



Foothills Water Network

Hon. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
Via electronic filing

April 2, 2020

Re: Foothills Water Network's Response in Opposition to Petition for Waiver Determination (P-2246-065)

Dear Ms. Bose:

The Foothills Water Network (FWN) and its member organizations¹ respectfully submit this response in opposition to the August 22, 2019 "Request" of Yuba County Water Agency (YCWA) that the Federal Energy Regulatory Commission (FERC or Commission) "confirm" that the State of California, through the State Water Resources Control Board, has waived Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. §1341, for the relicensing of the Yuba River Development Project (FERC no. 2246-065).² This response in opposition also responds to the Commission's "Notice of Petition for Waiver Determination," issued in the same docket on March 3, 2020.³

The instant response in opposition updates and supplements FWN's October 4, 2019 response in opposition to YCWA's August 22, 2019 Request for a determination of waiver.⁴

FWN and member organizations are parties to the relicensing proceedings for the Yuba River Development Project.⁵ Their motions to intervene contain descriptions of each organization and its interests in these proceedings.⁶

¹ Foothills Water Network, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council of Fly Fishers International (formerly Northern California Council Federation of Fly Fishers), Sierra Club, South Yuba River Citizens League, and Trout Unlimited.

² August 22, 2019 Letter of Michael A. Swiger, Counsel, Yuba County Water Agency, to Secretary Bose, eLibrary no. 20190822-5016 (Request for Waiver).

³ FERC, *Notice of Petition for Waiver Determination*, eLibrary no. 20200303-3032.

⁴ *See Response in Opposition of Foothills Water Network to August 22, 2019 "Request" of Yuba County Water Agency to Confirm Waiver of Water Quality Certification Yuba River Development Project, P-2246-065*, (Oct. 4, 2019), eLibrary no. 20191007-5004.

⁵ *See Motion to Intervene by Foothills Water Network, Adventure Connection, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Gold Country Fly Fishers, Nevada City Rancheria, Northern California Council Federation of Fly Fishers, Sierra Club, South Yuba River Citizens League, Tributary Whitewater Tours, And Trout Unlimited*, P-2246, (Aug. 25, 2017), eLibrary no. 20170825-5266. *See also Motion to Intervene by Friends of the River*, (Aug. 25, 2017), eLibrary no. 20170825-5244.

⁶ *See Id.*

For the reasons set forth in the enclosed response, FWN opposes a finding of waiver of certification authority and requests that FERC find that YCWA has impermissibly delayed the relicensing proceeding. FERC should order YCWA to complete CEQA and submit a new application for certification with a completed CEQA document, or, in the alternative, deny YCWA's application for relicensing the Yuba River Development Project for lack of diligent prosecution. The response letter is attached. Please feel free to contact me if you have any questions.

Respectfully submitted,



Traci Sheehan Van Thull
Foothills Water Network

with the requirements of the California Environmental Quality Act (CEQA), and will coordinate with the State Water Board and other Responsible Agencies under CEQA.”¹²

On August 3, 2018, YCWA withdrew and resubmitted its application for certification.¹³ The new application stated: “YCWA intends to be the Lead Agency for the purpose of compliance with the requirements of the California Environmental Quality Act (CEQA), and will coordinate with the State Water Board and other Responsible Agencies under CEQA.”¹⁴

On July 31, 2019, the State Water Board denied YCWA’s application without prejudice, explaining: “YWA is the CEQA lead agency for the Project and has not begun the CEQA process.”¹⁵

On August 22, 2019, YCWA submitted its Request for Waiver, requesting that FERC deem the State Water Board’s authority to issue certification for the Yuba River Development Project waived. Citing to *Hoopa Valley Tribe v. Federal Energy Regulatory Commission (Hoopa Valley Tribe)*,¹⁶ YCWA argued for waiver on the basis that YCWA withdrew and refiled its application with the State Water Board in 2018, and thus that the State Water Board issued the decision denying certification more than one year after YCWA filed the original application.

