

167 FERC ¶ 61,056
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Placer County Water Agency

Project No. 2079-080

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued April 18, 2019)

1. Placer County Water Agency (Placer County), licensee for the Middle Fork American Project No. 2079, located on the Middle Fork of the American and Rubicon Rivers and Duncan, North, and South Fork Long Canyon Creeks in Placer and El Dorado Counties, California, has filed a petition for an order declaring that the California State Water Resources Control Board (California Board) has waived its authority under section 401(a)(1) of the Clean Water Act¹ to issue water quality certification with respect to the relicensing of the project. This order grants the petition.

Background

2. On March 13, 1963, the Federal Power Commission issued Placer County a 50-year original license to construct, operate and maintain what is now the 223.753-megawatt Middle Fork American Project. By its terms, the license was set to expire on February 28, 2013.

3. On February 23, 2011, Placer County filed an application for a new license for the project. On June 7, 2011, the Commission issued a notice accepting the application and indicating that it was ready for environmental analysis.

4. On July 19, 2011, Placer County filed with the Commission a copy of a July 15, 2011, application it had filed with the California Board, requesting that the board issue water quality certification for the project, pursuant to section 401 of the Clean Water

¹ 33 U.S.C. § 1341(a)(1) (2012).

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Act.² The filing also included a return receipt, showing that the California Board had received the application on July 18, 2011.

5. On August 10, 2011, the California Board filed with the Commission a copy of a letter to Placer County, acknowledging receipt of the water quality certification application, which it stated “initiates a one-year time clock for the State Water Board to act on the request for water quality certification” and stating that “State Water Board staff have determined the Application is complete for filing.”³

6. By letter to the California Board dated June 12, 2012, Placer County stated that it “hereby simultaneously withdraws its outstanding request for Water Quality Certification and refiles its request for Water Quality Certification”⁴ Thereafter, Placer County withdrew and refiled its certification request on June 7, 2013, June 4, 2014, May 29, 2015, May 19, 2016, May 17, 2017, and May 14, 2018.⁵ The California Board actively participated in this process, on occasion directly requesting the withdrawal and refileing.⁶

² 33 U.S.C. § 1341(a)(1) (2012).

³ While 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 Placer County’s application was complete precludes any argument on this score.

⁴ *See* letter from Andrew Fecko (Resource Planning Administrator, Placer County) to Mr. Thomas Howard (Executive Director, California Board) (Petition for Declaratory Order, Attachment B, filed Feb. 22, 2019).

⁵ Petition for Declaratory Order at 4.

⁶ *See, e.g.*, E-mail from Michael Maher (Water Board) to Ben Ransom (Placer County) (June 6, 2013) (“I am checking in with you about the withdrawal and resubmittal letter we discussed last week . . . could you please generate a letter and send it out to us by tomorrow?”) (Petition for Declaratory Order at Attachment A); E-mail from Michael Maher (Water Board) to Ben Ransom (May 20, 2014) (“To prevent denial of your request without prejudice, please submit a request to withdraw and resubmit your application before [June 7, 2014]”) (Petition for Declaratory Order at Attachment A); E-mail from Meiling Roddam (California Board) to Ben Ransom (May 4, 2016) (“[P]lease send the withdrawal/resubmittal letter by May 19, 2016”) (Petition for Declaratory Order at Attachment A); E-mail from Meiling Roddam to Ben Ransom (May 5, 2017) (“I respectfully request that you withdraw and resubmit the application for certification for (continued ...)”)

To date, the California Board has not acted on, by either denying or approving, Placer County's application.

7. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Hoopa Valley Tribe v. FERC (Hoopa Valley)*,⁷ ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state had waived certification.

8. On February 22, 2019, Placer County filed the instant petition for declaratory order, citing *Hoopa Valley* and asking the Commission to declare that the California Board had waived its certification authority for the Middle Fork American Project relicensing.

9. On March 13, 2019, the Commission issued public notice of the petition, setting March 28, 2019, as the deadline for intervening, protesting, or filing comments. Merced Irrigation District, the U.S. Department of Agriculture, the County of Placer, California, the California Board, and the Foothills Water Network (Foothills)⁸ filed timely motions to intervene. The California Department of Fish and Wildlife (California Fish and Wildlife) filed a protest, but stated that it was not moving to intervene.

Discussion

10. Section 401(a)(1) of the Clean Water Act provides 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 must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates.⁹ If the state "fails or

the Middle Fork American River Project before the May 19 deadline.") (Petition for Declaratory Order at Attachment A); E-mail from Meiling Colombano (California Board) to Ben Ransom (May 10, 2018) ("Just a reminder that the withdraw and resubmit date for the application for 401 water quality certification is May 17. If you could please send it to me before May 17, I would greatly appreciate it.") (Petition for Declaratory Order at Attachment A).

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

⁸ Foothills is a group of non-governmental organizations with an interest in river and watershed restoration and protection benefits for the Yuba, Bear, and American River watersheds.

⁹ 33 U.S.C. § 1341(a)(1).

