174 FERC P 61042 (F.E.R.C.), 2021 WL 194890

FEDERAL ENERGY REGULATORY COMMISSION
***1** Commission Opinions, Orders and Notices

Before Commissioners: James P. Danly, Chairman; Neil Chatterjee, Richard Glick, Allison Clements, and Mark C. Christie.

Turlock Irrigation District
Modesto Irrigation District

Project Nos. 2299-082, 14581-002
DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION
(Issued January 19, 2021)

1. On October 2, 2020, Turlock Irrigation District and Modesto Irrigation District (the Districts), licensees for the Don Pedro Hydroelectric Project No. 2299 (Don Pedro Project) and applicants for the unlicensed La Grange Hydroelectric Project No. 14581 (La Grange Project), jointly filed a petition for declaratory order. The Districts request that the Commission declare 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 certifications for relicensing the Don Pedro Project and for licensing the La Grange Project. This order denies the petition.

I. Background

2. The 168-megawatt Don Pedro Project is located on the Tuolumne River in Tuolumne County, California. The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the Don Pedro Project on March 10, 1964.[2] The Districts filed a timely application for a new license to continue to operate and maintain the Don Pedro Project on April 28, 2014.[3] The license expired on April 30, 2016, and the Districts continue to operate the Don Pedro Project under an annual license.[4]

3. The 4.7-megawatt La Grange Project is located on the Tuolumne River in Stanislaus and Tuolumne Counties, California, immediately downstream of the Don Pedro Project. On December 19, 2012, Commission staff issued an order finding that the existing, unlicensed La Grange Project requires licensing because it is located on a navigable river and occupies federal land.[5] On October 11, 2017, the Districts filed an application for an original license to continue to operate and maintain the La Grange Project.

4. Pursuant to public notices issued by the Commission, the deadline for filing motions to intervene in the Don Pedro Project relicense proceeding and the La Grange Project license proceeding was January 29, 2018.[6]

5. The Districts requested water quality certification for each project on January 26, 2018, and the California Board received the requests the same day.[7] On January 29, 2018, the Board provided preliminary certification conditions for the projects.[8] Thereafter, in a February 15, 2018 letter to the Districts acknowledging receipt of the certification applications, the Board stated that the Districts' applications met the application filing requirements set forth in the California Code of Regulations (California Code),[9] and identified January 26, 2019, as the one-year deadline for certification action.[10]

***2** 6. On January 24, 2019, the California Board denied without prejudice the Districts' applications.[11] The Board's denial letter stated that the Commission had not completed its review under the National Environmental Policy Act (NEPA), that the Districts had not started the California Environmental Quality Act (CEQA) process, and that the Board could not issue

certification prior to completion of the CEQA process.[12] Explaining that "denial without prejudice carries with it no judgment on the technical merits of the activity," the Board notified the Districts of the need to re-request certification in order to maintain active certification applications for the projects.[13]

7. 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*,[14] ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived its certification authority.

8. On April 22, 2019, the Districts submitted to the California Board their second requests for water quality certification for the Don Pedro and La Grange Projects. The Districts noted that, aside from an updated procedural background, their letters requesting certification were "substantively unchanged" from their initial requests.[15] In its May 21, 2019 letters to the Districts acknowledging receipt of the applications, the Board again stated that the applications met the application filing requirements,[16] and identified April 22, 2020, as the one-year deadline for certification action.[17]

9. On April 20, 2020, the California Board denied without prejudice the Districts' second certification requests.[18] The Board noted that it "may not issue a certification until the requirements for compliance with CEQA are met," and that the Commission had not yet completed its NEPA process. Further, the Boards' letters stated, without elaboration, that "the proposed activity does not comply with applicable water quality standards and other appropriate requirements."[19] In its denial letter for each project, the Board "encourage[d] the Districts to submit a new request for certification."[20]

10. On July 20, 2020, the Districts submitted to the California Board their third requests for water quality certification for the Don Pedro and La Grange Projects. Again, the Districts stated that, aside from updating the procedural background, their third requests were identical to the first and second requests for certification.[21] In its August 18, 2020 letters to the Districts acknowledging receipt of the applications, the Board again notified the Districts that the applications met the application filing requirements,[22] and identified July 20, 2021, as the one-year deadline for certification action.[23]

***3** 11. On October 2, 2020, the Districts filed the instant petition. They subsequently withdrew their third requests for certification, on November 19, 2020.[24] On December 1, 2020, the California Board filed draft certifications for the projects.[25]

II. **Procedural Issues**

12. On November 6, 2020, the Commission issued public notice of the Districts' petition, establishing December 7, 2020, as the deadline for filing interventions and comments on the petition.[26] Before the Commission issued that notice, the California Board filed comments and a motion to intervene on October 29, 2020.[27] California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (collectively, Conservation Groups) filed initial comments on November 2, 2020. On November 13, 2020, the Districts filed an answer in opposition to the California Board's motion to intervene. On November 30, 2020, the Districts filed an answer to the California Board's and Conservation Groups' comments. On December 7, 2020, Sierra Club filed comments and a motion to intervene, and the Conservation Groups filed supplemental comments. All commenters oppose the petition.