On October 4, 2019, FWN filed a *Response in Opposition of Foothills Water Network to August 22, 2019 “Request” of Yuba County Water Agency to Confirm Waiver of Water Quality Certification Yuba River Development Project, P-2246-065*.¹⁷

On March 3, 2020, the Commission issued a Notice of Petition for Waiver Determination in the docket for P-2246-065, requesting comments on YCWA’s August 22, 2019 request. The Notice treats YCWA’s request as a “petition.”¹⁸

While YCWA’s request has been pending, the Commission has interpreted the decision in *Hoopa Valley Tribe* to find waiver in other pending relicensings. On October 17, 2019, the Commission issued an Order Denying Rehearing on the Commission’s April 18, 2019 Declaratory Order finding that the State Water Board had waived water quality certification for Placer County Water Agency’s Middle Fork American River Project (FERC no. 2079).¹⁹ On February 20, 2020, the Commission issued a Declaratory Order on Waiver of Water Quality Certification, finding that the State Water Board had waived water quality certification for the relicensing of six of Southern California Edison’s Big Creek projects (P-67-133, P-120-028, P-

¹² *Id.*, p. 2.

¹³ YCWA’s second application for certification is included as part of Appendix B of its Request for Waiver, pdf pp. 22 ff.

¹⁴ *Id.*

¹⁵ Letter from Eileen Sobek, State Water Board, to Curt Aikens, Yuba County Water Agency, July 31, 2019. Included as Appendix A of Request for Waiver, pdf pp. 11-12.

¹⁶ 913 F.3d 1099 (D.C. Circ. 2019).

¹⁷ FWN, *Response in Opposition of Foothills Water Network to August 22, 2019 “Request” of Yuba County Water Agency to Confirm Waiver of Water Quality Certification Yuba River Development Project, P-2246-065*. (Oct. 4, 2019), eLibrary no. 20191007-5004.

¹⁸ Notice of Petition for Waiver Determination, *op. cit.*

¹⁹ 169 FERC ¶ 61,046 *Order Denying Rehearing*, P-2079-081 (Oct. 17, 2019).

2085-020, P-2086-039, P-2174-017, and P-2175-021).²⁰ On March 19, 2020, the Commission issued a Declaratory Order on Waiver of Water Quality Certification, finding that the State Water Board had waived water quality certification for the license surrender of the Kilarc-Cow Project (FERC no. 606).²¹

II. Argument

A. The Commission Should Deny Yuba County Water Agency's Request for a Finding of Waiver under CWA Section 401.

In its Request for Waiver, YCWA contends that, “under recent court and Commission precedents, the withdrawal and resubmittal scheme that the State Water Board directed YCWA to follow in this case resulted in a waiver by the State Water Board under CWA 401.”²² YCWA argues: “In light of the court’s ruling, it would be incorrect to view YCWA’s August 3, 2018 certification request as a ‘new request’ triggering a new one-year period, or as an actual withdrawal of its August 24, 2017 request.”²³ It further argues that the State Water Board’s July 31, 2019 Denial without Prejudice of YCWA’s August 3, 2018 application for certification is a “[h]orse of the [s]ame [c]olor,” the functional equivalent of a withdrawal and resubmittal of an application for certification.²⁴

YCWA overreaches in its reading of *Hoopa Valley Tribe* and in the portrayal of YCWA as a victim in this instance. The record in this case shows that the applicant has delayed certification in this proceeding, not the state agency. The record further shows that this delay was not indefinite or prejudicial to FERC’s administration of the Federal Power Act.

YCWA’s Request for Waiver is not a case where the agency and applicant have agreed to defer a certification decision. Rather, the record here shows that the state was unable to proceed due to YCWA’s failure to comply with a requirement of state law that was a condition precedent to the state issuing a certification decision.

In ruling on YCWA’s request, the Commission must determine how *an applicant’s* failure to comply with state law requirements for 401 certification affect the Commission’s interpretation of the one-year deadline for the state to “act” on a request for certification or risk waiver.

²⁰ 170 FERC ¶ 61,135, *Declaratory Order on Waiver of Water Quality Certification*, P-67-133, P-120-028, P-2085-020, P-2086-039, P-2174-017, and P-2175-021 (Feb. 20, 2020).

²¹ 170 FERC ¶ 61,232, *Declaratory Order on Waiver of Water Quality Certification*, FERC nos. 606-027 and 606-037 (Mar. 19, 2020) (Order on Waiver for Kilarc-Cow) (internal citations omitted).

²² Request for Waiver, p. 1.

²³ *Id.*, p. 5.

²⁴ *Id.*, p. 8.

