

171 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Nevada Irrigation District

Project No. 2266-102

ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued April 16, 2020)

1. On February 19, 2019, Nevada Irrigation District (NID), licensee for the Yuba-Bear Hydroelectric Project No. 2266 (Yuba-Bear Project), filed a request for the Commission to determine that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)¹ to issue water quality certification regarding the relicensing of the Yuba-Bear Project. This order makes such a determination.

I. Background

2. On June 24, 1963, the Commission issued NID a 50-year license, effective May 1, 1963, for the Yuba-Bear Project, located on the Middle Yuba, South Yuba, and Bear Rivers in Sierra, Nevada, and Placer Counties, California.² On April 15, 2011, NID submitted a timely application for a new license for the project.

3. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States, such as NID's operation of the Yuba-Bear Project, must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.³ If the state "fails or refuses to act on

¹ 33 U.S.C. § 1341(a)(1) (2018).

² *Nevada Irrigation Dist.*, 29 F.P.C. 1256 (1963). The license expired on April 30, 2013. NID continues to operate the project under an annual license.

³ 33 U.S.C. § 1341(a)(1). Section 401(d) provides that a certification and the conditions contained therein shall become a condition of any federal license or

a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request,” then certification is waived.⁴ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.⁵

4. NID requested water quality certification for relicensing of the Yuba-Bear Project on March 15, 2012, and the California Board received the request on the same day.⁶ In its March 29, 2012 acknowledgment letter, the Board stated that NID is “notified that [its] application for certification is pending before the [California Board].”⁷

5. On March 1, 2013, NID withdrew and resubmitted its application for water quality certification.⁸ NID stated that “[t]he project has not changed, so the April 15, 2011 FERC application, which the Board has on file, contains all information required for a complete application for a water quality certificate.”⁹ In its March 27, 2013 acknowledgment letter, the Board stated that “NID’s [March 1, 2013] letter initiates a one-year deadline from the date it was received for the [California Board] to act on the request for certification” and “[t]he new deadline for certification action is

authorization that is issued. *Id.* § 1341(d). *See City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

⁴ 33 U.S.C. § 1341(a)(1).

⁵ *Id.*

⁶ NID Request at Appendix B, NID March 15, 2012 Letter to California Board.

⁷ NID Request at Appendix B, California Board March 29, 2012 Letter to NID at 1. The Board acknowledged that NID satisfied the application filing requirements specified in California Code of Regulations, Title 23, Section 3856. Although it is clear that a state agency’s one-year review period begins with the agency’s receipt of an application for water quality certification and not from a date that the agency deems the application complete, *see California v. FERC*, 966 F.2d 1541, 1552-53 (9th Cir. 1992) (affirming Commission application of regulation establishing state agency receipt of certification application as beginning of one-year review period), the California Board’s statement that NID’s application met the filing requirements of California Code of Regulations, Title 23, Section 3856 (Contents of a Complete Application) precludes any argument on this score. A similar statement was included in each of the California Board’s subsequent acknowledgment letters to NID.

⁸ NID Request at Appendix B, NID March 1, 2013 Letter to California Board.

⁹ *Id.* at 1.

February 28, 2014.”¹⁰ The Board did not dispute that the initial application had been complete.

6. On May 17, 2013, Commission staff issued a draft environmental impact statement (EIS) analyzing the effects of the relicensing.¹¹ The draft EIS noted that the California Board’s decision on the section 401 water quality certification application was due by March 1, 2014.¹²

7. In comments filed on August 22, 2013, the California Board stated that Commission staff mischaracterized the water quality certification process. The Board asserted that it “must also comply with the California Environmental Quality Act (CEQA)” in order to issue a water quality certification.¹³ The Board stated that because the CEQA process would not be finished by spring 2014, “[t]he most likely action will be that the [l]icensees will withdraw and resubmit their respective applications for water quality certifications before the one year deadline if the [Board] is not ready to issue its water quality certifications.”¹⁴

8. On February 21, 2014, NID withdrew and resubmitted its application for water quality certification.¹⁵ NID noted that it had amended its license application on April 18, 2012, but that the project had not changed since that time.¹⁶ Accordingly, NID stated that the Board already had on file “all information required for a complete application for a water quality certificate.”¹⁷ In its March 11, 2014 acknowledgment

¹⁰ NID Request at Appendix B, California Board March 27, 2013 Letter to NID at 1.