13. In support of its motion to intervene, the California Board first points to the Commission's recent practice of publicly noticing the filing of a petition for declaratory order regarding waiver of water quality certification under section 401.[28] Those notices of petitions, the Board states, have provided an opportunity for entities to file notices of intervention, motions to intervene, or protests and the Commission has accepted as timely any interventions filed during the time period established by the notice. Therefore, the Board asserts, its intervention should be considered timely. Second, the California Board states

that its intervention should be granted to allow the Board to "exercise its statutorily recognized duties with respect to Section 401 water quality certification" and in light of its "statutory responsibilities to protect the quality of waters of the state in the public interest."[29] Third, because its actions are the target of the Districts' petition, the Board states that denying intervention would be unfair, as no other party can adequately represent the Board's interest in preserving its authority under section 401 of the CWA.[30] Fourth, the Board asserts that it had good cause for not intervening earlier in the license proceedings for the Don Pedro and La Grange Projects because it had no reason to believe its authority to deny or condition certification would be jeopardized and because it could not foresee the ramifications of the yet-to-be-issued *Hoopa Valley* opinion. Good cause is further established, the California Board asserts, because it had no reason to anticipate that its denials of certification would be reviewed in a forum other than state court and because the Board has been an active participant in the license proceedings.[31] The Board urges the Commission to "unconditionally confirm, recognize, or grant party and intervenor status" to it in this proceeding, and asserts that limiting the scope of its participation as intervenor would be inconsistent with the Commission's regulations and the Commission's practice addressing similar petitions.[32]

***4** 14. The Districts filed an answer opposing the California Board's motion to intervene.[33] They urge the Commission to deny the Board's late motion to intervene in the license proceedings for the Don Pedro and La Grange Projects. First, the Districts argue that by failing to intervene after having two previous opportunities to do so, the Board slept on its rights and should not be allowed to intervene now.[34] Second, the Districts deem the Board's argument that it could not have foreseen the *Hoopa Valley* result as unavailing because, as the Districts note, issues concerning certification conditions and waiver arise with relative frequency in Commission license proceedings.[35] Third, the Districts claim that allowing the Board to intervene in the licensing proceedings would prejudice the Districts and cause undue burden, because the Districts have relied on the fact that the Board, given its current lack of party status, would be unable to seek rehearing of any license that the Commission may issue for the Don Pedro or La Grange Projects.[36] However, the Districts state that they do not oppose the Board's intervention in a separately sub-docketed proceeding for the Districts' petition for declaratory order seeking waiver of water quality certification.[37]

15. The Secretary's public notice explained that because the Districts' petition is part of the licensing proceedings for the Don Pedro and La Grange Projects, any person who intervened in either proceeding is already a party to the licensing proceeding.[38] The notice further explained that, generally, the filing of a petition for a declaratory order involving an issue arising from the licensing proceeding, such as waiver of certification, does not trigger a new opportunity to intervene.[39] Accordingly, the notice directed any person seeking to become a party at this stage in the license proceedings to file a motion to intervene out-of-time, pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedure, that provides justification by reference to the factors set forth in Rule 214(d).[40]

16. The California Board and Sierra Club, the only entities that filed motions to intervene in the petition proceeding (both of which were timely and neither of which was opposed), became parties in that proceeding by operation of the Commission's rules of practice and procedure.[41] However, as the notice made clear, any entity seeking to also intervene in the licensing proceedings would have to justify late intervention in accordance with our regulations.[42]

17. After considering the Rule 214(d) factors, we find that neither the California Board nor the Sierra Club has demonstrated good cause for intervening late in the licensing proceedings. As both entities were aware, water quality issues generally, and water quality certification in specific, are matters that arise in all licensing proceedings. Nonetheless, neither entity elected to timely intervene.

***5** 18. The California Board asserts that good cause exists for its failure to intervene in the licensing proceedings because it had no reason to believe its certification authority would be jeopardized nor could it anticipate the implications of the *Hoopa Valley* opinion. We disagree. The Board's actions do not amount to good cause, but rather, constitute sleeping on its rights.[43] In any case, to the extent that the Board's interest in preserving its statutory authority to issue water quality certification for

the Don Pedro and La Grange Projects is a compelling interest not adequately represented by any other party to the license proceedings,[44] that interest is completely protected by the Board's status as a party to the limited proceeding on the petition.[45] In addition, granting late intervention in the underlying licensing proceedings could disrupt the proceeding and cause prejudice to, or additional burdens on, existing parties.

