



Foothills Water Network

**BEFORE THE
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Nevada Irrigation District)

**Yuba-Bear Hydroelectric Project
Project No. 2266-102**

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

**Re: ANSWER OF Foothills Water Network to February 19, 2019
“REQUEST” OF NEVADA IRRIGATION DISTRICT TO CONFIRM WAIVER OF
WATER QUALITY CERTIFICATION YUBA-BEAR HYDROELECTRIC PROJECT,
P-2266-102**

Via electronic filing

Dear Ms. Bose:

The Foothills Water Network (FWN or Network) and its member organizations¹ respectfully submit this answer to the February 19, 2019 “Request” of Nevada Irrigation District (NID) that the Federal Energy Regulatory Commission (FERC or Commission) “confirm” that the State of California, through the State Water Resources Control Board (State Water 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-Bear Hydroelectric Project (FERC no. 2266-102).²

Since NID’s “Request” is irregular and does not clearly fit into a defined procedure before the Commission, FWN treats NID’s referenced February 19, 2019 filing as a motion. FWN’s answer within 15 days is thus timely under 18 CFR § 385.213.

The Commission should deny NID’s Request. In the first instance, the court has not issued its mandate in *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir. Jan. 25, 2019), and thus it does not yet have any precedential value. The Commission should not waive certification

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 Federation of Fly Fishers, Save Auburn Ravine Salmon and Steelhead, Sierra Club, Sierra Foothills Audubon Society, South Yuba River Citizens League, and Trout Unlimited.

² February 19, 2019 Letter of Remleh Scherzinger, General Manager, Nevada Irrigation District, to Secretary Bose, eLibrary no. 20190219-5133 (Request for Waiver).

for any pending licensing prior to the exhaustion of potential appeal and issuance of the court's mandate. Such action would create substantial and unnecessary procedural confusion and disarray should the judicial panel's decision in *Hoopa Valley Tribe v. FERC* be modified or reversed on any subsequent appeal.

NID alleges that the certification should be deemed waived because NID withdrew and refiled its application with the State Water Board several times, and so it has been more than one-year since NID filed its initial application. The Commission has long held that the withdrawal and resubmittal of a certification application restarts the one-year clock under CWA section 401.³ This practice became necessary to ensure an adequate record as the basis for the State's certification decision after the Commission changed its rules to start the one-year clock at the time an application is filed rather than at the time the State deems an application complete. Under the Commission's regulations, 18 C.F.R. § 5.23(b), NID was required to file an application for certification not later than 60 days after the Notice of Readiness for Environmental Analysis. Accordingly, it filed its first application on March 15, 2012. This was 2 years and 9 months before the Commission issued the Final EIS. The State Water Board's reliance on FERC's longstanding practice should not be cause for a finding of waiver, which could contribute to the project's non-compliance with the State's water quality standards over the 30 to 50-year term of any new license.

In addition, the facts of the status of NID's pending certification clearly distinguish it from *Hoopa Valley Tribe v. FERC*. In that case, the judicial panel found that the State Water Board and Oregon Department of Environmental Quality had entered into an agreement to defer issuance of water quality certifications under Clean Water Act section 401. Leaving aside whether that finding was correct, there plainly was no such agreement here. Instead, the State Water Board repeatedly requested that NID provide information needed to complete the certification process under state law.

Mr. Scherzinger acknowledged in the Request for Waiver that, "[e]ach of the [California State Water Resources Control Board's reply] letters [to NID] cited the need to complete environmental review under the California Environmental Quality Act (CEQA) before the State Water Board could grant 401 WQC." Request for Waiver, p. 2. NID, at its own election, is lead agency for CEQA for the Certification. That means it controls not only the timing and submission of information necessary to prepare the Environmental Impact Report that is a condition precedent to the State Water Board's issuance of a certification under state law, but also the preparation of the actual document. The ball is squarely in NID's court.

The opportunity to withdraw and resubmit, as well as the State Water Board's denial of NID's application without prejudice, was an accommodation by the State Water Board to NID. Prior to the instant request, at no time has NID objected to the State Water Board's procedures, which have plainly inured to NID's benefit. Unlike the Klamath Project relicensing, where the licensee agreed to implement numerous interim measures to improve water quality pending

³ See, e.g., *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, *6 (Jan. 11, 2018); *Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc.*, 164 FERC ¶ 61,084, *10-11 (Aug. 6, 2018); *Idaho Power Co.*, 161 FERC ¶ 61284, *1 (Dec. 21, 2017) ("Since then, Idaho Power has withdrawn and refiled its applications each year, thus establishing a new one-year deadline.").

issuance of a new license, NID is operating under substantially the same conditions of its 1963 license, which favor power generation over environmental protection, pending issuance of a new license.

Further, as Mr. Scherzinger also acknowledges, FERC staff has contributed to the delay in relicensing the Yuba-Bear Project because it has not yet initiated formal consultation under Section 7 of the Endangered Species Act, 16 U.S.C. §1536, with the National Marine Fisheries Service, pending developments in the licensing of the Yuba River Development Project (FERC no. 2246-065), downstream of the Yuba-Bear Project. See *Final Environmental Impact Statement for the Upper Drum-Spaulding Hydroelectric Project, Lower Drum Hydroelectric Project, Deer Creek Hydroelectric Project, and Yuba-Bear Hydroelectric Project*, p. lxxv.⁴

The record shows that the State Water Board has diligently acted in processing NID's application. Contrary to NID's assertions, the current delays in the 401 proceeding are due to NID's failure to provide information necessary to fully evaluate the Project's potential impacts on water quality over the term of any new license, and to prepare the environmental document required under state law. In addition, the record shows that the Commission could not act on NID's license application regardless of the 401 proceeding because it has not yet completed consultation under ESA section 7. Thus, depriving the State Water Board of its proper exercise of authority in these circumstances would serve neither the public interest nor practical purpose.

Thank you for considering this answer in opposition to Nevada Irrigation District's Request for Waiver. 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-Bear Project. In the event the Commission is considering a finding of waiver, FWN requests that the Commission formally notice and solicit comments on NID's Request for Waiver prior to taking any final action.

Respectfully submitted this 5th day of March, 2019,



Foothills Water Network

A handwritten signature in black ink, appearing to read 'TJV'.

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⁴ FEIS for Yuba-Bear, Drum-Spaulding, Lower Drum, and Deer Creek projects, December 19, 2014, eLibrary no. 20141219-4003.



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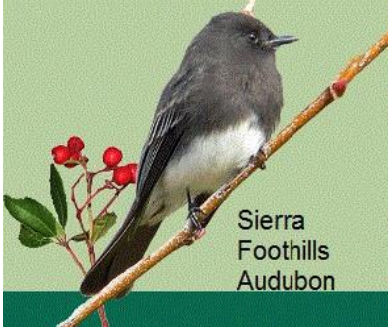
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