permitted activity will comply with water quality requirements.” (40 C.F.R. §§
24 121.2, 121.3; see also 33 U.S.C. § 1341; *American Rivers, Inc. v. FERC* (2d Cir. 1997) 129 F.3d 99,
25 107.)

26 61. The Certification contains conditions issued without or in excess of the State Water
27 Board’s authority, in violation of the Clean Water Act in at least five ways.

1 62. First, Executive Director Sobeck’s issuance of the Certification on behalf of the State
2 Water Board exceeded the State’s authority under Clean Water Act section 401 because the Districts
3 had no application for a 401 Certification pending at the time Ms. Sobeck issued the January 15, 2021
4 Certification.

5 63. Ms. Sobeck denied the Districts’ prior water quality certification applications without
6 prejudice, and on November 19, 2020, the Districts formally withdrew their most recent request for
7 certification.

8 64. A pending certification application is fundamental to the certification procedure.
9 Without a pending request for certification that provides all relevant and up-to-date details concerning
10 the activities and discharges in question, the State Water Board’s certification may be based on
11 incorrect assumptions or information. It is the water quality certification applicant’s responsibility to
12 ensure the State Water Board is provided this critical information. (See 40 C.F.R. § 121.5(b)
13 [describing information required to be included in a certification request].) Without a pending
14 certification application before it, the State Water Board had no authority to issue the Certification.

15 65. Second, conditions in the Certification exceed the State’s authority to regulate point
16 source discharges under section 401.

17 66. The scope of a water quality certification is limited to assuring that a discharge from a
18 federally licensed or permitted activity will comply with water quality requirements. (33 U.S.C. §
19 1341; 40 C.F.R. § 121.3.) For purposes of section 401, “[d]ischarge . . . means a discharge from a
20 point source into a water of the United States,” and “[w]ater quality requirements means applicable
21 provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory
22 requirements for point source discharges into waters of the United States.” (40 C.F.R. § 121.1(f), (n).)

23 67. The Environmental Protection Agency’s (EPA) final rule issued in July 2020 provides
24 that states are *not* authorized to condition “the activity as a whole, once the threshold condition, the
25 existence of a discharge, is satisfied.” (EPA, Clean Water Act section 401 Certification Rule, 85
26 Fed.Reg. 42210 at 42233-34, 42251-52 (July 13, 2020) (“EPA Final Rule”).) Rather, the proper scope
27 of section 401 certification is to condition “the discharge from a federally licensed or permitted
28 activity, *as opposed to the activity as a whole.*” (*Id.* at 42251, emphasis added.) The EPA Final Rule

1 provides that the “certifying authority’s review and action under section 401 is limited to water quality
2 impacts to waters of the United States resulting from a potential *point source* discharge from a
3 proposed federally licensed or permitted project.” (*Id.* at 42233-34, 42251-52.)

4 68. But here, contrary to federal regulations, the Certification conditions the “activity as a
5 whole,” and not just discharges from the Projects. (January 15, 2021 Certification at p. 12.) Several
6 conditions in the Certification, including conditions 1.B, 1.C, 1.D, 2, 3, 5, and 8 through 13, are not
7 limited “to assuring that a discharge from a Federally licensed or permitted activity will comply with
8 water quality requirements.” (40 C.F.R. § 121.3.) Rather, the Certification provides that it is
9 conditioning the “activity as a whole,” and State Water Board staff made no attempt to evaluate or
10 quantify the water quality impacts of the Projects’ point-source discharges or even to establish a nexus
11 between the Projects’ discharges and the Certification conditions. For example, condition 3 of the
12 Certification (Temperature) impermissibly contains a storage requirement. The storage levels of the
13 Projects’ reservoirs are not “discharges” and, thus, minimum carryover storage is not a “water quality
14 requirement” related to the Projects’ discharges.

15 69. Because these numerous conditions are not designed to assure the Projects’ point-
16 source discharges comply with applicable water quality requirements, these conditions fall outside of
17 the scope of the State Water Board’s authority under section 401.

18 70. Third, the Certification fails to provide adequate justification or information for each
19 condition, as required by the Clean Water Act and its implementing regulations. (See 40 C.F.R. §
20 121.7(d).)