¹¹ The draft EIS also analyzed the effects of relicensing the Drum-Spaulding Hydroelectric Project No. 2310 (Drum-Spaulding Project).

¹² Commission May 17, 2013 draft EIS (draft EIS) at 7.

¹³ California Board’s August 22, 2013 Comments on draft EIS at 1.

¹⁴ *Id.* The Board’s comments refer to the water quality certification applications for the Yuba-Bear Project and the Drum-Spaulding Project.

¹⁵ NID Request at Appendix B, NID February 21, 2014 Letter to California Board.

¹⁶ *Id.* at 1. Although the April 18, 2012 amendment application predates NID’s March 1, 2013 withdrawal and resubmittal of its water quality certification application, NID did not note the amended application in its March 1, 2013 letter.

¹⁷ *Id.* at 1.

letter, the Board stated that “NID’s [February 21, 2014] letter initiates a one-year deadline from the date it was received for the [California Board] to act on the request for certification” and “[t]he new deadline for certification action is February 21, 2015.”¹⁸ The Board did not dispute NID’s statements that the project had not changed and that the Board had on file all necessary information.

9. On December 19, 2014, Commission staff issued a final EIS, which provided staff-recommended measures to be included in any new license that may be issued for the Yuba-Bear Project.¹⁹

10. On February 16, 2015, NID withdrew and resubmitted its application for water quality certification for the third time.²⁰ Similar to its response to the previous withdrawal letters, the California Board’s March 18, 2015 letter acknowledged that NID’s application “initiates a one-year deadline from the date it was received for the [California Board] to act on the request for certification” and set February 17, 2016 as the new deadline.²¹

11. NID withdrew and resubmitted its water quality certification application three more times: on February 9, 2016, February 3, 2017, and January 29, 2018.²²

12. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion in *Hoopa Valley Tribe v. FERC*,²³

¹⁸ NID Request at Appendix B, California Board March 11, 2014 Letter to NID at 1.

¹⁹ The final EIS noted that the California Board had until February 21, 2015 to act on the request. Commission December 19, 2014 final EIS at 9.

²⁰ NID Request at Appendix B, NID February 16, 2015 Letter to California Board.

²¹ NID Request at Appendix B, California Board March 18, 2015 Letter to NID at 1.

²² NID Request at Appendix B: California Board’s March 9, 2016 Letter to NID set February 9, 2017 as the new deadline; the March 3, 2017 Letter set February 3, 2018 as the new deadline; and the February 14, 2018 Letter set January 29, 2019 as the new deadline.

²³ 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency).

holding that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived certification.

13. Also on January 25, 2019, the California Board denied without prejudice NID's request for water quality certification, stating that the CEQA process and consultation under the Endangered Species Act (ESA) had not been completed, and that "[i]n order to maintain an active certification application, NID will need to request certification for the [p]roject."²⁴ NID did not subsequently file a new request for water quality certification with the California Board.

14. On February 19, 2019, NID filed its request with the Commission, asking us to determine that the California Board waived its certification authority for the relicensing of the Yuba-Bear Project.

15. On March 5 and March 18, 2019, the Foothills Water Network (Foothills) and the California Board, respectively, filed responses to NID's request, asking that the Commission deny the request to find waiver.

II. Discussion

16. The "waiver" provision in section 401(a)(1) of the CWA is at issue here. As noted above, under section 401 of the CWA, if a state certifying agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such federal application."²⁵

17. For the reasons discussed below, we find that the California Board waived its authority under section 401.

A. Hoopa Valley and Commission Precedent

18. In *Hoopa Valley*, the D.C. Circuit found that "a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."²⁶ The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the

²⁴ NID Request at Appendix A, California Board January 25, 2019 Letter Denying Without Prejudice NID's Water Quality Certification at 1-2.

