



# State Water Board Water Quality Certification Impacts on the Nevada Irrigation District

## Background

NID has filed a petition asking the U.S. Supreme Court to intervene and provide clarity about the state's ability to issue a water quality certification for NID's vital Yuba-Bear Hydroelectric Project.

The Federal Energy Regulatory Commission (FERC) has exclusive authority to issue licenses for hydroelectric projects, including the Yuba-Bear Project.

The Federal Clean Water Act gives states the opportunity within one year to issue water quality certification to add terms and conditions to the new FERC license. NID first sought California's water quality certification in 2012 and annually thereafter for six years.

In 2020, a federal court confirmed states only had one year to issue water quality certifications. Recognizing this decision placed California's certification of NID's Project in jeopardy, the State Water Board unilaterally and without a pending request issued a certification for NID's Project on August 14, 2020.

The fundamental question is whether the State Water Resources Control Board was required to act on NID's Water Quality Certification Application within one year of its submittal.

This issue is important because the certification that was issued was done so outside of the normal public process. Further, the state certification included a condition that would allow the State Water Board to modify the operating requirements of the hydropower project administratively and at any time during the license period through the issuance of new conditions.

The petition to the U.S. Supreme Court seeks to avoid these potential impacts by having the court agree with FERC that California waived its water quality certification authority by failing to act within one year.

This outcome would still mean that NID's Yuba-Bear Project would be operated consistent with all the new license's requirements to ensure balanced protection of all interests, including water supply for NID's customers, hydroelectric generation, recreation, instream flow, and protection of the environment.

## Implications

**Consequences could mean water supply shortages to NID's customers more than half the time and the reduced ability to carryover water in storage for use in the next year.** The conditions would also have devastating effects on recreation and on hydroelectric power production by decreasing revenue that is then used to subsidize water rates for the benefit of NID's customers.

- A 49% reduction in average annual hydroelectric power generation (a 131 gigawatt-hours per year reduction);
- A 56% reduction, totaling 76,000 acre-feet, in NID's water delivery target in the driest years and water supply shortages in more than 50 percent of years;
- 57-68% reduction in carryover storage, making NID more susceptible to critical drought years;
- 46% reduction in average annual power sales, totaling more than \$6.2 million per year;
- Environmental impacts to other fish and wildlife species, including the endangered yellow-legged frog.



## Timeline of Key Actions

### 2012

**March 2012:** NID submits its application to FERC for a new license for the Yuba-Bear Project, and separately applied to the State Water Board for Water Quality Certification. For the next six years, the State Water Board directs NID to withdraw and resubmit its 401 Application to prevent the running of the one-year Clean Water Act limitations period.

### 2019

**January 25, 2019:** the U.S. Court of Appeals for the Ninth Circuit issues its Hoopa Valley decision, concluding the Clean Water Act's requirement that state regulators act on Certification requests within one year means exactly what it says – one year.

**January 25, 2019:** the State Water Board issues a Denial Without Prejudice of NID's pending application for water quality certification.

**February 2019:** NID requested that FERC clarify whether the DC Circuit's Hoopa Valley Decision applied to NID, such that the State Water Board had waived its 401 authority, or alternatively, whether NID should submit another application for Certification in March.

**March 18, 2019:** the State Water Board files a response to NID's request, asking that FERC find the State Water Board did not waive its water quality certification authority

### 2020

**April 16, 2020:** FERC issues an "Order on Waiver of Water Quality Certification," finding that by failing to act on NID's initial application for Certification within one year, the State Water Board had waived its 401 Certification authority. Shortly thereafter, the State Water Board and local non-government organizations sought rehearing of the FERC Order.

**July 21, 2020:** FERC issues its "Order Addressing Arguments Raised on Rehearing," and upheld its original Order Granting Waiver.

**August 14, 2020:**, with no notice, no public hearing, or opportunity to be heard, the State Water Board's Executive Director issues the purported Yuba-Bear 401 Water Quality Certification to NID.

**August 17, 2020:** Foothill Water Network et al. petitions the Ninth Circuit Court of Appeals for review of FERC's Orders Granting waiver of Water Quality Certification requirements.

### 2021

**May 2021:** the Ninth Circuit Court of Appeals grants the parties' joint motion to consolidate the similar 401 certification considerations of NID, the Yuba Water Agency, and Merced Irrigation District cases.

### 2022

**August 4, 2022:** the Ninth Circuit Court of Appeals rejects FERC's waiver orders, holding that NID's 401 Certification holds.