21 71. The Clean Water Act regulations require that a section 401 certification include
22 statements explaining why each condition is necessary to assure that the discharge from the proposed
23 project will comply with water quality requirements. (40 C.F.R. § 121.7(d)(1)(i).) “Water quality
24 requirements” are the “applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water
25 Act, and state or tribal regulatory requirements for point source discharges into waters of the United
26 States.” (40 C.F.R. § 121.1(n).) But instead of citing to specific “water quality requirements,” as that
27 term is defined in the Clean Water Act regulations (40 C.F.R. § 121.1), the Certification makes broad
28 references to regulatory and environmental review documents and studies. (See, e.g., January 15, 2021

1 Certification at pp. 13-17, 18-19 [nonspecific references to various documents].) Environmental
2 review documents and studies are not “water quality requirements,” nor can the State Water Board
3 claim that such references adequately justify that the conditions would assure the Projects’ point-
4 source discharges comply with any applicable water quality requirements. (40 C.F.R. § 121.7(d)(1)(i).)
5 For most of the Certification conditions, no such regulatory requirements exist. And, in the case of
6 condition 1.D (Bay-Delta Plan Flow Objectives), this regulatory requirement is the subject of ongoing
7 litigation.

8 72. Fourth, the conditions giving the State Water Board enforcement authority are invalid.

9 Under the Clean Water Act, FERC is the sole entity with enforcement authority over the FERC license
10 conditions, including the January 15, 2021 Certification. The State Water Board may not, through a
11 water quality certification, grant itself ongoing monitoring and plan review authority because doing so
12 would improperly tread into FERC’s enforcement authority. (See, e.g., EPA Final Rule at 42275,
13 42279.)

14 73. But the Certification imposes conditions that exceed the State Water Board’s authority
15 under section 401 of the Clean Water Act by attempting to grant State Water Board staff enforcement
16 authority, including authority to review and approve (or deny) a variety of plans *after* FERC issues the
17 license, including the following:

18 a. Condition 1.C: Would subject operations of the Projects to decisions made by a
19 newly formed “Tuolumne River Anadromous Fish Committee and the Lower San Joaquin River
20 Watershed Group,” comprised of “State Water Board, California Department of Fish and Wildlife
21 (CDFW), National Marine Fisheries Service (NMFS), United States Fish and Wildlife Service
22 (USFWS), BLM, and other members identified by the Deputy Director.” (January 15, 2021
23 Certification at pp. 47-48, 62.)

24 b. Condition 1.D: Reserves the right to the State Water Board to adaptively
25 manage flows.

26 c. Numerous conditions require the preparation and filing of a series of studies and
27 reports with the State Water Board. Examples include: condition 11 (filing gravel augmentation
28 reports); 12 (filing habitat improvement reports); 13 (predator suppression report); 14 (aquatic

1 invasive species report); 15 (recreation facility report); 18.A (requiring the creation of an elaborate
2 “comprehensive Tuolumne River monitoring, assessment, reporting, and special studies plan”); 18.B
3 (annual summary reports); and 18.C (peer-reviewed “comprehensive” report).

4 74. If allowed, such conditions would give State Water Board staff the authority to
5 determine compliance with the majority of conditions and thereby control operation of the Projects, an
6 authority that can be found nowhere in the Clean Water Act.

7 75. Fifth, the Certification also impermissibly includes conditions that require compliance
8 at points beyond FERC’s jurisdiction, which is limited to what FERC has designated to be the
9 jurisdictional boundaries of the Projects under the Federal Power Act. Moreover, the Projects are
10 incapable of meaningfully impacting flow conditions dozens of miles downstream, with hundreds to
11 thousands of intervening water uses in between the Projects’ discharge and the compliance points.

12 These impermissible conditions include:

13 a. Condition 1.D: Water conditions in the Lower San Joaquin River and Bay-Delta
14 fall well outside of the Projects’ boundaries and, therefore, fall outside of FERC’s jurisdiction to
15 regulate or enforce.