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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,” certification is waived.¹⁰ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.¹¹ Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become a condition of any federal license that is issued.¹²

11. In *Hoopa Valley*, the court answered in the affirmative the question of “whether 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.”¹³ The court concluded that where a licensee each year sent a letter¹⁴ indicating withdrawal of its certification request and resubmission of the same “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [the Commission’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”¹⁵ 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.”¹⁶

¹⁰ *Id.*

¹¹ *Id.* The agency also may not issue an authorization if certification has been denied.

¹² 33 U.S.C. § 1341(d). See *City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

¹³ 913 F.3d at 1103. The court recognized that, as of the time of briefing, 27 of the 43 licensing applications before the Commission were awaiting state certification. *Id.* at 1104. One of those applications was that for the Middle Fork American Project.

¹⁴ In the *Hoopa Valley* case, 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.* This also occurred in the case before us.

¹⁵ *Id.*

¹⁶ *Id.*

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12. *Hoopa Valley* provides a definitive answer to the question posed here. While the California Board and Placer County may not have had a formal agreement regarding withdrawing and refiling the certification application, the record shows that both entities worked to ensure that this would take place each year.¹⁷ The fact that such correspondence took place electronically rather than by letter is immaterial. Similarly to *Hoopa Valley*, the two entities agreed upon a procedure that delayed a certification decision by over six years. This process has been a cause of lengthy delay in the Middle Fork American Project relicensing¹⁸ and, consistent with the *Hoopa Valley* decision, we conclude that the California Board has waived its certification authority.

13. California Fish and Wildlife and the California Board argue that *Hoopa Valley* is distinguishable from the case at hand because the Tribe was not the project owner (as is Placer County) and was not a party to a larger agreement between state and federal agencies to hold a license proceeding in abeyance and because Placer County contributed to delay by its own actions.¹⁹ The California Board also asserts that *Hoopa Valley* should have only prospective application.²⁰ The Foothills Network agrees, expressing an interest in preserving state authority, and contends that a finding of waiver here would violate fundamental fairness in dealings between state and federal agencies and would undermine the cooperative federalism that is at the core of the Clean Water Act.²¹

14. That the petitioner in *Hoopa Valley* was a third party, rather than a licensee, is not a pertinent distinction. The court in no way suggested that its ruling rested on the identity of the party that had brought the case. Rather, it enunciated an interpretation of the Clean Water Act that appears applicable to all similarly-situated cases. Similarly, the court did not rely on the multi-party nature of the withdrawal and refiling agreement. Indeed, the fact that numerous entities were party to the agreements in the proceedings that underlay *Hoopa Valley* did not dissuade the court from finding the arrangements there inconsistent

¹⁷ See *infra* note 4.

¹⁸ The Commission issued a final environmental impact statement for the Middle Fork American Project relicensing on February 22, 2013, completed National Historic Preservation Act consultation on March 2, 2013, and completed Endangered Species Act consultation on May 21, 2013. But for the absence of water quality certification, the Commission could have acted at any time thereafter.

¹⁹ California Fish and Game protest at 2; California Board response at 2-3.

²⁰ California Board response at 3-4.

²¹ Placer County supports the petition.

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with the Clean Water Act. If the number of parties to an agreement were relevant, there would appear to be even less reason to uphold the two-party agreement here.

15. The assertion that *Hoopa Valley* should be applied only prospectively is also not convincing. The *Hoopa Valley* court did not in any way indicate that its ruling was limited solely to the case before it, and to conclude that the court's decision does not apply to similarly-situated cases would fail to give full effect to that ruling. We are aware of no sound legal or equitable basis for doing so.

16. A claim that there was no agreement between the California Board and Placer County is likewise unavailing. We agree there is nothing in the record indicating that the two entities signed a specific document governing how future certification applications were to be treated. However, the exchanges between the California Board and Placer County make clear that each year the California Board expected (and in a number of instances specifically requested) that Placer County would withdraw and refile its applications and that Placer County cooperated in these events.²² These actions amount to an ongoing agreement.

17. Nor are assertions that a finding of waiver here would violate fundamental fairness or upset the balance established by Congress persuasive. The court has ruled that repeated withdrawals and refiling of certification applications are inconsistent with the statutory one-year limit established by Congress. Arguments that this conclusion is inconsistent with fairness or with Congressional intent must be addressed to Congress, which alone has authority to revise federal legislation.

18. In determining that a state waives its Section 401 authority when it agrees to the repeated withdrawal and refiling of requests for water quality certification, the *Hoopa Valley* court 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.²³ 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.²⁴ Where no new Section 401 application was actually refiled—e.g., because the parties only exchanged

²² See n.6, *supra*.

²³ *Id.*

²⁴ See Placer County petition at 3 (stating that it “did not submit new or modified applications for certification Indeed, it did not even resubmit a new copy of its application. Instead [Placer County] simply filed a letter stating that it was withdrawing and resubmitting its application”).

correspondence indicating that they would refile without actually doing so—there would not appear to be a new filing with a new deadline.

The Commission orders:

The petition for declaratory order, filed by Placer County Water Agency on February 22, 2019, is granted. The Commission determines that the California State Water Control Board has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the relicensing of the Middle Fork American Project No. 2079.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.