²⁵ 33 U.S.C. § 1341(a)(1).

²⁶ 913 F.3d at 1103.

same,²⁷ “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”²⁸ In fact, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.”²⁹

19. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.³⁰ In *Placer County*, the Commission held that a formal agreement between a licensee and a state was not necessary to support a finding of waiver; rather, the exchanges between the entities could amount to an ongoing agreement.³¹ The Commission found that the record showed that the entities worked to ensure that the withdrawal and refile happened each year,³² given that the licensee submitted evidence that the state sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and resubmission.³³ Based on this functional agreement and the fact that Placer County never filed a new application, the Commission concluded that the process caused lengthy delay and found that the state waived its certification authority.³⁴

²⁷ In *Hoopa Valley*, the court noted that before each calendar year passed, the applicant sent a “letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . in the same one-page letter. . . .” *Id.* at 1104 (emphasis in original).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 167 FERC ¶ 61,056, *reh’g denied*, 169 FERC ¶ 61,046 (2019) (*Placer County*).

³¹ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *see also Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232, at P 27 (2020) (*Pacific Gas and Electric*); *Southern California Edison Co.*, 170 FERC ¶ 61,135, at P 23 (2020) (*Southern California Edison*).

³² *Placer County*, 167 FERC ¶ 61,056 at P 12.

³³ *Placer County*, 169 FERC ¶ 61,046 at P 17.

³⁴ *Id.* PP 12, 18.

20. Similarly, in *Southern California Edison Co.*,³⁵ the Commission found that the California Board waived its section 401 authority with respect to the relicensing of six projects that comprise the Big Creek hydroelectric system. There, the Commission rejected the Board's argument that *Hoopa Valley* was not applicable. While there was no explicit agreement between the applicant and the Board, the Commission found that the record showed the Board's direct participation in the withdrawal and resubmittal scheme, including the Board's comments on the draft EIS in which the Board stated that "[i]f the one year federal period for certification is insufficient for the [] Board to act, staff will recommend that [Southern California Edison] withdraw and resubmit their request for [water quality certification] for the six Big Creek projects."³⁶ The Commission found that this statement coupled with the emails that the Board staff sent annually ahead of the one-year deadline requesting the licensee to withdraw and resubmit its certification application, demonstrated the state's coordination with the licensee and was sufficient to support a waiver finding.³⁷

21. Thereafter, in *Pacific Gas and Electric Co.*,³⁸ the Commission found that the California Board waived its section 401 authority with respect to the surrender of the Kilarc-Cow Creek Hydroelectric Project No. 606, again stating that an explicit agreement between the applicant and the Board was not necessary to find waiver.³⁹ We found that the record showed that the Board expected the applicant to withdraw and refile and the applicant cooperated.⁴⁰ In its comments on the draft EIS, the Board had indicated that the "usual process" involves the applicant voluntarily withdrawing and refiling its application.⁴¹ Moreover, the Commission found the Board's assertion that it could not issue a water quality certification until the CEQA process was complete, which often takes more than one year, unavailing and that the general principle from *Hoopa Valley* still applied.⁴²

³⁵ 170 FERC ¶ 61,135.

³⁶ *Id.* P 24; *see also id.* PP 23-29.

³⁷ *Id.* P 25.

³⁸ 170 FERC ¶ 61,232.

³⁹ *Id.* P 27.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* PP 31-33.