1. YCWA's Inaction, Not the State's, Has Delayed the 401 Certification Proceeding.

Under California law, compliance with the California Environmental Quality Act (CEQA) is a condition precedent to the state's issuance of 401 certification.²⁵ California law permits a licensee that is a state agency, like YCWA, to be the Lead Agency for purposes of CEQA.²⁶ The lead CEQA agency is responsible for preparing and publishing the Environmental Impact Report (EIR) or negative declaration in a timely manner "prior to acting upon or approving the project" and must "certify that its decisionmaking body reviewed and considered the information contained in the EIR or negative declaration on the project."²⁷ Additionally, California law permits other jurisdictional state agencies to rely on a CEQA document prepared by another agency for a project.²⁸

Here, YCWA declared in its August 24, 2017 application for certification and reaffirmed in its August 3, 2018 application for certification its intent to serve as Lead Agency for purposes of CEQA compliance for the Yuba River Development Project.²⁹ The State Water Board stated its intent to rely on the CEQA document prepared and submitted by YCWA for purposes of satisfying CEQA prior to issuing a 401 certification.³⁰ The State Water Board informed YCWA that it could not issue a 401 certification until the YCWA issued the CEQA document.³¹ YCWA did not issue the CEQA document; instead, in 2018 it withdrew and resubmitted its 401 application, which served the purpose of giving YCWA more time to comply with CEQA. The State Water Board did not object because up until April 2019,³² the Commission's position was that the one-year timeline under Section 401 applied to "a request," each request was treated individually, and withdrawal and resubmittal of a request did not affect the time limit for processing a new request.³³

YCWA does not dispute that it voluntarily assumed the responsibility of being Lead Agency for CEQA or that it failed to fulfill those duties in a timely manner.³⁴ It does not dispute that its failure to produce a CEQA document after two years effectively blocked the State Water Board from issuing a 401 certification in accordance with state law.

²⁵ Cal. Code Regs. tit. 23, § 3856(f).

²⁶ Cal. Code Regs. tit. 14, §§ 15051, 15367.

²⁷ Cal. Code Regs. tit. 14 § 15050.

²⁸ Cal. Code Regs. tit. 14, §§ 15051, 15367.

²⁹ As quoted, *supra*.

³⁰ Request for Waiver, Appendix B, pdf p. 20-21. Email from Philip Choy, State Water Board, to Jim Lynch, HDR (July 25, 2018, 9:24 am), *see also* Letter from Eileen Sobeck, State Water Board, to Curt Aikens, Yuba County Water Agency, July 31, 2019. Included as Appendix A of Request for Waiver, pdf pp. 11-12.

³¹ *Id.*

³² The date of the *Declaratory Order on Waiver*, Placer County Water Agency, *op. cit.*

³³ 168 FERC ¶ 61,129, *Order on Voluntary Remand*, Constitution Pipeline Company, LLC (Docket CP18-5-000 *et al.*).

³⁴ Request for Waiver, p. 4, *see also* p. 7 fn. 34 ("Nonetheless, YCWA estimates that as lead CEQA agency, it would be required to spend approximately \$300,000 to complete the CEQA process, in addition to the substantial administrative fees YCWA pays to the State Water Board every year in connection with the CWA 401 certification process").

In August, 2019, YCWA reversed its position and asked the Commission to find that YCWA’s application for certification was “complete” in the absence of the CEQA document, or that completion of YCWA’s acknowledged CEQA responsibility is utterly separate from completeness of its application for certification.³⁵

State law is clear that that environmental review under CEQA must be completed before the State Water Board can issue a final certification decision.³⁶ Further, even if the law were not clear, the issue of whether the State Water Board can issue a certification in the absence of CEQA is a matter of state law. As the Commission explained in its rulemaking for 18 C.F.R. § 4.34, responsibility for determining compliance with state law requirements rests with the state:

Under both the old and the new regulations, there is no issue of whether state agency procedural requirements apply; clearly they do, and they must be complied with. The sole issue is who has the responsibility for determining whether the applicant has complied with those procedural requirements. The amended regulation places that responsibility squarely where it belongs, and where the Commission always intended it to be: on the state agencies responsible for implementing those procedural requirements.

Order No. 533, “Regulations Governing Submittal of Proposed Hydropower License Conditions,” 56 Fed. Reg. 23,108-01, 23,127 (May 20, 1991).