19. The same is true of Sierra Club, which in any case lacks the statutory concerns expressed by the Board. Although Sierra Club argues that it did not anticipate the Districts' "novel decision" to file a petition seeking waiver on the basis of the Board twice denying the Districts' requests for certification,[46] as was true of the Board, Sierra Club was aware that issues regarding water quality, including any related to certification, would arise in the licensing proceedings and has not explained it failure to timely intervene to address those matters. Moreover, Sierra Club's limited interest in this proceeding[47] — opposition to the Districts' petition seeking waiver of certification—is adequately represented by its timely intervention in the proceeding on the petition.

III. Discussion

20. 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 the Districts' operation of the Don Pedro and the La Grange Projects, must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.[48] If the state "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," then certification is waived.[49] Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.[50]

21. The Districts contend that, by twice denying certification without prejudice and encouraging application resubmittal, the California Board relied on a tactic that is not only indistinguishable from the withdrawal-and-resubmission scheme rejected by the *Hoopa Valley* court, but also inconsistent with section 401(a) of the CWA. The California Board argues that we should not find waiver because: (1) *Hoopa Valley* is not applicable; (2) treating the Board's denial of certification as waiver would be inconsistent with the plain language of the CWA; (3) the Districts failed to exhaust their administrative and judicial remedies; and (4) the Districts' unclean hands preclude equitable relief.[51] The Conservation Groups and Sierra Club also argue that *Hoopa Valley* is inapplicable.[52]

***6** 22. For the reasons discussed below, we find that the California Board did not waive its authority under section 401.

A. *Hoopa Valley* and Commission Precedent

23. 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."[53] The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same,[54] "[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."[55] 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."[56]

24. Following *Hoopa Valley*, the Commission found in a series of orders that the California Board waived its section 401 authority. In the first case, *Placer County Water Agency*,[57] the Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,[58] 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.[59] We concluded that

these exchanges between the entities could amount to an ongoing agreement and that, coupled with the fact that Placer County never filed a new application, caused lengthy delay and amounted to the state waiving its certification authority.[60] Thereafter, in *Southern California Edison Co.*,[61] *Pacific Gas & Electric Co.*,[62] *Nevada Irrigation District*,[63] *Yuba County Water Agency*,[64] *South Feather Water & Power Agency*,[65] *Merced Irrigation District*,[66] and *Pacific Gas & Electric*,[67] the Commission again found that the California Board waived its authority to issue a water quality certification where the applicant withdrew and refiled its application numerous times, even when an explicit agreement was not in place. The Commission found unpersuasive the arguments that the licensee, as the respective lead agency for CEQA, controlled the timing for the CEQA analysis, and reiterated that the "state's reason for delay is immaterial."[68] Further, the Commission reaffirmed that section 401 of the CWA is clear, and that failure to act within the one-year time limit is dispositive, regardless of whether the timing of the water quality certification, even if it extends beyond one year, would not disrupt the relicensing proceeding.[69]

***7** 25. In other instances, the Commission has not found waiver. In *KEI (Maine) Power Management (III) LLC*,[70] the Commission found on rehearing that the Maine Department of Environmental Protection did not waive its certification authority where the applicant withdrew and refiled its application to give itself time to negotiate fish passage measures with resource agencies. Most recently, in *Village of Morrisville, Vermont*,[71] the Commission found that the Vermont Agency of Natural Resources did not waive its certification authority where the applicant twice withdrew and refiled its application to give itself time to review study reports, consider alternatives, and conduct a cost benefit analysis. In both cases, the Commission found insufficient evidence of the state certifying agency encouraging or supporting withdrawal and resubmittal, and that the record reflected the genesis of withdrawal and resubmittal to be on the applicant's desire to avoid receiving a certification with conditions to which it objected.[72]

B. Application of *Hoopa Valley* and Commission Precedent to the Licensing Proceedings for the Don Pedro and La Grange Projects

26. The Districts argue that the California Board's letters denying certification without prejudice are a tolling mechanism that is ""indistinguishable from" and the "functional equivalent" of the withdraw-and-resubmit arrangement that the D.C. Circuit rejected in *Hoopa Valley*.[73] Specifically, the Districts argue that the California Board's actions are impermissible under *Hoopa Valley* because: (1) the Board's letters, by denying certification without prejudice and encouraging application resubmittal, amount to a coordinated scheme for the purposes of extending the CWA's statutory deadline; (2) the Districts have continued to re-submit the same request for certification following the Board's denials; (3) the Board's letters denying certification without prejudice frustrate the same policy concerns articulated by the court in *Hoopa Valley*; and (4) the Board's regulations treat withdrawal-and-resubmittal and denial without prejudice letters as interchangeable tolling mechanisms.[74]

