

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQ 2020-0043

IN THE MATTER OF THE
STATE WATER RESOURCES CONTROL BOARD'S
LIMITED OWN MOTION RECONSIDERATION OF

**WATER QUALITY CERTIFICATION FOR
YUBA COUNTY WATER AGENCY
YUBA RIVER DEVELOPMENT PROJECT
FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2246**

**ORDER ADOPTING LIMITED AMENDMENTS TO ENABLE PROCEEDING ON
RECONSIDERATION**

BY THE BOARD

1.0 INTRODUCTION

On July 17, 2020, the State Water Resources Control Board (State Water Board or Board) Executive Director issued a water quality certification (certification) for Yuba County Water Agency's¹ (YCWA or Applicant) Yuba River Development Project (YRDP). The certification included Condition 23, which postponed the effective date of the certification for purposes of filing petitions for reconsideration until a prior

¹ Doing business as Yuba Water Agency.

determination by the Federal Energy Regulatory Commission (FERC) that the Board had waived its certification authority was invalidated by judicial or administrative action. This limited order provides for the amendment of Condition 23 to indicate that the certification is final for the purposes of reconsideration as of today's date, to correct a citation error, and to conform the language of the condition with that of other certifications issued following a FERC waiver order.

2.0 RECONSIDERATION AUTHORITY

The State Water Board may amend its decisions on its own motion, as provided under California Code of Regulations, title 23, section 3867, subdivision (b)(1), which states:

The state board and the executive director, when acting as the state board's designee, may undertake such reconsideration on their own motion. They shall notify the applicant (if any), the federal agency, and all interested persons known to the state board or executive director and give those notified the opportunity to submit information and comments before taking a final reconsideration action (as listed in Subsection 3869(a) of this Chapter).

The State Water Board provided notice to the Applicant, the federal agency, and all interested persons by notice issued on November 18, 2020.

3.0 DISCUSSION

This limited order provides a brief overview of points relating to the State Water Board's authority to issue certifications, and to the context of the July 17, 2020 certification for Yuba County Water Agency's Yuba River Development Project, FERC Project No. 2246. For additional background, please refer to Sections 1 – 3 of the **certification**, available online at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/ferc2246/yrdp_certification1.pdf.

Summary of Authority

Section 401 of the Clean Water Act (33 U.S.C. § 1341) requires any applicant for a federal license or permit that may result in a discharge into waters of the United States to provide the licensing or permitting federal agency with certification that the project will comply with water quality requirements. (*Id.*, § 1341(a)(1), (d).) The state's certification may set conditions implementing Clean Water Act requirements, including the requirements of Section 303 of the Clean Water Act for water quality standards and implementation plans, or to implement "any other appropriate requirement of State law." (*Id.* § 1341(d).) Section 401 further provides that certification conditions shall become conditions of any federal license or permit for the project. (*Ibid.*) If the state agency denies certification, the federal agency cannot approve the project. (*Id.* § 1341(a)(1).)

The State Water Board is the state agency responsible for Section 401 certification in California. (Wat. Code, § 13160.) The State Water Board has delegated authority to act on applications for certification to the Executive Director. (Cal. Code Regs., tit. 23, § 3838, subd. (a); see also State Water Board Resolution No. 2012-0061.)

Background Summary

YCWA is the public agency that owns and operates the YRDP, FERC Project No. 2246, a multi-use water development that includes hydropower production. YCWA has applied to FERC to relicense its hydropower facilities, as its 1966 operation license has expired. YCWA is the "lead agency" under the California Environmental Quality Act (CEQA), responsible for assessing the potential environmental impacts, mitigation measures, and alternatives for the continued operation of the YRDP facilities. Despite initiating license renewal proceedings in 2010, YCWA has not initiated CEQA review.

On August 22, 2019, YCWA filed a petition with FERC, alleging that the State Water Board had waived its certification authority. On May 21, 2020, FERC issued an order granting YCWA's petition. On June 20, 2020, the State Water Board filed a request for rehearing with FERC, challenging FERC's May 21, 2020 order finding waiver of the

State Water Board's certification authority. The State Water Board's request for rehearing included a draft certification.