B. Application of Hoopa Valley and Commission Precedent to the Relicensing Proceeding for the Yuba-Bear Project

22. The California Board and Foothills claim that *Hoopa Valley* does not support a finding of waiver in this proceeding.⁴³ They claim that there was no agreement for NID to withdraw and resubmit its application, and that NID acted voluntarily and unilaterally in doing so each year before the deadline.⁴⁴

23. As we have held previously, an explicit written agreement to withdraw and refile is not necessary.⁴⁵ The facts in this proceeding are similar to those in *Pacific Gas and Electric Co.*, in that the Board expected NID to withdraw and refile its application and NID did so. In its comments on the draft EIS, the Board even stated that it was “most likely” that NID would withdraw and resubmit its application “before the one year deadline if the [Board] [was] not ready to issue its water quality certification[.]”⁴⁶ As in *Hoopa Valley, Placer County, Southern California Edison Co.*, and *Pacific Gas and Electric Co.*, the California Board’s efforts constituted a failure to act within the meaning of section 401 and gave it nearly six years beyond the one-year deadline to act.⁴⁷

24. The Board argues that “[c]onsistent with logic and Commission precedent, . . . an applicant’s decision to withdraw its request for certification before expiration of the

⁴³ California Board March 18, 2019 Response at 2; Foothills March 5, 2019 Response at 2. Foothills also contends that the Commission should not apply the findings in *Hoopa Valley* to any pending licensing proceeding until judicial appeal of the decision has been exhausted. Foothills March 5, 2019 Response at 1-2. On December 9, 2019, the United States Supreme Court denied certiorari, making the *Hoopa Valley* decision final. *See California Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019).

⁴⁴ California Board March 18, 2019 Response at 2-4; Foothills March 5, 2019 Response at 2-3.

⁴⁵ *See Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232 at P 27; *Southern California Edison Co.*, 170 FERC ¶ 61,135 at P 23; *Placer County*, 167 FERC ¶ 61,056 at PP 17-18; *see also Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 at PP 33-34 (*Constitution*).

⁴⁶ California Board’s August 22, 2013 Comments on draft EIS at 1.

⁴⁷ *Hoopa Valley*, 913 F.3d at 1105 (“The record indicates that PacifiCorp’s water quality certification request has been complete and ready for review for more than a decade.”); *Placer County*, 169 FERC ¶ 61,046 at P 18; *Southern California Edison Co.*, 170 FERC ¶ 61,135 at P 25; *Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232 at P 27.

certification period eliminates any need to approve or deny the withdrawn request.”⁴⁸ Similarly, Foothills argues that the Commission should not find waiver where the Board relied on the Commission’s long-standing practice of accepting withdrawals and resubmittals as restarting the one-year waiver deadline.⁴⁹ We disagree. In *Hoopa Valley*, the court faulted the Commission for concluding that, although the many resubmissions from the hydroelectric license applicant “involved the same [p]roject, each resubmission was an independent request, subject to a new period of review.”⁵⁰ Despite previous Commission orders concluding that once an application is withdrawn, the refiling restarts the one-year period, the court explained that a state’s obligation “to act on a request for certification” within one year applies to a specific request and “cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.”⁵¹

25. The Board alleges that NID presumably withdrew its requests voluntarily to avoid the Board denying its application.⁵² In addition, both the Board and Foothills argue that the certification process was upheld by the CEQA process, for which NID was the lead agency and controlled the timing.⁵³ We rejected similar arguments in prior proceedings. In *Southern California Edison Co.*, we found that the California Board had waived its water quality certification authority based on the fact that in the eight-plus years of the applicant effectuating a withdrawal and resubmittal of its application with a single page letter, the applicant never filed a new application or any new supporting information.⁵⁴ In reaching this decision, we also relied on record evidence that showed the California Board’s direct participation in the withdrawal and resubmittal scheme, namely annual

⁴⁸ California Board March 18, 2019 Response at 3.

⁴⁹ Foothills March 5, 2019 Response at 2.

⁵⁰ 913 F.3d at 1104.

⁵¹ *Id.*

⁵² California Board March 18, 2019 Response at 2.

⁵³ *Id.* at 3; Foothills March 5, 2019 Response at 2.