16 b. Condition 1.D: Compliance points for condition 1.D at Modesto and Vernalis
17 fall well outside of the Projects’ boundaries, FERC’s enforcement jurisdiction, and the Districts’
18 ability to control flows. (See January 15, 2021 Certification at p. 52 [setting Vernalis as a compliance
19 point].) Flow conditions at these compliance points represent the cumulative activities of hundreds to
20 thousands of water users, and water quality conditions at these locations cannot, therefore, be validly
21 attributed to the Projects’ discharges.

22 c. Condition 5: The compliance point for condition 5 (Vernalis) is dozens of miles
23 away from the Projects’ discharges and falls well outside of the Projects’ boundaries and FERC’s
24 enforcement authority.

25 d. Condition 8.A: Compliance points at the confluence of the Lower Tuolumne
26 River fall well outside of the Projects’ boundaries and outside of FERC’s enforcement authority.

27 76. Compliance points that are dozens of miles downstream of the Districts’ discharges are
28 not only inappropriate and irrelevant to the Projects’ point-source discharges, but such conditions fail

1 to account for the Districts’ lack of control over tributary, Lower San Joaquin River, and Bay-Delta
2 water conditions at these proposed compliance points. Given that such conditions are unenforceable by
3 FERC, and that the Clean Water Act vests FERC with sole enforcement authority, these conditions
4 have no place in the Certification.

5 77. For the foregoing reasons, conditions in the challenged Certification exceed the scope
6 of the State Water Board’s authority under section 401 of the Clean Water Act and associated
7 regulations. Respondents acted without or in excess of jurisdiction and committed a prejudicial abuse
8 of discretion by failing to proceed in the manner required by law in issuing the January 15, 2021
9 Certification.

10 **THIRD CAUSE OF ACTION**

11 **(Against All Respondents)**

12 **(Violation of the Supremacy Clause of the United States Constitution)**

13 78. San Francisco realleges and incorporates, as though fully set forth herein, each and
14 every allegation of this Petition.

15 79. By exceeding the scope of its authority under the Clean Water Act, as described in the
16 second cause of action (paragraphs 59 through 77, above), the State Water Board also exceeded the
17 scope of authority provided to states under the Federal Power Act and, thus, proceeded in conflict with
18 the Supremacy Clause of the United States Constitution.

19 80. The Supremacy Clause makes the laws of the United States “the supreme Law of the
20 Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (U.S.
21 Const., art. VI, cl. 2.) The touchstone of any preemption inquiry is Congress’ intent.

22 81. The Federal Power Act imposes a highly regulated and comprehensive federal
23 regulatory regime governing hydroelectric facilities, occupying the field of hydroelectric licensing.
24 (See *California v. FERC* (1990) 495 U.S. 490, 496-500.) Under the Federal Power Act, FERC has
25 exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new
26 and existing hydropower projects. (16 U.S.C. §§ 797(e), 808, 817.)

27 82. Section 401 of the Clean Water Act is one narrow exception to FERC’s paramount and
28 exclusive role in regulating hydropower projects, with the terms and requirements of a water quality

1 certification incorporated as conditions in an issued FERC license. (33 U.S.C. § 1341.) Authority
2 under the Clean Water Act is very narrow. “The scope of a Clean Water Act section 401 certification
3 is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with
4 water quality requirements.” (40 C.F.R. § 121.3; see also *American Rivers, supra*, 129 F.3d at p. 107.)

5 83. The term and conditions of the Certification that exceed the scope of the State Water
6 Board’s authority under section 401 of the Clean Water Act are thus also preempted by federal law
7 (pursuant to the Supremacy Clause of the U.S. Constitution) for invading the exclusive regulatory
8 province of FERC, as established in the Federal Power Act.

9 84. Furthermore, the Certification runs afoul of FERC and the Federal Power Act in
10 another respect. On July 20, 2020, FERC issued a Final Environmental Impact Statement for the
11 Projects. There, FERC staff rejected the Bay-Delta Plan Flow Objectives on the basis that it does not
12 appropriately balance power and non-power values associated with the operation of the Projects.
13 Notwithstanding this express rejection by FERC, the State Water Board improperly includes the Bay-
14 Delta Plan Flow Objectives at Condition 1.D of the Certification.

15 85. Respondents acted without or in excess of jurisdiction and committed a prejudicial
16 abuse of discretion by failing to proceed in the manner required by law in issuing the January 15, 2021
17 Certification.