27. The California Board responds that the limited holding of *Hoopa Valley* is not applicable in these circumstances because: (1) there is no withdrawal-and-resubmittal; (2) there is no formal agreement between the Board and the Districts explicitly requiring abeyance of the Board's review of the Districts' requests for certification; and (3) there is no "coordinated ... scheme" to indefinitely delay or otherwise halt the Board's processing of the Districts' requests for certification.[75]

***8** 28. Due to the fact the Board, by denying the applications without prejudice, indeed acted on the them, as opposed to the serial withdrawal-and-resubmittal of certification requests in a number of the cases discussed above, we agree with the California Board that the holding of *Hoopa Valley* is not dispositive here. That the Districts' first requests for certification were denied without prejudice, one day before the court issued its opinion in *Hoopa Valley*, rather than the Districts withdrawing and resubmitting their application, refutes the argument that the Board engaged in a coordinated scheme to evade the waiver period. Unlike the cases where the Commission found that the state certifying agency had waived its authority under section 401, here, there is no record evidence that the Districts and the California Board engaged in actions amounting to an agreement, formal or functional, to circumvent section 401's statutory deadline. Accordingly, *Hoopa Valley* and the subsequent Commission orders

in which we found waiver where applicants engaged in serial withdrawal and resubmittal of their applications do not dictate a finding of waiver in this case.

C. Validity of the California Board's Denials under Section 401(a) of the Clean Water Act

29. Section 401(a)(1) of the CWA, in relevant part, states:

If the State, interstate agency, or Administrator, as the case may be, 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 this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.[76]

With regard to the state certifying agency's role, the *Hoopa Valley* court put it succinctly: "Section 401 requires state action within a reasonable period of time, not to exceed one year."[77] Here, on both occasions, the Board "acted" prior to the expiration of the one-year statutory deadline by denying without prejudice the Districts' requests for certification. No party disputes this. Rather, the Districts urge the Commission to find that the Board's letters denying certification without prejudice are invalid actions under section 401(a) of the CWA.[78] The Districts argue that "a non-substantive action, even if styled as a 'denial,' cannot constitute a valid "action on a request for certification"' under section 401(a) because it would effectively nullify the statute's waiver provision.[79] Accordingly, the Districts urge the Commission to find that the Board has waived its authority to issue certifications for the licensing of the Don Pedro and La Grange Projects.

***9** 30. The Districts also contend that the Commission is obligated to determine whether the Board's denial of certification is valid as a matter of federal law.[80] Following the Districts' logic, if the Board's denials of certification on non-substantive grounds, rather than on the technical merits of the certification requests, are invalid actions under federal law, then the Commission must conclude that the Board has waived its certification authority.[81]

31. The California Board contests the Districts' characterization of the Commission's obligations, asserting that there is no reason for the Commission to distinguish between a denial based on inadequate information (i.e., a non-substantive denial) and a denial based on the technical merits of a certification request.[82] Contrary to the Districts' position, the Board contends that the validity of a state's decision to grant or deny certification is grounded in state law, rather than by reference to federal law.[83] Moreover, the Board distinguishes the cases proffered by the Districts as instances where the court found that the Commission was required to review state-issued certifications to ensure compliance with the requirements of section 401.[84] Responding to the Districts' claim that a state certifying agency's denial of certification is limited to "substantive denials of certification on the merits," the Board argues that the Districts attempt "to insert language and intent into Section 401 that does not exist" and notes that "Section 401 contains no such limitation."[85]

32. We agree with the California Board that the validity of its action— denial of certification pursuant to state water quality standards—is a question that turns on state law.[86] The cases cited by the Districts do not convince us that the Commission's review is warranted, or appropriate, when a state denies certification. As the California Board points out, the cases cited by the Districts concern the validity of certifications issued by the state; none address the validity of a state's denial of certification.[87] As the D.C. Circuit explained, a state's decision to grant or deny a request for section 401 water quality certification is "generally reviewable only in State court, because the breadth of State authority under [s]ection 401 results in most challenges to a certification decision implicating only questions of State law."[88] A state-issued certification "is reviewable in federal court, however, at least to the extent Section 401 itself imposes requirements that a State must satisfy in order for a certification to be

a "certification required by this section."[89] Because section 401 contains no explicit requirements restricting a state's authority to deny certification, we conclude that it is not the Commission's role to review the appropriateness of a state's decision to deny certification. This review falls squarely within the state court's purview. Whether the mere statement that the Districts' proposals violate state water quality standards, without more, is sufficient justification for denying certification is a matter for a state court to determine.