On June 29, 2020, Governor Gavin Newsom signed amendments to the Water Code that provide the State Water Board with the authority to issue certifications before completion of CEQA review, under certain conditions. (See Wat. Code, section 13160, subd. (b)(2), as amended by Stats. 2020, ch. 18, § 9.)

On July 17, 2020, the State Water Board issued certification, with conditions, for the YRDP.

On July 21, 2020, FERC issued an order denying rehearing. On September 16, 2020, the State Water Board filed a petition challenging FERC's waiver orders. (*State Water Resources Control Board v. FERC* (9th Cir., No. 20-72782).)

Condition 23

In light of the unresolved nature of the Board's dispute with FERC and YCWA regarding whether the Board has waived its certification authority, the certification included Condition 23, which states:

Issuance of this certification shall become effective upon the earliest of: a grant of rehearing of FERC's May 22, 2020 order finding waiver of the State Water Board's water quality certification authority; issuance of a judicial order overturning that order; or issuance of another judicial or administrative action finding that FERC improperly found waiver of the State Water Board's certification authority. Unless and until such action overturning FERC's finding of waiver, this certification shall not be considered a final action for the purposes of Water Code section 13160 regarding reconsideration or for administrative review.

The condition cited to Water Code section 13160 in error: it should have referred to California Code of Regulations, title 23, section 3867, which concerns reconsideration.

The policy underlying Condition 23's delay of reconsideration was avoidance of unnecessary use of scarce public resources in potentially revisiting, revising, or litigating

certification terms that would not become effective absent a decision finding that the Board retained certification authority in the FERC YRDP proceeding.

Nevertheless, YCWA filed a petition for reconsideration on August 14, 2020, triggering an ex parte communication bar that, in light of the timeline for litigation challenging FERC's waiver determination, is expected to remain in place for an extended period, without additional action. YCWA's petition is premature under Condition 23. For the reasons discussed below, however, the Board has determined that the most appropriate course of action is to reconsider the certification on its own motion for the limited purpose of amending Condition 23 to allow submission of any new petitions for reconsideration, and for amendment of YCWA's August 14, 2020 petition if desired.

YCWA's petition for reconsideration suggests that the Applicant deems the benefit of moving forward to resolve its concerns with the certification outweigh the benefit of avoiding potentially unnecessary expense. And while review of the certification at this time arguably may be premature, the State Water Board has determined that, rather than not considering requests for reconsideration at this point, the better course is to evaluate the specific issues raised in a petition or petitions for reconsideration. The Board can then better determine which issues, if any, are not ripe or are otherwise inappropriate for reconsideration before the waiver issues are resolved.

The formal reconsideration process itself suggests that the applicant's position regarding the timing of a reconsideration process is to be afforded considerable weight. (See Cal. Code Regs., tit. 23, sec. 3869(c) [allowing for a grant of abeyance request only upon agreement of the applicant and the petitioner (if not the applicant)].) The formal reconsideration process also provides a mechanism that can address timing and resource considerations for the applicant and other parties. Any party wishing to postpone a reconsideration decision -- including postponement to avoid unnecessary expenditure of resources -- may submit a request for abeyance, in accordance with California Code of Regulations, title 23, section 3869, subdivision (c). A grant of such a request would require written agreement of the applicant. (*Ibid.*) A grant of abeyance would lift the current ex parte communication ban. Lifting this ban could facilitate

resolution of concerns with the certification terms or other issues. In light of the Applicant's petition for reconsideration on the merits of the certification, and the availability for the abeyance process to adequately address concerns regarding the potential unnecessary expenditure of resources and allow for informal communications aimed at resolving concerns with the terms of certification, proceeding with the formal reconsideration process provides the appropriate forum for addressing resource issues.

Before the Board moves to address YCWA's petition on reconsideration, it is important to allow any other aggrieved person the opportunity to file for reconsideration. Other groups or individuals may have concerns about the conditions of certification or other relevant issues but held off on seeking reconsideration in light of Condition 23.² Amending the term to provide for reconsideration as of 30 days from issuance of this order provides all interested persons the opportunity to file.