18 **FOURTH CAUSE OF ACTION**

19 **(Against All Respondents)**

20 **(Violation of the Porter-Cologne Water Quality Control Act)**

21 86. San Francisco realleges and incorporates, as though fully set forth herein, each and
22 every allegation of this Petition.

23 87. Pursuant to the Porter-Cologne Water Quality Control Act, the State Water Board may
24 adopt water quality control plans for waters where the Clean Water Act requires water quality
25 standards. (Wat. Code, § 13170.) But this authority has limits. The Certification contains conditions—
26
27
28

1 including the unimpaired flow and salinity objectives from the 2018 Bay-Delta Plan⁴—that violate the
2 Porter-Cologne Water Quality Control Act in multiple ways.

3 88. First, The Porter-Cologne Water Quality Control Act directs the State Water Board to
4 balance beneficial uses when implementing water quality objectives. (See Wat. Code, §§ 13000,
5 13241, 13170 [requiring that the Board comply with Water Code sections 13240 through 13244 when
6 adopting water quality control plans].) The State Water Board thus must seek “the highest water
7 quality which is reasonable, considering all demands being made and to be made on those waters and
8 the total values involved, beneficial and detrimental, economic and social, tangible and intangible.”
9 (Wat. Code, § 13000.) The Water Code also provides that “domestic use is the highest use and
10 irrigation is the next highest use of water,” and that “the use of water for the municipality or the
11 inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is
12 first in time.” (Wat. Code, §§ 1254, 1460; see also Cal. Code Regs., tit. 23, §§ 660 [definition of
13 “domestic use”], 663 [definition of “municipal use”]; *Meridian Ltd. v. City and County of San*
14 *Francisco* (1939) 13 Cal.2d 424, 450.)

15 89. Several conditions, including 1.D and 5, implement portions of the Bay-Delta Plan that
16 were adopted without consideration or balancing of the most critical beneficial uses of the Tuolumne
17 River as required by the Porter-Cologne Water Quality Control Act. For example, State Water Board
18 staff’s stated reason for condition 1.D is “to reasonably protect native fish and wildlife beneficial uses
19 in the [Lower San Joaquin River] watershed to Bay-Delta.” (January 15, 2021 Certification at p. 24).
20 This condition only “protects” one beneficial use at the severe sacrifice of all others and explicitly fails
21 to adequately consider, let alone balance, all other beneficial uses of Tuolumne River waters. The
22 Projects’ discharges have minimal to negligible impacts on water conditions and fish survival, in the
23 Lower San Joaquin River and Bay-Delta. Nor can discharges from the Projects appreciably improve or
24 control water conditions in those water bodies.

25
26 ⁴ On January 10, 2019, San Francisco and others filed a petition and complaint against the State Water
27 Board for unlawfully adopting the Bay-Delta Plan. (*San Joaquin Tributaries Authority, et al. v.*
28 *California State Water Resources Control Board* (Super. Ct. Tuolumne County, No. CU62094).) The
action has since been coordinated in Sacramento County. (*State Water Board Cases* (Super. Ct. Sac.
County, JCCP No. 5013).)

1 90. The Certification fails to even mention San Francisco’s domestic and municipal uses in
2 the evaluation of any of its conditions, let alone balance these uses with others as required by the
3 Porter-Cologne Water Quality Control Act. Such balancing would have required the State Water
4 Board to acknowledge and evaluate the unprecedented levels of rationing that would have to be
5 imposed in the Bay Area during droughts if the Certification were implemented, and to explicitly
6 balance these domestic and municipal beneficial uses with the others on the Tuolumne River.