Where a licensee fails to comply with a condition precedent to issuance of 401 certification under state law, as here, the Commission should not enable the licensee to profit from its own delinquency by finding that the licensee’s actions have forfeited the state’s right to condition the project to comply with water quality standards.

2. The State Water Board Did Not Agree to Delay Licensing.

YCWA characterizes the State Water Board’s correspondence regarding 401 Certification as “instruction” or “direction” to “withdraw and resubmit” its application for 401 certification.³⁷ This is a mischaracterization of the correspondence. Rather, the State Water Board informed YCWA that the State Water Board could not issue 401 certification without a CEQA document. YCWA’s action to “withdraw and resubmit” its application for 401 certification was a voluntary decision that YCWA made to avoid a denial of certification based on its failure to comply with CEQA.

As Appendix B of the Request for Waiver demonstrates,³⁸ the State Water Board requested the required CEQA document from YCWA and its consultant HDR in order to

³⁵ Request for Waiver, p. 8 (“Further, the State Water Board’s July 31, 2019 letter did not assert that YCWA’s application somehow became incomplete with the passage of time. Rather, the letter discussed the need to complete the CEQA process ...”).

³⁶ See Cal. Code Regs. tit. 23, § 3836(c).

³⁷ See Request for Waiver, p. 1 (emphasis added); see also “YCWA believes that under recent court and Commission precedents, the withdrawal and resubmittal scheme that the State Water Board *directed* YCWA to follow in this case resulted in a waiver by the State Water Board under CWA 401.” *Id.*

³⁸ See Request for Waiver, p. 3.

complete certification. The State Water Board's July 25, 2018 e-mail to YCWA and HDR stated:

YCWA's water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final CEQA document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification. Please submit a withdraw/resubmit of the certification application as soon as possible. Let me know if you have any questions.³⁹

Correspondence between State Water Board staff and YCWA's agent on July 25, 2018 later in the day makes it explicit that the alternative to a letter from YCWA to the State Water Board withdrawing and resubmitting its application for certification would be denial without prejudice: "My management usually gets a little antsy when our action date gets below 3 weeks because a 'deny without prejudice' letter takes time to route to our Executive Director. If possible, please submit the [withdraw and resubmit] letter by next Friday."⁴⁰

The Request for Waiver portrays the State Water Board as the actor and YCWA as a passive respondent without choice. This is false. YCWA characterizes its own August 3, 2018 withdrawal and resubmittal of its application for certification as "*pro forma*." It was not. It was an affirmative action of YCWA to avoid denial of certification.

The fact that the State Water Board accommodated YCWA's request to withdraw and resubmit its application rather than denying the application cannot be construed as an agreement by the State Water Board to delay FERC's licensing procedure. YCWA had already delayed it by failing to prepare a CEQA document to accompany its certification request.⁴¹

YCWA's failure to timely prepare the CEQA document, does not comport with its obligations as a license applicant. The applicant for a FERC license has a duty to diligently perform its obligations. *See, e.g., Mountain Rhythm Resources*, 90 FERC ¶ 61,088 (Jan. 30, 2000).

It is not the state but the applicant that has "shelved" the water quality certification for the relicensing of the Yuba River Development Project by failing to satisfy a condition precedent to the state's action on certification. It is not the state but the *applicant* that has delayed FERC's ability to issue a new federal license. The Commission should not find waiver in these circumstances.

³⁹ See citation in Request for Waiver, p. 3. For full text, see Request for Waiver, Appendix B, pdf pp. 20-21. Email from Philip Choy, State Water Board, to Geoff Rabone, YCWA, and Jim Lynch, HDR (July 25, 2018, 9:24 am).

⁴⁰ Request for Waiver, Appendix B, pdf p. 20. Email from Philip Choy, State Water Board, to Jim Lynch, HDR (July 25, 2018, 11:08 am).

⁴¹ Conservation Groups do not concede that a licensee's voluntary withdrawal and resubmittal of an application for water quality certification does not trigger a new one-year clock for action on the (new) application. However, the fact set in the instant case compels a finding of non-waiver regardless of any determination on that broader issue.

3. There is No Excuse for YCWA's Non-Performance.

YCWA makes a series of arguments as to why its failure to perform its CEQA obligations is not germane to its Request for Waiver. These arguments are meritless.

