

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

ORDER WQ 2011-0005

In the Matter of Petition for Reconsideration of

THE NEVADA HYDRO COMPANY, INC.

Regarding Denial of Request for Water Quality Certification for
Lake Elsinore Advanced Pumped Storage Project

Federal Energy Regulatory Commission Project No. 11858

COUNTY: Riverside County

ORDER DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

The Nevada Hydro Company, Inc. (Nevada Hydro) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Executive Director's denial of water quality certification issued on October 1, 2009. The denial was issued in response to the Nevada Hydro's request for water quality certification pursuant to section 401 of the Clean Water Act (33 U.S.C. § 1341) for a Federal Energy Regulatory Commission (FERC) license of the proposed Lake Elsinore Advanced Pumped Storage Project (LEAPS or Project).

Nevada Hydro filed a timely petition for reconsideration. Nevada Hydro contends that the Board's denial of certification was: 1) premature; 2) a violation of California law; and 3) an inappropriate abuse of the Board's discretion.

For the reasons set forth below, Nevada Hydro's petition for reconsideration is denied. To the extent the petition raises additional issues not discussed in this Order, the Board determines those grounds are not a proper basis for reconsideration or do not merit additional review.

2.0 GROUNDS FOR RECONSIDERATION

Any person may petition the State Water Board for its action or failure to act on a water quality certification action. (Cal. Code Regs., tit. 23, § 3867.) On reconsideration, the Board may: 1) refuse to reconsider the action or failure to act of the executive director, regional board, or executive officer if the petition fails to raise substantial issues that are appropriate for reconsideration; 2) deny the petition upon a finding that the original action or failure to act was appropriate and proper; 3) set aside or modify, if possible, the previous action or take new appropriate action; 4) direct the executive director, executive officer, or regional board to take appropriate action. (Cal. Code Regs., tit. 23 § 3869.)

3.0 FACTUAL BACKGROUND

3.1 FERC Project No. 11858

In 2004, Nevada Hydro and Elsinore Valley Municipal Water District (District) submitted a joint application to FERC for a license to operate a proposed 500-megawatt pumped storage project west of Lake Elsinore in Cleveland National Forest.¹

¹ Nevada Hydro and the District also applied for a special use permit from the United States Forest Service to construct the approximately 32 mile long Talega-Escondido/Valley-Serrano (TE/VS) transmission line. FERC only has authority over hydroelectric facilities and transmission facilities needed to carry the project power to market (Final EIS, Appendix B). The California Public Utilities Commission (PUC) states that FERC will determine if a license will or will not include TE/VS.

On March 11, 2005, the co-applicants filed with the State Water Board an application for water quality certification for the proposed project.² In 2006, the District filed a Notice of Preparation pursuant to the California Environmental Quality Act (CEQA) for the proposed project. The District identified the State Water Board as a responsible agency.

Nevada Hydro first submitted a water quality certification application in 2005. Between 2005 and 2009 Nevada Hydro withdrew and resubmitted its application annually. (See Cal. Code Regs., tit. 23, § 3835, subdivision (b).) Despite the District's filing of a notice of preparation for the project a CEQA document was never produced. At some point, a dispute developed between Nevada Hydro, the California Public Utilities Commission (PUC), and the District over the appropriate scope of the project and over which agency was the appropriate lead agency for preparation of CEQA environmental documents.³

In October 2007, Nevada Hydro filed for a certificate of public convenience and necessity (CPCN or certificate) with the PUC for the TE/VS transmission component of the project. According to the PUC, a CPCN is necessary for Nevada Hydro to build the transmission line component of the project.⁴ FERC will determine the scope of the project it approves, but cannot approve the LEAPS project without a primary transmission line connecting the generator to a distribution system.

² Although the District and Nevada Hydro are co-applicants for a FERC license and for a water quality certification from the State Water Board, only the Nevada Hydro Company has filed a petition for reconsideration.