***10** 33. Moreover, as the *Hoopa Valley* court observed, section 401 does not define "failure to act" or "refusal to act."[90] Based on the plain language of the statute, we find that on both occasions the California Board, in denying certification, "acted" on the Districts' request within one year. We are reluctant to read meaning into the statute that Congress intended the terms "failure to act" or "refusal to act" to encompass a state's denial of certification without prejudice, especially as our interpretation of the CWA is entitled to no deference.[91] It may be that the courts will find repeated denials without prejudice, and particularly those that do not rest on any substantive conclusions, to be the equivalent of the withdrawal-and-resubmittal scheme. Given, however, that the state in this case appears to have satisfied the statutory mandate for action, we are not prepared to conclude based on the record before us that the state has waived its section 401 authority.

34. We are sympathetic to the Districts' argument that they are left without any state-level recourse following the Board's issuance of letters denying certification without prejudice, because the letters do not constitute final administrative actions and are thus non-reviewable in California state courts.[92] However, it is not clear from the record before us that the Districts have attempted and been thwarted in an attempt to seek review of the Boards' letters. Nor do the state court cases cited by the Districts persuasively establish that the Districts' ability to challenge the Board's denial of the Districts' requests for certification is foreclosed.[93]

35. For the reasons discussed above, we find that the California Board did not waive its authority under the CWA to issue certifications for the Don Pedro and La Grange licensing proceedings.[94]

D. **Request for Dismissal of Licensing Applications**

36. The Conservation Groups assert that the Districts' licensing applications for the Don Pedro and La Grange Projects should be dismissed.[95] Citing *Swift River Co.*[96] and *Creamer and Noble Energy, Inc.*,[97] the Conservation Groups state that Commission precedent mandates dismissal in situations, such as here, where the state has denied certification and no timely appeal of the denial or an active certification request is pending 90 days after the state's denial of certification.[98]

37. It is the Commission's policy that, if a license applicant informs the Commission within 90 days from the date of a denial of water quality certification that it has filed a timely appeal of the denial or a new request for certification, the Commission keeps the license application on file until the applicant has exhausted its remedies on administrative and judicial appeal, so long as the applicant continues to demonstrate, through periodic status reports, due diligence in pursuing these remedies. However, if the second certification request is denied, the Commission will dismiss the license application, unless the appeal of the first denial is pending.[99] This policy was developed in the context of applications for original license, under the rationale that, "[a]t some point, the public interest in freeing up potential sites for hydroelectric development or for other purposes will outweigh the private interest in maintaining the application on file while repeated requests for certification are pursued."[100]

***11** 38. As the Commission explained in *West Penn Power Co.*,[101] this rationale does not apply with respect to a relicense application, which involves an existing project that continues to operate under annual license or Administrative Procedure Act authority[102] pending relicensing. In addition, if a relicense application for a major project is dismissed after the FPA section 15(c) statutory deadline for such applications,[103] it cannot be refiled.[104] For this reason, the Commission has given relicense applications greater flexibility than original license applications with respect to circumstances that can cause an application

to be dismissed.[105] In light of the special considerations attending relicense applications, Commission staff does not dismiss such applications after two certification denials. We find that the special considerations due relicense applications are similarly compelling in the context of an original license application for an existing, unlicensed project that requires licensing, such as the La Grange Project. Dismissal of such a license application would in effect shut down an existing, operational project. Moreover, allowing greater latitude to original license applications for existing, unlicensed projects that require licensing does not implicate the same site banking concerns that the new project dismissal policy was intended to curtail. Accordingly, we are not dismissing the licensing applications for the Don Pedro or La Grange Projects at this time.

The Commission orders:

(A) Turlock Irrigation District and Modesto Irrigation District's October 2, 2020 petition for declaratory order is denied.

(B) The California State Water Resources Control Board's motion to intervene out-of-time in the licensing proceedings is denied. The California Board's participation as an intervenor is limited to only those issues raised in Turlock Irrigation District and Modesto Irrigation District's October 2, 2020 petition for declaratory order.

(C) Sierra Club's motion to intervene out-of-time in the licensing proceedings is denied. Sierra Club's participation as an intervenor is limited to only those issues raised in Turlock Irrigation District and Modesto Irrigation District's October 2, 2020 petition for declaratory order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.
Deputy Secretary

Footnotes

1 33 U.S.C. § 1341(a)(1).

2 *Turlock Irrigation Dist.*, 31 FPC 510 (1964), *aff'd sub nom. California v. FPC*, 345 F.2d 917 (9th Cir. 1965). The license authorized construction of a new dam and reservoir that submerged existing, unlicensed project facilities constructed in 1923. The license was effective as of the first day of the month in which the Districts accepted it, which did not occur until May 1965 after judicial review.

3 The Districts filed an amended license application for the Don Pedro Project on October 11, 2017.

4 Notice of Authorization for Continued Project Operation (May 5, 2016).

5 *Turlock Irrigation Dist.*, 141 FERC ¶ 62,211 (2012), *reh'g denied*, 151 FERC ¶ 61,240 (2015), *aff'd, Turlock Irrigation Dist. v. FERC*, 786 F.3d 18 (D.C. Cir. 2015).

