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ENVIRONMENTAL PROTECTION

State Water Resources Control Board

MAR 18 2019

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D. C, 20426

Dear Secretary Bose:

RESPONSE TO NEVADA IRRIGATION DISTRICT'S WAIVER REQUEST OF 401 WATER QUALITY CERTIFICATION FOR THE YUBA-BEAR HYDROELECTRIC PROJECT, FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2266, NEVADA, PLACER, AND SIERRA COUNTIES

The California State Water Resources Control Board (State Water Board) is providing the Federal Energy Regulatory Commission (FERC or Commission) this response to the Nevada Irrigation District (NID) submittal to you, dated February 7, 2019 (February 7, 2019 submittal). In that submittal, NID suggests that the State Water Board waived its water quality certification authority under section 401 of the Federal Water Pollution Control Act (33 U.S.C. § 1341) (Section 401) for NID's relicensing of the Yuba-Bear Hydroelectric Project (FERC Project No. 2266) (Project). The State Water Board disagrees with NID. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. Jan. 25, 2019) (*Hoopa*) does not provide a basis for determining that the State Water Board has waived water quality certification for the Project.

The Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387) (Clean Water Act) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Section 101 of the Clean Water Act (33 U.S.C. § 1251(g)) requires federal agencies to "cooperate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 401 requires every applicant for a federal license or permit which 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 be in compliance with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313). Section 401 directs the agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the Clean Water Act and with any other appropriate requirement of state law. Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. The State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act and any other federal act. (Wat. Code, §13160.)

In taking a certification action, the State Water Board must either: (1) issue an appropriately conditioned certification; or (2) deny certification. (Cal. Code Regs., tit. 23, § 3859.) A water quality certification may be issued if it is determined that there is reasonable assurance that an activity is protective of state and federal water quality standards and that the appropriate environmental documents have been adopted to support certification and meet the requirements of the California Environmental Quality Act (CEQA). (33 U.S.C. § 1431; Pub. Resources Code, § 21006, 21080; Cal. Code Regs., tit. 23, § 3856, subd. (f).) When a proposed project's compliance with water quality standards is not yet determined, the State Water Board may deny certification without prejudice. (Cal. Code Regs., tit. 23, § 3837, subd. (b)(2).)

The Project is interrelated with the Upper Drum Spaulding Project (FERC Project No. 2310), the Deer Creek Project (FERC Project No. 14530), the Lower Drum Project (FERC Project No. 14531), and the Yuba River Development Project (FERC Project No. 2246). As you know, the Commission is applying a watershed approach (i.e., analyzing all projects jointly) to comply with requirements from the National Marine Fisheries Service under Section 7 of the Federal Endangered Species Act (ESA). ESA consultation has not been completed and NID has stated that its intention is to incorporate the results of this critical element into the required CEQA process. Both the ESA consultation and the CEQA analysis will inform the State Water Board of potential impacts to water quality and beneficial uses. Because FERC is likewise awaiting a joint ESA assessment, in no way is the pendency of a water quality certification action interfering with the issuance of a FERC license.

NID suggests that the history of its Project water quality certification filings is "practically identical" to the scenario the court described in *Hoopa.* It is not. For example, the documents included by NID with its February 7, 2019 submittal show clearly that the State Water Board never entered into an agreement with NID to hold in abeyance all state permitting reviews, including Section 401 water quality certification, "in an unsuccessful attempt to circumvent FERC's regulatory authority of whether and when to issue a federal license" (*Hoopa,* 913 F.3d at p. 1103), which was a foundational factor in the D.C. Circuit's *Hoopa* decision.

NID appears to admit that the State Water Board never failed or refused to act on a request for water quality certification within one year of a pending request, as its own documents show that NID voluntarily and unilaterally withdrew its previously pending requests for water quality certification before the one-year deadline for action lapsed. NID asks the Commission to conclude in effect that the State Water Board's failure to reject NID's own action – voluntary withdrawal of its request for certification – is the legal equivalent of a failure or refusal to act on the initial request. NID's characterization of the history of water quality certification for the Project ignores the impacts its own actions had on the State Water Board's process. At no point prior to the February 7, 2019 submittal has NID ever suggested there was an agreement in advance, in any of its voluntary application withdrawals submitted to the State Water Board. (See e.g. NID March 1, 2013 letter to State Water Board ["At this time and by copy of this letter, NID formally withdraws without prejudice its May [*sic*] 15, 2012 application for water quality certification for the Project relicensing."].)