³ This dispute continues, as Elsinore Valley opposed a request by Nevada Hydro and the PUC to the Office of Planning and Research (OPR) for OPR to make a lead agency determination naming the PUC as the appropriate lead agency. Apparently the District is concerned that Nevada Hydro's application for a certificate of convenience and public necessity with the PUC is an attempt by Nevada Hydro to narrow the scope of the project and allow for construction of the transmission line portion of the project only. OPR issued a ruling on October 12, 2010, designating the PUC as the appropriate lead agency. The PUC has assured the District that the project it analyzes will include the pumped storage component.

⁴ According to Nevada Hydro, the transmission line was always a separate project from the pumped storage component. The transmission line could be built independently of the pumped storage. The District disputes this claim.

The PUC claimed that because it would be granting the certificate for the transmission line, it was the appropriate lead agency for the whole project.⁵

Nevada Hydro most recently submitted a water quality certification application on January 21, 2009. On April 16, 2009, the PUC dismissed Nevada Hydro's application for a CPCN without prejudice. The PUC could not continue with the application process because Nevada Hydro had not adequately described the project. As a result of the PUC dismissal, a lead agency was not identified to complete the required CEQA documentation.

In a July 10, 2009 letter to the State Water Board, Nevada Hydro requested that the Board act as CEQA lead agency for the project. Nevada Hydro stated that it "rejects any assertion that the State Water Board is not the CEQA lead agency for the project." The District submitted a letter to the Board on July 21, 2009 stating, "we do not support this request [for the Board to act as lead agency], and offer no opinion on the lead agency issue at this time."

On October 1, 2009, pursuant to section 3837, subdivision (b)(2), the State Water Board denied Nevada Hydro's water quality certification application without prejudice. In the denial letter, the Board explained that the denial was based on the Board not having adequate documentation to comply with CEQA. The Board explained that before issuing water quality certification the Board must be provided with ample time to properly review final CEQA documentation. (Cal. Code Regs., tit.23, §3856, subd. (f).)⁶ The Board also explained that the District appeared to be the appropriate lead agency for the preparation of environmental documents. It advised however, that Nevada Hydro could request a lead agency determination from the Governor's Office of Planning and Research (OPR) if it needed clarification of this issue. (Cal. Code Regs., tit.23, § 15053.)

⁵ Under a Development Agreement between Nevada Hydro and the District, the District will have no interest in the ownership or operation of the transmission line.

⁶ The Board was aware that the PUC had been acting as lead agency for the project and had terminated its CEQA review due to inadequacies in Nevada Hydro's application, including a failure to provide an accurate description of the project.

4.0 DISCUSSION

4.1 The State Water Board is not the Appropriate CEQA Lead Agency

Nevada Hydro applied to the PUC on October 9, 2007 for a CPCN for the Talega-Escondido/Valley Serrano transmission line component of the project. The PUC determined it was the appropriate lead agency for CEQA purposes and identified the State Water Board and the District as responsible agencies. The PUC considered the interconnect transmission line and the pumped storage component of the Project related, and determined it would need to examine both in its CEQA analysis. In a January 9, 2009 letter to the State Water Board, Nevada Hydro stated that it expected the State Water Board to fully cooperate with the PUC in developing an adequate CEQA document.

On April 16, 2009, the PUC dismissed Nevada Hydro's application for the CPCN because its application lacked a proper environmental assessment and accurate description of the project. Without an application before the PUC, Nevada Hydro requested that the Board act as the lead agency for the Project. In a July 10, 2009 letter to the Board, Nevada Hydro claims that because the PUC determined that no discretionary entitlements are required for the construction of the transmission line or pumped storage projects the Board is the only remaining agency that could act as lead agency. This statement is incorrect. The PUC dismissed Nevada Hydro's application for a CPCN because Nevada Hydro had not adequately described the project, not because approval was unnecessary. And even if the PUC were not involved, the Board would not be the only remaining agency that could act as lead agency. The District is a joint applicant for the water quality certification, and as a public agency could serve as lead agency for purposes of CEQA if no PUC approval was required for the project. (See Cal. Code Regs., tit. 23, § 15051.)