6 *See* November 30, 2017 Notices of Application Accepted for Filing issued for Project Nos. 2299-082 and 14581-002. A second intervention period followed Commission staff's issuance of the draft Environmental Impact Statement (EIS). *See* February 11, 2019 Notice of Availability of the Draft EIS for the Don Pedro and La Grange Projects (setting April 12, 2019, as the deadline for filing comments on the draft EIS); 18 C.F.R. § 380.10(a) (2020) (deeming timely any motion to intervene filed on the basis of, and within the comment period for, a draft EIS).

7 As required by section 5.23(b)(1)(ii) of the Commission's regulations, 18 C.F.R. § 5.23(b)(1)(ii) (2020), the Districts filed a copy of the requests with the Commission, including proof of the date of receipt of the request.

8 The California Board provided comments and preliminary terms and conditions for the Don Pedro and La Grange Projects in response to the Commission's November 30, 2017 Notice of Ready for Environmental Analysis.

9 Districts' October 2, 2020 Petition for Declaratory Order at attachment B (California Board's February 15, 2018 Receipt Letter) (citing Cal. Code Regs., tit. 23, § 3856) (Petition).

10 *Id.*

11 Petition at attachment C (California Board's January 24, 2019 Denial Letter).

12 *Id.* The Board has explained that, at the time of the January 2019 certification denial, it "could not determine compliance with water quality standards and issue water quality certification until environmental documentation had been prepared evaluating the potential environmental impacts of the proposed project and any feasible mitigation measures." California Board's October 29, 2020 Motion to Intervene and Comments on Petition at 20 (California Board's October 29 Comments).

13 *See id.*

14 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency).

15 Petition at 8.

16 *Id.* at attachment B (California Board's May 21, 2019 Receipt Letters) (citing Cal. Code Regs., tit. 23, § 3856).

17 *Id.*

18 *Id.* at attachment C (California Board's April 20, 2020 Denial Letters).

19 *Id.*

20 *Id.*

21 *Id.* at 10.

22 *Id.* at attachment B (California Board's August 18, 2020 Receipt Letters) (citing Cal. Code Regs., tit. 23, § 3856).

23 *Id.*

24 Districts' November 20, 2020 Copy of Withdrawal of Requests for Water Quality Certification.

25 California Board's December 1, 2020 Copy of Draft Water Quality Certification for the Don Pedro and La Grange Projects. Notwithstanding that the Districts had not initiated the CEQA process as of the date of the draft certification (i.e., November 30, 2020), the California Board explained that, pursuant to a June 2020 amendment to the California Water Code, the Board is now authorized to issue certifications before completion of CEQA review, "where waiting until completion of CEQA review presents a substantial risk of waiver of certification." *Id.* (citing Cal. Water Code § 13160(b)(2) (2020)); *see also* Petition, Attachment F (providing copy of Cal. Water Code § 13160 and Assembly Bill No. 92).

26 85 Fed. Reg. 72,646 (Nov. 13, 2020).

27 The California Board subsequently filed a second request to intervene, which included, "out of an abundance of caution," a request to incorporate by reference its October 29, 2020 motion to intervene and comments, which preceded the Commission's public notice of the Districts' petition. California Board's December 4, 2020 Notice of Intervention, Motion to Intervene, and Comments at 2-3.

28 California Board's October 29 Comments at 10.

29 *Id.* at 11.

30 *Id.* at 12.

31 *Id.* at 13-14 (noting its January 29, 2018 filing of general comments and preliminary terms and conditions in response to the Commission's November 30, 2017 Notice of Application).

32 *Id.* at 14.

33 Districts' November 13, 2020 Answer in Opposition to Late Motion to Intervene.

34 *Id.* at 2-3. The Board had the opportunity to timely intervene on two prior occasions: after the Commission accepted the Districts' license applications for the projects and after Commission staff issued the draft EIS. *See* November 30, 2017 Notices of Application Accepted for Filing issued for Project Nos. 2299-082 and 14581-002 (establishing January 29, 2018, as the deadline for filing motions to intervene) and 18 C.F.R. § 380.10(a) (deeming timely any motion to intervene filed on the basis of, and within the comment period for, a draft EIS).

35 *Id.* at 3-4.

36 *Id.* at 4.

37 *Id.* at 1, 5.

38 Secretary's November 6, 2020 Notice of Petition for Declaratory Order at n.1.

39 *Id.*

40 18 C.F.R. § 385.214(b)(3) and (d) (2020).

41 *See id.* § 385.214(c).

42 *See Idaho Power Co.*, 171 FERC ¶ 61,238, at PP 11-14 (2020).