YCWA argues that the Clean Water Act is a federal statute and that Section 401 does not mention state environmental review.⁴² Though the Clean Water Act is a federal statute, it delegates specific authorities to the states to certify compliance with state law. Federal courts have ruled that the states determine the procedures of certification according to state law, and that the jurisdiction for challenges to certifications is in state court. *See Roosevelt Campobello Intern. Park Com'n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982). The fact that the Clean Water Act does not populate the federal statute with particular aspects of the laws of the fifty states follows from the delegation of authority *and procedure* to the states under cooperative federalism.

YCWA argues that the need to complete environmental review does not toll the one-year deadline for certification.⁴³ Again, it is YCWA that has failed to perform its CEQA obligations, not the State Water Board. Nothing prevented YCWA from completing CEQA prior to applying for certification or otherwise completing CEQA in sufficient time to support the State Water Board's making a timely decision on certification.⁴⁴

YCWA argues that the Commission's "exhaustive" NEPA document provides "more than adequate environmental review" for certification.⁴⁵ Stating the equivalence of NEPA and CEQA as a general matter is legally incorrect.⁴⁶ In addition, the Commission is not charged with the authority to judge the adequacy of an actual or prospective use of a NEPA document for purposes of CEQA, a state statute. YCWA had the option to supplement the Commission's EIS in order to complete CEQA.⁴⁷ YCWA did not do so. Moreover, the Commission did not issue

⁴² Request for Waiver, p. 7.

⁴³ *Id.*

⁴⁴ It is no more unreasonable for YCWA to have anticipated, prior to *Hoopa Valley Tribe*, a "bright line" interpretation of the one-year limit on certification than it is for the State Water Board to have anticipated such a strict limitation in accepting YCWA's withdrawal and resubmittal. Both entities had equal access to the statute.

⁴⁵ *Id.*

⁴⁶ *See Washoe Meadows Cmty. v. Dep't of Parks & Recreation*, 17 Cal. App. 5th 277, 290; *see also* Carstens, Douglas and Arthur Pugsley "The Recent Reemergence of CEQA's Substantive Mandate", California Environmental Law Reporter, March 2008 Issue 3; Cal. Code Regs. tit. 14, § 15221(b), "Because NEPA does not require separate discussion of mitigation measures or growth inducing impacts, these points of analysis will need to be added, supplemented, or identified before the EIS can be used as an EIR."

⁴⁷ FERC issued the FEIS for the relicensing of the Yuba River Development Project on January 2, 2019. Clearly, YCWA could not have used the FEIS to complete CEQA prior to the initial resubmittal of the application for certification on July 29, 2018. This sequence highlights an additional procedural disconnect that neither the Commission nor the Court in *Hoopa Valley tribe* has addressed. The requirement to apply for certification within 60 days of the Notice of Ready for Environmental Analysis (18 C.F.R. § 4.34(b)(5)(i)) makes it virtually impossible for certification to be informed by FERC's FEIS in a relicensing proceeding under the Integrated Licensing Process. *See* FERC, Integrated Licensing Process: Post-Application Activity, *available at* <https://www.ferc.gov/resources/processes/flow/hydro-6.asp>.

the Final EIS for the Yuba River Development Project relicensing until January 2, 2019, five months after YCWA submitted its second application for certification.⁴⁸

4. There Was No Indefinite Delay in the Licensing Proceeding or Repeated Withdrawal of the Application for Certification.

In its Request for Waiver, YCWA repeats the court's citation in *Hoopa Valley Tribe to Alcoa Power Generating Inc. v. FERC*,⁴⁹ which held that “[t]he purpose of the waiver provision is to prevent a state from *indefinitely* delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401.”⁵⁰

YCWA continues to argue that its own 2018 request was not a new request at all, because it was superficially similar to the actions found lacking in *Hoopa Valley Tribe*:

Further, the court found that the licensee's withdrawals and resubmissions “were not new requests at all;” rather, the licensee “sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . *in the same one page letter . . .*” This is precisely what YCWA did in its August 3, 2018 withdrawal and resubmittal. In light of the court's ruling, it would be incorrect to view YCWA's August 3, 2018 certification request as a “new request” triggering a new one-year period, or as an actual withdrawal of its August 24, 2017 request. The filing was purely *pro forma*, as in *Hoopa Valley*, with the sole intent of following the State Water Board's practice of avoiding the one year statutory deadline by instructing applicants to withdraw prior to the one-year deadline and then refile.⁵¹