In its July 10, 2009 letter to the Board, Nevada Hydro states it will participate in the CEQA process, but ultimately seeks an “independent and defensible environmental review” from the Board. It is unclear what Nevada Hydro means by an “independent review” but the Board agrees that whether acting as a lead agency or as a responsible agency, the Board must exercise its independent judgment in its environmental review of the project. (Cal. Code Regs., tit., 23 §§ 15020, 15096.)⁷ But the Board cannot simply become the lead agency for the project because Nevada Hydro has requested it.

The criteria for determining the appropriate lead agency for a project are set out in the CEQA regulations. (Cal. Code Regs., tit. 23, §15051.) Section 15051 subdivision (a) states that if a public agency will carry out the project that agency “shall be the lead agency.” Because Nevada Hydro and the District are co-applicants for a FERC license and water quality certification, the District, would appear to be the appropriate lead agency. But, even if a non-governmental entity, such as Nevada Hydro, were carrying out the project, section 15051 subdivision (b) states that the agency with the “greatest responsibility for supervising or approving the project as a whole” should be the lead agency. OPR has determined that because the PUC must issue a CPCN for the project to proceed, it has the greater responsibility (relative to the District) for approving the project and is the appropriate lead agency. Subdivision (c) provides the final criteria, stating that “the agency to act first shall be the lead agency.” Nevada Hydro has submitted an application for a CPCN with the PUC. Thus, the PUC will act first on the project, and the project will not go forward unless a CPCN is issued. Therefore, under any of the provisions outlined in section 15051, the Board is not the appropriate lead agency for the project.

⁷ Despite its argument that the Board must complete an independent review, Nevada Hydro later attempted to obtain approval without Board review by asking FERC to waive certification requirements. FERC denied Nevada Hydro’s request.

4.2 The environmental documents submitted by Nevada Hydro do not comply with CEQA and do not provide a sufficient basis for the Board to evaluate potential water quality impacts

Nevada Hydro does not dispute that the Board requires CEQA documentation before issuing a water quality certification. Instead, Nevada Hydro asserts that the Board has been provided with documentation sufficient to comply with CEQA and the Board improperly abused its discretion by not considering the documents provided as being sufficient for its CEQA review. Nevada Hydro points to the Environmental Impact Statement (EIS) prepared by FERC for the license application, and an Environmental Impact Report (EIR)/ EIS prepared for the Sunrise Powerlink transmission line project. Neither environmental document is sufficient for the Board to rely on to fulfill its CEQA obligations.

FERC Environmental Impact Statement for LEAPS

Nevada Hydro claims that the Board had the discretion to use the EIS prepared pursuant to the National Environmental Policy Act (NEPA) and released by FERC in February 2007. The State Water Board cannot use a NEPA document to satisfy its CEQA responsibilities unless the NEPA document meets the requirements of CEQA. (See Cal. Code Regs., tit. 14, § 15221, subd. (a)(2).) The FERC 2007 EIS for the project is not adequate for CEQA purposes. During the comment period for the draft document, the Board submitted a series of comments highlighting the areas where the EIS did not contain enough information for the Board to evaluate environmental impacts related to water resources. The final EIS does not correct these deficiencies. FERC itself acknowledges that the EIS was not intended to serve as an EIR. In the EIS, FERC states that “this document is not a joint EIR/EIS.” FERC also notes that the CEQA lead agency may choose to incorporate some of the information in the EIS in its environmental analysis.