43 Participants in Commission proceedings may not sit back and wait to see how issues might be resolved before deciding whether to intervene to protect their interests. *See Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009) (*Cal. Trout*); *Idaho Power Co.*, 171 FERC ¶ 61,238 at P 17 n.27, (citing *Cal. Trout*, 572 F.3d at 1022 ("[T]he Commission has steadfastly and consistently held that a person who has actual or constructive notice that his interests might be adversely affected by a proceeding, but who fails to intervene

in a timely manner, lacks good cause under Rule 214."); *Bradwood Landing, LLC*, 126 FERC ¶ 61,035, at PP 11, 16 (2009) (denying late intervention to movant who claimed that scientific studies made it more aware of its interests in the proceeding); *Cent. Neb. Pub. Power & Irrigation Dist.*, 125 FERC ¶ 61,192, at P 12 (2008) ("The Commission expects parties to intervene in a timely manner based on the *reasonably foreseeable issues* arising from the applicant's filings and the Commission's notice of proceedings." (emphasis added)); *Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at P 13 (2008) ("Those entities with interests they intend to protect are not entitled to wait until the outcome of a proceeding and then file a motion to intervene once they discover the outcome conflicts with their interests.")).

44 *See* 18 C.F.R. § 385.214(d)(1)(iii).

45 We recently clarified that the Commission may, but need not, establish separate sub-dockets for petitions filed in licensing proceedings. *Idaho Power Co.*, 171 FERC ¶ 61,238 at P 13. As a result, our decision is not influenced by the fact that separate sub-dockets are not used in this case.

46 *See* Sierra Club's December 7, 2020 Comments and Motion to Intervene at 8, 9 (Sierra Club Comments).

47 Sierra Club Comments at 3 ("The outcome of these CWA Section 401 agency implementation matters is clearly a significant program concern of the Sierra Club") and 7 ("Our major interest here is the Commission's national implementation of its water quality certification legal responsibilities").

48 33 U.S.C. § 1341(a)(1). 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. *Id.* § 1341(d). *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (*Tacoma*).

49 33 U.S.C. § 1341(a)(1).

50 *Id.*

51 *See* California Board's October 29 Comments.

52 Conservation Groups' November 2, 2020 Comments at 16-22; Sierra Club Comments at 6.

53 913 F.3d at 1103.

54 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).

55 *Id.*

56 *Id.*

57 167 FERC ¶ 61,056, *reh'g denied*, 169 FERC ¶ 61,046 (2019) (*Placer County*).

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

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

60 *Id.* PP 12, 18.

61 170 FERC ¶ 61,135, *modified*, 172 FERC ¶ 61,066 (2020) (*S. Cal. Edison*) (finding that the California Board waived its section 401 authority for relicensing six projects that comprise the Big Creek hydroelectric system where the Board staff sent annual emails to the licensee noting the upcoming one-year deadline and explicitly requested withdrawal and resubmittal over multiple years).

62 170 FERC ¶ 61,232, *modified*, 172 FERC ¶ 61,065 (2020) (*Pacific Gas & Elec.*) (finding waiver where the record showed the California Board expected the applicant to withdraw and refile its certification application and the applicant cooperated by simultaneously withdrawing and refiling the same water quality certification application for nine years).

63 171 FERC ¶ 61,029 (2020), *modified*, 172 FERC ¶ 61,082 (2020).

64 171 FERC ¶ 61,139, *reh'g denied*, 172 FERC ¶ 61,080 (2020) (*Yuba County*).

65 171 FERC ¶ 61,242 (2020) (*South Feather*).

66 171 FERC ¶ 61,240 (2020).

67 172 FERC ¶ 61,064 (2020).

68 *Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 at P 28; *Yuba County*, 171 FERC ¶ 61,139 at P 25; *Merced Irrigation District.*, 171 FERC ¶ 61,240 at P 32; *South Feather*, 171 FERC ¶ 61,242 at P 31.

69 *See Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 at P 29; *Yuba County*, 171 FERC ¶ 61,139 at P 27; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at P 32; *South Feather*, 171 FERC ¶ 61,242 at P 31.

70 171 FERC ¶ 62,043 (delegated order), *modified*, 173 FERC ¶ 61,069 (2020) (*KEI Power*).

71 173 FERC ¶ 61,156 (2020) (*Vill. of Morrisville*).

72 *See KEI Power*, 171 FERC ¶ 62,043 at PP 42-46; *Vill. of Morrisville*, 173 FERC ¶ 61,156 at PP 21-23.

73 Petition at 11, 14.

74 *Id.* at 14-23.

75 California Board's October 29 Comments at 16.

76 33 U.S.C. § 1341(a)(1).

77 *Hoopa Valley*, 913 F.3d at 1104.

78 *See* Petition at 24-32.

79 *Id.* at 24.