Amending Condition 23 will also reduce potential confusion regarding how to interpret the term in light of similar actions. The YRDP certification is one of three certifications issued after FERC found waiver. Condition 22 of the July 31, 2020 water quality certification for the Merced River Hydroelectric Project and the Merced Falls Hydroelectric Project (collectively Merced; FERC Project Nos. 2179 & 2467) and Condition 21 of the August 14, 2020 certification for the Yuba-Bear Hydroelectric Project (Yuba-Bear; FERC Project No. 2266), specify that the certifications are final for the purposes of reconsideration. The respective Merced and Yuba-Bear conditions also use different language to clarify that the certification conditions are not effective without additional action, in light of FERC's waiver finding.

The State Water Board has challenged the waiver findings for these four projects before the Ninth Circuit Court of Appeals, in related proceedings. (*State Water Resources Control Board v. FERC*, (9th Cir., No. 20-72432) petition pending [*Nevada Irrigation*

² Comments submitted on the proposed limited order indicate that entities other than YCWA intend to submit petitions for reconsideration. (See, e.g., Comments of California Sportfishing Protection Alliance, Friends of the River, the Sierra Club Mother Lode Chapter, and South Yuba River Citizens League at p. 3.)

District]; *State Water Resources Control Board v. FERC*, (9th Cir., No. 20-72958) petition pending [*Merced Irrigation District*]; and *State Water Resources Control Board v. FERC*, (9th Cir., No. 20-72782) petition pending [*Yuba County Water Agency*.]) Modeling the amended Condition 23 in the YRDP certification after the analogous conditions of the Merced and Yuba-Bear certifications will eliminate the potential to interpret the terms differently. The legal position of all three certifications is the same, and it is appropriate to eliminate any confusion that could arise from using different conditions. This uniformity is particularly appropriate because multiple parties have engaged or intervened in both the YRDP proceedings before FERC, and in the Merced or Yuba-Bear proceedings.

For the same reasons, it is also appropriate to delete text in section 3.0 of the certification that reflects the original language of Condition 23. This text states: “Issuance of this certification will become effective only if the FERC order is overturned.”

4.0 CONCLUSION

In light of the above, it is in the public interest to amend Condition 23 of the YRDP certification and related text. This limited amendment allows for reconsideration on the merits to proceed in a manner that: accounts for concerns regarding unnecessary expenditure of resources; allows all parties to participate on equal footing; corrects an error in the original condition; and eliminates potential confusion regarding the joint interpretation of the condition in light of similarly-situated certifications. This order in no way affects or prejudices the State Water Board’s determinations on any other procedural or substantive issue regarding any future reconsideration of the certification for the YRDP.

ORDER

IT IS HEREBY ORDERED THAT

1. Condition 23, on page 55 of the July 17, 2020 Water Quality Certification for Yuba County Water Agency, Yuba River Development Project, Federal Energy Regulatory Commission Project No. 2246 is hereby amended to read:

The requirements of this certification shall not become effective as conditions required to be included in the FERC license unless and until FERC sets aside the determination of waiver made in its May 21, 2020 order and its July 21, 2020 order addressing arguments on rehearing or is required to do so by court order, or there is another judicial or administrative action finding that FERC improperly found waiver of the State Water Board's certification authority. The requirements of this order are not binding on or enforceable against the Licensee except to the extent they are incorporated into a FERC license or FERC license amendment, or are incorporated into another regulatory decision or order by the State Water Board or a Regional Water Board. This condition does not affect the time for filing a petition for reconsideration under section 3867 of title 23 of the California Code of Regulations, provided that the failure to seek reconsideration of this certification is not a limitation on the ability to seek reconsideration of a later issued decision or order for which reconsideration is authorized under State Water Board regulations or the Water Code. Any petitions for reconsideration under section 3867, or amendments to petitions for reconsideration previously filed, are due within 30 days of the December 15, 2020 adoption of amendments to the previous text of Condition 23.

2. The first full sentence on page 15 of the July 17, 2020 Water Quality Certification for Yuba County Water Agency, Yuba River Development Project, Federal Energy Regulatory Commission Project No. 2246 ("Issuance of this certification will become effective only if the FERC order is overturned.") is hereby deleted.

CERTIFICATION

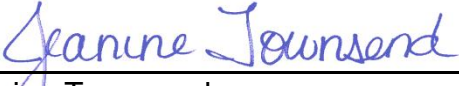
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 15, 2020.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D'Adamo
Board Member Tam M. Doduc
Board Member Sean Maguire
Board Member Laurel Firestone

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board