7 91. Second, the Certification also includes several conditions that attempt to protect
8 beneficial uses that do not have the requisite water quality objectives. (See conditions 1.B [recreational
9 beneficial uses], 1.G [to protect “all beneficial uses”], 3 [to protect “cold-water” beneficial uses], 7 [to
10 generically protect beneficial uses], 12 [to protect “aquatic-life” beneficial uses], 14 [to protect against
11 “potential” impacts to unspecified beneficial uses]. (January 15, 2021 Certification at pp. 21-23, 27,
12 28, 34, 37-39).) Beneficial uses and water quality objectives only constitute “water quality standards”
13 when applied “together.” As the beneficial uses and water quality objectives are “inextricabl[y]
14 linked,” any attempt to independently impose conditions based solely on beneficial uses and without
15 associated water quality objectives would be an “impermissible modification of the State’s standards.”
16 (State Water Board Letter to EPA at p. 6; Bay-Delta Plan at p. 3 [beneficial uses and water quality
17 objectives only constitute water quality standards “under the terminology of the federal Clean Water
18 Act” when taken “[t]ogether”]; Wat. Code, § 13245.) The Porter-Cologne Water Quality Control Act
19 requires the State Water Board to establish a “reasonable” level of protection for identified beneficial
20 uses of water, while considering all competing “demands being made and to be made on those
21 waters.” (Wat. Code, §§ 13000, 13241.) However, nowhere does the Act provide the State Water
22 Board the authority to compel the protection of beneficial uses outside of ensuring compliance with
23 legally adequate water quality objectives adopted for the protection of those beneficial uses.

24 92. Third, the Certification unlawfully seeks to compel compliance with components of the
25 Bay-Delta Plan’s Program of Implementation (“POI”)—which is not a regulatory mandate, but a series
26 of recommendations to other agencies—in excess of the State Water Board’s authority under section
27 401 and the Porter-Cologne Water Quality Control Act. As the State Water Board acknowledged in its
28 response to comments on the Bay-Delta Plan, its authority to assure compliance with water quality

1 objectives is “limited to *recommending* actions by other entities,” not compelling that certain actions
2 be taken. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101, 124,
3 citing Wat. Code, § 13242, subd. (a), emphasis in original.) The improper conditions include:

4 a. Condition 1.D (Bay-Delta Plan Flow Objectives) reserves authority for State
5 Water Board staff to dictate that the Projects adaptively implement the unimpaired flow objective in a
6 manner described in the POI and inconsistent with the unimpaired flow objective. (January 15, 2021
7 Certification at pp. 24-25, 49 [allowing State Water Board staff to compel that the flow be “adjusted,
8 shaped, or shifted”].)

9 b. Condition 3 (Temperature) impermissibly implements another recommendation
10 in the POI by requiring carryover storage.

11 c. Conditions 9, 11, and 12 all require habitat improvements and would similarly
12 implement a recommendation in the POI. (See Bay-Delta Plan at p. 23 [listing “habitat restoration” as
13 a recommended means of achieving protection of fish and wildlife beneficial uses].)

14 93. These components of the POI are not “water quality standards” adopted pursuant to
15 section 303 of the Clean Water Act, nor are they “water quality requirements” pursuant to section 401
16 of the Clean Water Act (40 C.F.R. §§ 121.1(f), (n); 121.3) and, thus, fall outside of the scope of the
17 State Water Board’s authority under section 401 of the Clean Water Act.

18 94. All conditions that compel compliance with the recommendations of the POI are not
19 independent requirements of State law and are beyond the State Water Board’s authority to condition
20 the Projects.

21 **FIFTH CAUSE OF ACTION**

22 **(Against All Respondents)**

23 **(Violation of California’s Constitution)**

24 95. San Francisco realleges and incorporates, as though fully set forth herein, each and
25 every allegation of this Petition.

26 96. Article X, section 2 of the California Constitution provides, in part: “It is hereby
27 declared that because of the conditions prevailing in this State the general welfare requires that the
28 water resources of the State be put to beneficial use to the fullest extent of which they are capable, and

1 that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the
2 conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof
3 in the interest of the people and for the public welfare. The right to water or to the use or flow of water
4 in or from any natural stream or water course in this State is and shall be limited to such water as shall
5 be reasonably required for the beneficial use to be served, and such right does not and shall not extend
6 to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion
7 of water.”

8 97. This provision of the California Constitution prohibits the waste or unreasonable
9 method of use or unreasonable method of diversion of water, and thereby mirrors and reinforces the
10 State Water Board’s obligation to balance beneficial uses of water pursuant to the Porter-Cologne
11 Water Quality Control Act.