There is an essential temporal difference between *Hoopa Valley Tribe* and the State Water Board's e-mails to YCWA, as cited *supra*. The State Water Board placed a clear and definite requirement on YCWA: YCWA needed to complete its CEQA responsibilities before the State Water Board could process the certification,⁵² regardless of the “technical” adequacy of YCWA's application for certification.⁵³ There is no evidence *in this case* of indefinite delay by the State Water Board. YCWA's affirmation of YCWA's own “sole intent” to avoid the statutory deadline is simply that: an affirmation of *the licensee's effort* to delay certification. YCWA's Request for Waiver is entirely consistent with that affirmed evasive action. YCWA never

⁴⁸ FERC, *Final Environmental Impact Statement for Hydropower License, Yuba River Development Project, Project No. 2246-065 – California* (Jan. 2, 2019), eLibrary no. 20190102-3000. FERC staff revised the Proposed Action based on response to comments. See for example, summer flows downstream of New Bullards Bar Dam, FEIS p. 5-17/pdf. p. 604.

⁴⁹ 643 F.3d 963, 972 (D.C. Cir. 2011).

⁵⁰ Request for Waiver, p. 5, citing to *Hoopa Valley Tribe* at 1104 (emphasis added).

⁵¹ Request for Waiver, p. 5.

⁵² Request for Waiver, Appendix B, pdf pp. 20-21. Email from Philip Choy, State Water Board, to Geoff Rabone, YCWA, and Jim Lynch, HDR (July 25, 2018, 9:24 am).

⁵³ Request for Waiver, Appendix A, State Water Board's Denial without Prejudice of Water Quality Certification, (Jul. 31, 2019), pdf pp. 11-12. (“The denial without prejudice carries with it no judgment on the technical merits of the Project.”)

demonstrated any intent to complete CEQA for the certification and has not initiated scoping for CEQA to this day.⁵⁴

In orders subsequent to *Hoopa Valley Tribe*, the Commission has called particular attention to the serial withdrawal and resubmittal of identical applications for certification lasting many years.

In the Order Denying Rehearing on PCWA, the Commission calls out “the repeated withdrawal and refile of the same application.”⁵⁵

In the Order on Waiver for Kilarc-Cow, the Commission states: “PG&E has withdrawn and refiled the same application every year from its initial request in 2009 through 2018”⁵⁶ noting explicitly that in the title of subsection III(A)(2) “The [d]elay [w]as [i]ndefinite.”⁵⁷

The delay in this case was not indefinite. The State Water Board did not treat YCWA’s 2018 withdrawal of its application for certification to be “*pro forma*.” In the face of YCWA’s complete inaction on CEQA, the State Water Board, on July 31, 2019, denied YCWA’s application for certification.

5. Denial Means Denial.

Reproducing the term “scheme” from the description in *Hoopa Valley Tribe*, YCWA argues that the State Water Board’s denial without prejudice is the functional equivalent of withdraw and resubmit, because in the instant case it has the same “effect.”⁵⁸

The Clean Water Act delegates authority to the states to determine whether a proposed federal action is consistent with state laws relating to water quality and any “other appropriate requirement of state law.” 33 U.S.C. § 1341(d). Imputing an alternative meaning to a denial of certification and thus holding such denial invalid would deny the foundational authority that the Clean Water Act delegates to the states. If a state cannot deny certification, the authority to certify consistency with state law has no meaning. YCWA’s proposal to authorize FERC, a federal agency, to ignore a state’s timely denial of a certification application ignores the plain language of section 401, which provides that “[n]o license or permit shall be granted if certification has been denied by the State,” 33 U.S.C. § 1341(a)(1).

The Commission must reject YCWA’s representation of what the State Water Board’s Denial without Prejudice was “designed” to do.⁵⁹ On its face, denial means denial.

⁵⁴ Yuba County Water Agency has not initiated scoping for CEQA review of the Yuba River Development Project as of the filing date for these comments, April 2, 2020.

⁵⁵ *Order Denying Rehearing*, P-2079-081 at ¶ 18.