⁵⁴ 170 FERC ¶ 61,135, at P 28; *see also Constitution*, 168 FERC ¶ 61,129 at PP 32-37 (rejecting the state’s argument that the applicant voluntarily resubmitted two certification requests in response to the state’s indication that more time was necessary to obtain and review additional information and that the state would have likely denied the applications otherwise).

reminder emails that the Board sent to the licensee just before the one-year deadline requesting withdrawal and resubmission of the application.⁵⁵ We further concluded that

[e]ven absent this evidence, prior to and upon receipt of each withdrawal, the California Board had the option of denying certification within the one year it was afforded under the CWA. Therefore, by accepting each of [the licensee's] withdrawal/resubmission letters, the California Board consented to the scheme of resetting the one-year deadline.⁵⁶

26. Similarly, in *Pacific Gas and Electric Co.*, we found that the California Board expected and encouraged the certification applicant to serially withdraw and resubmit an identical application to avoid the CWA's one-year waiver deadline.⁵⁷ With respect to the applicant's certification application for the surrender of its license, the California Board acknowledged when it commented on the draft EIS, and in every letter the Board sent acknowledging receipt of the resubmitted application, that the water quality certification could not be issued without a final CEQA document.⁵⁸ We found that the California Board's contention that the applicant's actions contributed to the delay ignored the California Board's own role in the process.⁵⁹

27. Here, too, the California Board expected NID to repeatedly withdraw and resubmit its application to avoid the CWA's one-year deadline. The Board acknowledged in its comments on the draft EIS that the water quality certification could not be issued until the CEQA process was complete and, accordingly, that NID would likely need to withdraw and resubmit its application.⁶⁰ Tellingly, as noted above, the Board did not

⁵⁵ *Southern California Edison Co.*, 170 FERC ¶ 61,135 at P 25.

⁵⁶ *Id.*

⁵⁷ 170 FERC ¶ 61,232 at P 31.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See supra* P 7. Indeed, state regulations codify this practice. *See* Cal. Code Regs, tit. 23, § 3836(c) ("If an application is determined to be complete by the certifying agency, but CEQA requires that the certifying agency review a final environmental document before taking a certification action, an extension of the federal period for certification cannot be obtained, and the federal period for certification will expire before the certifying agency can receive and properly review the necessary environmental documentation, the certifying agency shall deny without prejudice certification for any

dispute NID's repeated statements that the project had not changed between applications and that the Board had all of the information it needed to act.

28. The Board and Foothills's arguments that, because NID is the lead agency for CEQA and controls the timing for CEQA compliance, NID should not benefit from its own actions and the Board should not be deprived of its CWA certification authority are unpersuasive.⁶¹ We find that the Board's contention that NID alone is responsible for the delay in issuance of a water quality certification ignores the Board's own role in the process. The California Board has admitted that its administrative process often takes more than the one year permitted by the CWA. The state's reliance on a regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete does not excuse compliance with the CWA. Moreover, as we have explained, the "state's reason for delay [is] immaterial."⁶² "The plain language of [s]ection 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.'"⁶³

29. Lastly, the Board and Foothills argue that finding waiver here would serve no purpose because the Commission cannot issue a license until ESA consultation is complete.⁶⁴ Regardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies: where an applicant withdraws and resubmits a request for water quality certification to avoid section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401; thus has waived its section 401 authority.⁶⁵ Here, we find that the California Board failed to act

discharge resulting from the proposed activity *unless the applicant in writing withdraws the request for certification.*") (emphasis added).

⁶¹ See California Board March 18, 2019 Response at 2-3; Foothills March 5, 2019 Response at 2-3.

⁶² *Placer County*, 169 FERC ¶ 61,046 at P 20; see also *Constitution*, 168 FERC ¶ 61,129 at P 37.

⁶³ See, e.g., *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

⁶⁴ California Board March 18, 2019 Response at 2; Foothills March 5, 2019 Response at 3.

⁶⁵ *Constitution*, 168 FERC ¶ 61,129 at P 31.

within the one-year period on NID's March 15, 2012 application, thereby waiving its certification authority.

The Commission orders:

Nevada Irrigation District's February 19, 2019 request for the Commission to find waiver is granted. The Commission determines that the California State Water Resources Control Board has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the relicensing of NID's Yuba-Bear Hydroelectric Project No. 2266.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.