80 *Id.* at 24-26 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011) (*Alcoa*); *Tacoma*, 460 F.3d 53; *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (*Keating*)).

81 *See* Petition at 26.

82 *See* California Board's October 29 Comments at 24-25.

83 *Id.* at 25 (citing *Keating*, 927 F.2d at 622).

84 *Id.* at 25-26.

85 *Id.* at 26.

86 *See Tacoma*, 460 F.3d at 67 ("[T]he decision whether to issue a section 401 certification generally turns on questions of state law. FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." (citing *Keating*, 927 F.2d at 622)).

87 *See Alcoa*, 643 F.3d at 968 (whether state-issued certification that was not effective until the applicant satisfied a bond requirement therein complied with the requirements of section 401); *Tacoma*, 460 F.3d at 68 (whether state-issued certification facially satisfied section 401(a)(1)'s public notice requirements); *Keating*, 927 F.2d at 624-25 (whether subsequent revocation of state-issued certification satisfied the terms of section 401(a)(3)).

88 *Alcoa*, 643 F.3d at 971 (citing *Tacoma*, 460 F.3d at 67).

89 *Id.* (citing 33 U.S.C. § 1341(a)(1)).

90 *Hoopa Valley*, 913 F.3d at 1104.

91 *Id.* at 1102 ("[B]ecause FERC is not the agency charged with administering the CWA, the [c]ourt owes no deference to its interpretation of Section 401 or its conclusion regarding the states' waiver.") (citing *Alcoa*, 643 F.3d at 972).

92 *See* Petition at 28-30.

93 *See* Petition at 29 n.97 (citing *SJCBC, LLC v. Horwedel*, 135 Cal. Rptr. 3d 85 (Cal. Ct. App. 2011) (medical marijuana dispensary operators not required to exhaust administrative remedies due to inability to initiate administrative review procedure following nuisance abatement orders); *McHugh v. Cnty. of Santa Cruz*, 109 Cal. Rptr. 149 (Cal. Ct. App. 1973) (taxpayer failed to exhaust administrative remedies in appealing real property taxes for several assessment years); *Bleeck v. State Board of Optometry*, 95 Cal. Rptr. 860 (Cal. Ct. App. 1971) (optometrist failed to exhaust administrative remedies in seeking to transfer several branch office licenses because applications were still pending before state optometry board)); *see also* Districts' November 30 Answer at 8, n.30 (citing *Cal. Water Impact Network v. Newhall Cty. Water Dist.*, 75 Cal. Rptr. 3d 393, 411 (Cal. Ct. App. 2008) (adequacy of water supply assessment not subject to direct judicial review and could only be reviewed as part of challenge to CEQA-required environmental impact report following city approval of development project)). To the contrary, the California Board states that "[t]here is no basis for concluding that denial without prejudice is not a final agency action subject to exhaustion of administrative remedies and judicial action." California Board's October 29 Comments at 26.

94 Because we find that the California Board did not waive certification, we need not address its remaining arguments regarding the Districts' failure to exhaust administrative remedies and unclean hands, which we have rejected in previous proceedings. *See, e.g., Yuba County*, 171 FERC ¶ 61,139 at P 28 (finding that the applicant need not exhaust all administrative remedies prior to seeking waiver determination from the Commission); *Pacific Gas & Electric*, 170 FERC ¶ 61,232 at P 43 (same); *S. Cal. Edison*, 172 FERC ¶ 61,066 at P 33 (same); *see also Yuba County*, 171 FERC ¶ 61,139 at 25 (finding unpersuasive the argument that applicant benefitted from its own inaction); *Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 at P 28 (same); *S. Cal. Edison*, 172 FERC ¶ 61,066 at P 36 (noting that, with respect to the ""coordinated withdrawal-and-resubmittal scheme," the California Board's hands are in the same state as the applicant's).

95 Conservation Groups' December 7, 2020 Supplemental Comments at 5, 13.

96 41 FERC ¶ 61,146 (1987).

97 93 FERC ¶ 61,044 (2000).

98 *See* Conservation Groups' December 7, 2020 Supplemental Comments at 5.

99 *See City of Harrisburg, Pa.*, 45 FERC ¶ 61,053 (1988).

100 *North Star Hydro Ltd.*, 58 FERC ¶ 61,266, at 61,844 (1992).

101 74 FERC ¶ 61,287, at 61,913 n.14 (1996) (*West Penn*).

102 5 U.S.C. § 558(c).

103 *See* 16 U.S.C. § 808(c)(1).

104 *See* 18 C.F.R. § 16.9(b)(4) (2020).

105 *See West Penn*, 74 FERC at 61,913 n.14; *see also* 18 C.F.R. § 16.9(b)(2), (3) (corrections of application deficiencies; amendments to applications).

174 FERC P 61042 (F.E.R.C.), 2021 WL 194890