⁵⁶ Order on Waiver for Kilarc-Cow at ¶ 25.

⁵⁷ *Id.*, p. 14.

⁵⁸ Request for Waiver, p. 8.

⁵⁹ *Id.*, p. 9.

B. The State Water Board Has Not Had the Opportunity to Examine the Project’s Impacts on Beneficial Uses in the Lower Yuba River Watershed following Environmental Review.

FWN concurs with the March 26, 2020 comments of the California Department of Fish and Wildlife (CDFW) on the instant Petition for Waiver, which state in part: “The [State Water Board] has not had the chance, after release of the FEIS, to determine through the CEQA process, or through the Section 401 process, whether the conditions in the FEIS fully mitigate for the Project and protect beneficial uses of water pursuant to Section 303 of the Clean Water Act (33 U.S.C. § 1313).”⁶⁰

As further noted in CDFW’s comments on the Notice of Petition for Waiver,⁶¹ the State Water Board in its *Comments on Ready for Environmental Analysis and Preliminary Terms and Conditions for Yuba River Development Project, Federal Energy Regulatory Commission Project No. 2246*⁶² already highlighted concerns on the following subjects:

- Impacts of Daguerre Point Dam
- Impacts of Englebright Dam
- Use of Multiple Intakes at Colgate Powerhouse
- Frequency of Closure of Lohman Ridge Diversion Tunnel
- Streamflow, Control Project Ramping and Flow Fluctuation downstream of New Bullards Bar Dam
- Sediment Enhancements downstream of New Bullards Bar Dam
- Sediment Management downstream of Englebright Dam
- Public Access to North Yuba River below New Bullards Bar Dam
- Water Temperature Management and Streamflow downstream of Narrows 2 Powerhouse and Narrows 2 Full Bypass
- Narrows 2 Intake Extension Project
- Introduction of Anadromous Fish upstream of Englebright Dam
- Sediment Management below Our House and Log Cabin Diversion Dams

Without proper examination of these issues as required under CEQA and the Clean Water Act, the beneficial uses of water in the Yuba River watershed are at risk for the next thirty to fifty years to environmental harms that the Federal Power Act may not address.

⁶⁰ See Comment of California Department of Fish and Wildlife under P-2246-065, Notice of Petition for Waiver Determination (Mar. 26, 2020), eLibrary no. 20200326-5188, p. 5.

⁶¹ *Id.*, pp. 5-7.

⁶² State Water Board, *Comments on Ready for Environmental Analysis and Preliminary Terms and Conditions for Yuba River Development Project, Federal Energy Regulatory Commission Project No. 2246* (Aug. 25, 2017), eLibrary no. 20170825-5276.

C. The Commission Should Find that an Application for 401 Certification Accompanied by a CEQA Document would Constitute a New and Different Application, or, in the Alternative, Dismiss Yuba County Water Agency’s License Application on the Grounds that YCWA Has Delayed the License Proceeding.

1. An Application Accompanied by a CEQA Document Would Constitute a New and Different Application.

As discussed *supra*, YCWA argues that “YCWA’s application *was* complete.”⁶³ Yet YCWA does not dispute that it failed to submit sufficient documentation to permit the State Water Board to act.

A complete [401] application shall include all of the following information and items: ... A copy of any draft or final CEQA document(s), if available, prepared for the activity. Although CEQA documentation is not required for a complete application, the certifying agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action.

Cal. Code Regs. tit. 23, § 3856, subd. (f).

As noted, *supra*, the State Water Board clearly distinguished between the “technical” merits of YCWA’s application and the State Water Board’s ability to act:

[W]hen a proposed project's “compliance with water quality standards and other appropriate requirements is not yet necessarily determined, but the application suffers from some procedural inadequacy (e.g., failure to ... meet CEQA requirements),” the State Water Board may deny certification without prejudice. (Cal. Code Regs., tit. 23, § 3837, subd. (b)(2).)⁶⁴

The Court in *Hoopa Valley Tribe* left open the question “how different a subsequent request must be to constitute a ‘new request’ such that it restarts the one-year clock.”⁶⁵

Similarly, the Commission has affirmed that it is an open issue whether a strict interpretation of the one-year deadline applies to a circumstance where the proposed project is changed, or if the licensee’s own actions prevent the state from issuing a decision on the merits of a certification in accordance with state law. For example, in its April 19, 2019 *Declaratory Order on Waiver of Water Quality Certification* for the Middle Fork American Project, the Commission stated:

In determining that a state waives its Section 401 authority when it agrees to the repeated withdrawal and refile of requests for water quality certification, the *Hoopa Valley* court

⁶³ *Id.*

⁶⁴ State Water Board, Denial without Prejudice of Water Quality Certification, Appendix A of Request for Waiver, pdf p. 11.