Sunrise Powerlink Environmental Impact Report

In the alternative, Nevada Hydro suggests that the 2008 Sunrise Powerlink Joint EIR/EIS contains adequate analysis of environmental impacts for the State Water Board to use that document as a basis for issuing its water quality certification. The Sunrise Powerlink is an entirely distinct project. Nevada Hydro asserts that because it discusses the Project in the analysis of alternatives, the State Water Board could rely on it for CEQA purposes, however, the Board noted in a March 7, 2008 letter to Nevada Hydro that Nevada Hydro previously did not believe the Sunrise Powerlink environmental documentation was a suitable substitute. In the March 7 letter, the Board also noted that the Sunrise Powerlink project identified 44 significant unmitigable impacts associated with the Project and that pursuant to CEQA an EIR must be developed that identifies these impacts and proposes mitigation where feasible. Finally, in its October 7, 2007 application with the PUC for a CPCN, Nevada Hydro stated that it was not proposing that the PUC consider the Sunrise Powerlink Draft EIR as the same document that would be needed for the transmission line project. The Sunrise Powerlink EIS/EIR is an environmental document prepared for a non-related transmission line project; it is not sufficient to serve as a basis for the State Water Board to issue a water quality certification for an entirely different transmission line and pumped storage project.

In any event, based on recent events at the PUC, it appears that Nevada Hydro has abandoned its argument that a sufficient CEQA document exists for the project. Since filing its petition for reconsideration with the Board, Nevada Hydro has reapplied to the PUC for a CPCN and acknowledges that a full environmental analysis of impacts of the transmission line and pumped storage will be necessary. Of interest, in its application to the PUC, Nevada Hydro never mentions prior documents as being sufficient for the PUC's environmental review despite the fact that the application is for the same project that Nevada Hydro argues that the Board has had all the information it needed to act on water quality certification.

In short, no matter who acts as the lead agency, the Board cannot issue a water quality certification for a project that requires one until it has a legally supportable CEQA document to review.

4.3 The Executive Director did not violate California law by dismissing Nevada Hydro's application without allowing petitioner to withdraw and resubmit its certification application.

The Executive Director's interpretation of sections 3836 and 3837 was permissible

Nevada Hydro claims that the Board acted improperly when it dismissed Nevada Hydro's water quality certification application without allowing Nevada Hydro the opportunity to withdraw and resubmit its application. Under its regulatory authority, however, the Board is under no obligation to allow an applicant to withdraw and resubmit water quality certification applications indefinitely, particularly in circumstances where the applicant has not diligently pursued the certification process.

California Code of Regulations, title 23, section 3836 subdivision (c), covers the actions the Board may take on water quality certifications when complete CEQA documentation has not yet been submitted. Section 3836 specifies that if the review period required by federal law will expire before the certifying agency can review environmental documents, the agency "shall deny without prejudice the certification, unless the applicant in writing withdraws the request for certification."

Nevada Hydro asserts that the Board acted contrary to the regulations when it dismissed its application for water quality certification. Although Nevada Hydro is correct in its assertion that section 3836 allows an applicant to withdraw and resubmit an application, nowhere do the regulations require the Board to notify an applicant prior to the expiration period, or allow an applicant to withdraw and resubmit an application rather than issue a dismissal without prejudice pursuant to section 3837.⁸

In order for the Board to preserve its ability to impose conditions on projects to protect water quality standards, it must have the authority to dismiss applications without prejudice. Otherwise, the Board would often be faced with the prospect of inadvertently waiving certification simply because an applicant has not withdrawn its application by the

⁸ In fact, it is an unreasonable interpretation of the regulations to require the Board to give every applicant an opportunity to withdraw and resubmit an application in every case. For example, if the one year review period is due to expire and there is insufficient time to get the applicant to withdraw the request for certification before the one year period expires, the Board must act or it is deemed to have waived its certification authority. (33 U.S.C. § 1341.)

one-year deadline. For example, in 2007 Nevada Hydro resubmitted its water quality certification application on February 21, 2007, and the one-year review period was set to expire on March 1, 2007. Due to the last minute withdrawal and resubmission, the Board was faced with the prospect of waiving its certification authority because the applicant waited until a week before the certification deadline to act.