Presumably, NID requested withdrawal of its request for water quality certification because it viewed a voluntary withdrawal as preferable to the State Water Board denying NID's request. The State Water Board, by its own regulations, must act on a request for certification before the federal period for certification expires. (Cal. Code Regs., tit. 23, § 3859.) Absent NID's voluntary withdrawal, the State Water Board would have denied NID's request for certification under California Code of Regulations, title 23, section 3837, subdivision (b)(2). The State Water

Board has been unable to approve NID's request because NID has not completed the environmental documentation required under CEQA. (*Id.* [Lack of CEQA documentation is grounds for denial without prejudice].) The timing of CEQA compliance is under NID's control, as NID is both the lead agency and the party responsible for funding CEQA review. NID now argues that the State Water Board's failure to object to NID's unilateral action equates to a failure to act. Consistent with logic and Commission precedent, the State Water Board has recognized that an applicant's decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request. (See e.g. *Constitution Pipeline Company, LLC* 162 FERC P 61014, paragraph 20; *New York State Department of Environmental Conservation v. FERC* (2nd Cir. 2018) 884 F.3d 450, 456.)

Unlike what the D.C. Circuit concluded occurred in *Hoopa*, here the Project applicant has voluntarily and unilaterally withdrawn each of its requests for water quality certification, and has by its own delays in completing its environmental analyses precluded the State Water Board from approving water quality certification for the Project. This is decidedly different from the scenario considered in *Hoopa,* where the court concluded that "the states' efforts, *as dictated by the [Klamath Hydroelectric Settlement Agreement (KHSA)],* constitute [failure and refusal under Section 401]." (*Hoopa,* 913 F.3d at p. 1104, italics added.) The court also noted that it "has never addressed the specific factual scenario presented in this case, *i.e.*, an applicant *agreeing with the reviewing states* to exploit the withdrawal-and-resubmission of water quality certification requests *over a lengthy period of time*." (*Hoopa,* 913 F.3d at p. 1105, italics added.)[1]

Furthermore, the documents filed with NID's February 7, 2019 submittal show clearly that the delay in issuance of water quality certification by the State Water Board has been due to NID's own failure to complete its required environmental analyses. As stated by NID in its March 15, 2012 letter to the State Water Board, "NID intends to be the Lead Agency for the purpose of compliance with the requirements of the California Environmental Quality Act, and will coordinate with the Board and other responsible agencies." Under CEQA, the lead agency is responsible for preparing and determining the adequacy of the environmental documentation for the project. (Cal. Code Regs., tit. 23, § 15050.) The responsible agency makes use of the environmental documentation as approved by the lead agency, and cannot approve until the lead agency has certified the adequacy of the environmental document. (See *id.*, §§ 15090, 15096.) Before NID completes its responsibility as CEQA lead agency, the State Water Board as a responsible agency under CEQA cannot approve the Project. This is a significant distinction from *Hoopa* where the party claiming waiver *was not* the party that controlled the timing of the water quality certification proceeding.

The court in *Hoopa* did not consider allegations of waiver made by an applicant who for all practical purposes controlled the certification and relicensing timeline. The *Hoopa* decision involved a lawsuit by a third-party tribe attempting to enforce the Clean Water Act section 401 timeline to act on a request for certification. The Hoopa Valley Tribe was not a party to the agreement of the applicant and certain other parties to withdraw and request abeyance of the water quality certification application at issue in the *Hoopa* decision. In contrast, NID has affirmatively taken the very action which forms the basis for its submittal and then requests FERC find waiver of the state's water quality certification. NID, at a minimum, should not benefit from its own actions and inactions in bringing the water quality certification proceeding to completion. (*Transcontinental Gas Pipeline Corporation* (1989) 49 FERC 63032, citing *Precision*

[1] In fact, the State Water Board was not a party to KHSA. But the holding of the case is based on the facts as stated in the court's opinion, not a materially different set of facts known to the State Water Board or other persons or entities not parties to the litigation.

Instrument Mfg. Co. v. Automotive Maintenance Machinery Co. (1945) 324 U.S. 806; see also *Rocky Mountain Natural Gas Co. v. FERC* (D.C. Circ. 1997) 114 F.3d 297.)

In fact, the court in *Hoopa* quoted from *Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 972 the relevant proposition that "[t]he purpose of the waiver provisions is to prevent *a State* from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." (*Hoopa,* 913 F.3d at p. 1101, italics added.) NID asks FERC to conclude that *the project applicant's own delay* can be cause for waiver of section 401 certification authority. That proposition certainly finds no support in *Hoopa,* where the court concluded that "Hoopa's interests are not protected directly as it is not a party to the KHSA …, nor are its interests protected indirectly through any participation by FERC in those same settlement agreements." (*Hoopa,* 913 F.3d at p. 1105-6.) Accordingly, *Hoopa* does not support NID's claim in the present instance, where not only is there no agreement to delay issuance of water quality certification, the delay is due to, and cannot possibly have prejudiced, NID, the Project applicant.

For the above reasons, the State Water Board does not see any merit in NID's request and asks that the Commission deny, or simply ignore NID's unsolicited and unwarranted request.

If you have questions regarding this letter, please contact Ms. Ann Marie Ore, Water Quality Certification Program Manager, by email at annmarie.ore@waterboards.ca.gov or by phone at (916) 319-9387.

Sincerely,

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