⁶⁵ *Hoopa Valley Tribe* at 1104.

noted that certain matters were not before it: the court declined to resolve the legitimacy of an arrangement in which an applicant withdrew its request and submitted a wholly new one in its place, concluding that there was no need to determine how different a request must be to constitute a new request such that it restarts the one-year clock. We do not believe that these issues are present in this case, where the record shows that Placer County did not ever file a new application.⁶⁶

Both the Order on Big Creek and the Order on Kilarc-Cow also place emphasis on the fact that the only document requested of licensees by the State Water Board was a statement affirming the licensees' respective withdrawal and resubmittal of a request for certification.⁶⁷ Here, the State Water Board clearly requested more, namely an environmental document that would likely run upwards of 100 pages, perhaps several hundred pages. That is a substantial request, not a perfunctory one.

The Commission should determine in the instant case, where the applicant has sufficient authority and has voluntarily committed to prepare the necessary CEQA document, that an application accompanied by a CEQA document would be a new application on which the State Water Board would have one year to act. The Commission should order YCWA to complete the necessary CEQA document and submit a new application for 401 certification accompanied by a completed CEQA document forthwith.

2. The Commission Continues to Have the Authority to Dictate the Timeline of the Licensing by Denying YCWA's License Application.

In the alternative, FERC has the authority to dismiss YCWA's license application for YCWA's failure to diligently prosecute the application for 401 certification. *See Mountain Rhythm Resources*, 90 FERC ¶ 61,088 (Jan. 30, 2000); *see also In re Swift River Company*, 41 FERC ¶ 61,146 (Nov. 6, 1987) (requiring applicant whose Section 401 certification was denied to exercise due diligence in pursuing any available appeal remedies). FERC policy holds that "indefinite delays in processing applications are not in the public interest."⁶⁸ YCWA has failed to timely act to comply with CEQA. This in turn delayed 401 certification. If the Commission has determined that the paramount issue in certification is timeliness, the Commission should hold all sources of delay equally accountable. In the instant case, this would mean denying the application of YCWA for relicensing.

III. Conclusion

The Commission should not allow YCWA to run out the clock and then point fingers at the State Water Board. It should not reward YCWA for failing to fulfill legal obligations.

⁶⁶ See 167 FERC ¶ 61,056, *Declaratory Order on Waiver of Water Quality Certification*, Placer County Water Agency, P-2079-080, April 19, 2019, (finding waiver of certification, relying on *Hoopa Valley Tribe*), at ¶ 18.

⁶⁷ *Order on Waiver*, Big Creek at ¶ 29 ([N]othing in the record indicates that between 2009 and 2017, SCE ever filed a new application"); *Order on Waiver*, Kilarc-Cow at ¶ 30 referring to a "single page letter."

⁶⁸ *Georgia-Pacific Corporation*, 35 FERC ¶ 61,120, n. 8 (April 25, 1986); *Town of Summersville, W. Va. v. FERC*, 780 F.2d 1034, 1040 (D.C. Cir. 1986).

The record shows that the State Water Board has diligently acted in processing YCWA's application. Contrary to YCWA's assertions, the current delays in the 401 proceeding are due to YCWA's failure to provide information necessary to fully evaluate the Project's potential impacts on water quality over the term of any new license by preparing the environmental document required under state law.

The Commission should find that the California State Water Resources Control Board has *not* waived Clean Water Act § 401 Water Quality Certification for the relicensing of the Yuba River Development Project. On the contrary, the Commission should order YCWA to complete CEQA and submit a new application with a completed CEQA document forthwith, or, in the alternative, deny YCWA's application for relicensing the Yuba River Development Project for lack of diligent prosecution.

Thank you for considering this response in opposition to Yuba County Water Agency's Request for Waiver.

Respectfully submitted this 2nd day of April, 2020,



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