12 98. As set forth in the fourth cause of action (paragraphs 87 to 89, above), the
13 Certification’s flow conditions only consider a single beneficial use of San Francisco’s water
14 (protection of native fish and wildlife) and thus ignore other beneficial uses, including the *highest*
15 beneficial use—San Francisco’s domestic and municipal uses. Moreover, there is little evidence that
16 the flow conditions will, in fact, materially protect native fish and wildlife.

17 99. For these reasons, the January 15, 2021 Certification is in violation of article X, section
18 2 of the California Constitution. By adopting these conditions, Respondents failed to proceed in the
19 manner required by law, and committed prejudicial abuses of discretion.

20 SIXTH CAUSE OF ACTION

21 (Against All Respondents)

22 (Failure to Consider Relevant Evidence; Issuance of Water Quality Certification Containing 23 Conditions Unsupported by Findings and Findings Unsupported by Evidence)

24 100. San Francisco realleges and incorporates, as though fully set forth herein, each and
25 every allegation of this Petition.

26 101. The State Water Board has not demonstrated that the conditions it seeks to impose
27 through the section 401 process are necessary to (1) mitigate water quality impacts from the licensed
28 facilities or (2) ensure compliance with applicable water quality standards/objectives.

1 “[A]s between appropriators, the rule of priority is ‘first in time, first in right.’ [Citation.] The senior
2 appropriator is entitled to fulfill its needs before a junior appropriator is entitled to use any water. (*Id.*
3 at p. 961, quoting *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d at pp.
4 101-102.)

5 106. “It should be the first concern . . . of the [State Water Board] in the exercise of its
6 powers under the act to recognize and *protect the interests of those who have prior and paramount*
7 *rights* to the use of the waters of the stream.” (*Meridian Ltd., supra*, 13 Cal.2d at p. 450, emphasis
8 added.)

9 107. San Francisco holds pre-1914 appropriative water rights on the Tuolumne River.

10 108. The Certification fails to evaluate the impacts from or require the curtailment of the
11 thousands of more junior water rights holders that affect fisheries in the Lower Tuolumne and San
12 Joaquin Rivers prior to imposing significant restrictions on the Districts’ and San Francisco’s more
13 senior water rights. These conditions shift responsibilities for downstream fishery and water quality
14 conditions to the Districts and San Francisco and violates this core tenet of California’s water rights
15 system, causing irreparable harm to the areas served by San Francisco and the Districts. State Water
16 Board staff have no justification for requiring San Francisco and the Districts to shoulder the burden of
17 achieving Lower San Joaquin River and Bay-Delta fishery and water quality objectives, while
18 requiring junior rights holders to contribute nothing to meet these targets, let alone requiring these
19 water users to contribute first.

20 109. This oversight is all the more egregious where, as here, several of the conditions are
21 designed (1) to improve environmental conditions in the Lower San Joaquin River and Bay-Delta for
22 which the Districts and San Francisco are not responsible, and (2) to remedy impacts that are
23 predominantly caused by junior water rights holders. California’s water rights system and Clean Water
24 Act section 401 do not afford the State Water Board the authority to require the Districts and San
25 Francisco, as senior water rights holders, to remedy impacts caused by junior water rights holders. (*El*
26 *Dorado, supra*, 142 Cal.App.4th at pp. 963-964.) All such conditions are unlawful.

1 **EIGHTH CAUSE OF ACTION**

2 **(Against All Respondents)**

3 **(Violation of Due Process Rights)**

4 110. San Francisco realleges and incorporates, as though fully set forth herein, each and
5 every allegation of this Petition.

6 111. The United States Constitution and the California Constitution both establish that
7 persons may not be deprived of property without due process of law. (U.S. Const., 14th Amend., § 1;
8 Cal. Const., art. I, § 7.)

9 112. “[O]nce rights to use water are acquired, they become vested property rights. As such,
10 they cannot be infringed by others or taken by governmental action without due process and just
11 compensation.” (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p.
12 101.) The water rights held by San Francisco are vested property rights that may not be infringed upon
13 or otherwise taken by governmental action without due process. (*Ibid.*)

14 113. The approval of the Certification at the staff level, without consideration of the
15 Districts’ and San Francisco’s water rights priorities and without a hearing, infringed on San
16 Francisco’s water rights without providing due process of law. Instead of providing the full protection
17 of these water rights through adjudicative proceedings, as is required under law when vested water
18 rights are at issue, the Districts and San Francisco were provided no process and were placed on
19 essentially the same footing as any other member of the public interested in this Certification. San
20 Francisco was only allowed to comment on the Draft Water Quality Certification, and State Water
21 Board staff failed to respond to these comments.