Nevertheless, Nevada Hydro argues that the Board's practice of allowing applicants to withdraw and resubmit applications has essentially become a regulatory practice that applicants are entitled to rely on. Nevada Hydro cites *Aliceville Hydro Associates v. F.E.R.C* (D.C. Cir. 1986) 800 F.2d 1147 (*AHA*) to support its argument. In *AHA*, the court determined that the agency's prior practice of allowing applicants to file preliminary applications on the same day that a previously filed application expired was not a policy that had become sufficiently entrenched as agency practice that it was acceptable for an applicant to rely on the agency's prior actions rather than its published regulations.⁹ Although the agency had allowed "same day" filings in 10 previous cases, the court determined it was not a practice repeated enough times, over a long enough period, and at a high enough level for the practice to become binding on the agency.

Similarly, when the State Water Board has given applicants a reminder that the one-year deadline is approaching and they may want to consider withdrawing and resubmitting their application, such courtesy notices are usually sent by staff, they are not official postings or actions by the Board. Moreover, the regulations do not provide that staff has an affirmative duty to provide such a notice; the applicable regulation authorizes the Board to dismiss an application without prejudice.

⁹ The published regulations state the application period runs for 30 days, meaning the entirety of 30 days, not a portion of the final day.

When a certification cannot be issued due to incomplete CEQA documentation, the regulations allow for a dismissal without prejudice or resubmission of an application -- the State Water Board is justified in pursuing either course. An agency's interpretation of its own regulations is entitled to "great deference." (*Udall v. Tallman* (1965) 380 U.S. 1, 16.) Staff allowed Nevada Hydro an opportunity to withdraw and resubmit its application five times as a courtesy, not because it was a Board practice that replaced, or even supplemented the regulations. In summary, the Board's interpretation of sections 3836 and 3837 was reasonable.¹⁰

Nevada Hydro had notice that the State Water Board would dismiss its application

Nevada Hydro further asserts that it was not provided "fair notice" of the Board's interpretation of section 3836. Nevada Hydro contends that it should have been provided with some type of notice of the Board's intention to deny its application without prejudice. Previous Board actions provided Nevada Hydro fair notice of its regulatory authority.

Prior to resubmitting its 2008 application, the Board advised Nevada Hydro in letters issued March 9, 2007 and March 6, 2008, that "staff will recommend denial of water quality certification without prejudice" if environmental and other documentation was not provided soon enough for the Board to review before the one-year federal review period expired. Given the prior warnings provided in writing, it is difficult to see how Nevada Hydro did not anticipate that a possible outcome of not providing sufficient CEQA documentation was the dismissal of its application without prejudice.

¹⁰ Even if it would be appropriate to require that applicants for certification be given an opportunity to withdraw and resubmit in every case, the appropriate remedy would be to direct the Executive Director to follow that approach in the future, not to set aside the denial without prejudice in this case. Nevada Hydro did not withdraw its request for certification within the one year period, and there is no reason to believe FERC would allow such a belated filing nunc pro tunc. If the State Water Board were to set aside the denial without prejudice without substituting an order approving or denying on the merits, FERC would deem certification to have been waived. A waiver would amount to an unconditional approval, in violation of both CEQA and State Water Board regulations, and would deprive the State of any opportunity to address the water quality impacts of the project.

CONCLUSION

Nevada Hydro withdrew and resubmitted its water quality certification application in five consecutive years. When the Board dismissed its 2009 application, there was no indication that a CEQA document would be forthcoming. The District co-applicant actively disputed Nevada Hydro's characterization of the project and the PUC had expressed similar uncertainty over the status of the project. Given the uncertain status of the project, as well as the prior withdrawal and resubmission of an application shortly before the expiration of the review period, the Board was under no obligation to provide Nevada Hydro another courtesy notice informing it that Nevada Hydro could withdraw and resubmit its application. In accordance with California Code of Regulations sections 3836 and 3837, the Executive Director was justified in dismissing Nevada Hydro's water quality certification application without prejudice.

ORDER

IT IS HEREBY ORDERED that Nevada Hydro's petition for reconsideration is denied.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 1, 2011.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
NAY: None
ABSENT: None
ABSTAIN: None



Jeanine Townsend
Clerk to the Board