22 114. The State Water Board’s failure to provide even minimal notice and a hearing before
23 substantially impacting San Francisco’s water rights violates the Porter-Cologne Water Quality
24 Control Act, established California water rights law, and due process protections, and infringes on the
25 due process rights of San Francisco. (See generally, *United States v. State Water Resources Control*
26 *Bd.*, *supra*, 182 Cal.App.3d 82.)

1 115. All flow-based conditions that would remedy environmental conditions beyond those
2 caused by the Projects' discharges violate these due process and water rights priority principles,
3 including but not limited to conditions 1.B, 1.C, 1.D, 1.G, 3, 5, and 8.

4 116. By violating San Francisco's rights to procedural due process, Respondents acted
5 without or in excess of their jurisdiction and engaged in a prejudicial abuse of discretion by failing to
6 proceed in the manner required by law when they issued the January 15, 2021 Certification.

7 **NINTH CAUSE OF ACTION**

8 **(Against All Respondents)**

9 **(Improper Delegation of Authority to Executive Director)**

10 117. San Francisco realleges and incorporates, as though fully set forth herein, each and
11 every allegation of this Petition.

12 118. In order to provide for the orderly and efficient administration of water resources, the
13 California Legislature created the five-member State Water Board to exercise the adjudicatory and
14 regulatory functions of the state in the field of water resources. (Wat. Code, §§ 174, 175.)

15 119. Pursuant to Water Code section 13160, the authority to issue water quality certifications
16 is vested with the State Water Board, which is a board of members appointed by the Governor and
17 confirmed by the state Senate, and not with the State Water Board staff.

18 120. The Water Code does not grant authority to the appointed members of the State Water
19 Board—via regulation or otherwise—to delegate powers or public trust duties to the Executive
20 Director (or to any staff member or individual) that were entrusted to the State Water Board itself.

21 121. Nonetheless, State Water Board regulations regarding water quality certifications
22 purportedly authorize the executive director, or his/her designee, "to take all actions connected with
23 applications for certification, including issuance and denial of certification." (Cal. Code Regs., tit. 23,
24 § 3838, subd. (a).) The regulations further provide that the Executive Director may issue water quality
25 certifications without a hearing and without input or vote from the State Water Board members. (Cal.
26 Code Regs., tit. 23, §§ 3858, subd. (b), 3859.)

1 122. The Certification issued by Executive Director Sobeck was issued pursuant to this
2 delegated authority, without hearing or oversight by the State Water Board, which also subsequently
3 failed to act on San Francisco's (or any other) Petition for Reconsideration.

4 123. The regulations permitting delegation of issuing authority to the Executive Director are
5 in violation of law, and therefore the Certification itself is invalid.

6 124. For these reasons, Respondents acted without or in excess of statutory or regulatory
7 authority, failed to provide a fair trial, and committed a prejudicial abuse of discretion by failing to
8 proceed in the manner required by law when they issued the January 15, 2021 Certification.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, San Francisco respectively prays for relief as follows:

11 1. For a writ of mandate directing the Respondents to set aside and vacate the January 15,
12 2021 Certification, and withdraw it from the FERC record.

13 2. For costs of suit incurred herein, including reasonable attorneys' fees, pursuant to Code
14 of Civil Procedure section 1021.5, Government Code section 800, or any other authority.

15 3. For such other and further relief as the Court may deem proper.

16
17 Dated: May 13, 2021

DENNIS J. HERRERA
City Attorney
RONALD P. FLYNN
Chief Deputy City Attorney
YVONNE R. MERÉ
Chief of Complex & Affirmative Litigation
MATTHEW D. GOLDBERG
BRIAN F. CROSSMAN
REBECCA A. BERS
NICHOLAS WHIPPS
Deputy City Attorneys

18
19
20
21
22
23
24 By: 
25 MATTHEW D. GOLDBERG

26 Attorneys for Plaintiff and Petitioner
27 CITY AND COUNTY OF SAN FRANCISCO
28