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SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

MAR 18 2019

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D. C, 20426

Dear Secretary Bose:

### **RESPONSE TO NEVADA IRRIGATION DISTRICT'S WAIVER REQUEST OF 401 WATER QUALITY CERTIFICATION FOR THE YUBA-BEAR HYDROELECTRIC PROJECT, FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2266, NEVADA, PLACER, AND SIERRA COUNTIES**

The California State Water Resources Control Board (State Water Board) is providing the Federal Energy Regulatory Commission (FERC or Commission) this response to the Nevada Irrigation District (NID) submittal to you, dated February 7, 2019 (February 7, 2019 submittal). In that submittal, NID suggests that the State Water Board waived its water quality certification authority under section 401 of the Federal Water Pollution Control Act (33 U.S.C. § 1341) (Section 401) for NID's relicensing of the Yuba-Bear Hydroelectric Project (FERC Project No. 2266) (Project). The State Water Board disagrees with NID. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. Jan. 25, 2019) (*Hoopa*) does not provide a basis for determining that the State Water Board has waived water quality certification for the Project.

The Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387) (Clean Water Act) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Section 101 of the Clean Water Act (33 U.S.C. § 1251(g)) requires federal agencies to "cooperate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 401 requires every applicant for a federal license or permit which 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 be in compliance with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313). Section 401 directs the agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the Clean Water Act and with any other appropriate requirement of state law. Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. The State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act and any other federal act. (Wat. Code, §13160.)

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

In taking a certification action, the State Water Board must either: (1) issue an appropriately conditioned certification; or (2) deny certification. (Cal. Code Regs., tit. 23, § 3859.) A water quality certification may be issued if it is determined that there is reasonable assurance that an activity is protective of state and federal water quality standards and that the appropriate environmental documents have been adopted to support certification and meet the requirements of the California Environmental Quality Act (CEQA). (33 U.S.C. § 1431; Pub. Resources Code, § 21006, 21080; Cal. Code Regs., tit. 23, § 3856, subd. (f).) When a proposed project's compliance with water quality standards is not yet determined, the State Water Board may deny certification without prejudice. (Cal. Code Regs., tit. 23, § 3837, subd. (b)(2).)

The Project is interrelated with the Upper Drum Spaulding Project (FERC Project No. 2310), the Deer Creek Project (FERC Project No. 14530), the Lower Drum Project (FERC Project No. 14531), and the Yuba River Development Project (FERC Project No. 2246). As you know, the Commission is applying a watershed approach (i.e., analyzing all projects jointly) to comply with requirements from the National Marine Fisheries Service under Section 7 of the Federal Endangered Species Act (ESA). ESA consultation has not been completed and NID has stated that its intention is to incorporate the results of this critical element into the required CEQA process. Both the ESA consultation and the CEQA analysis will inform the State Water Board of potential impacts to water quality and beneficial uses. Because FERC is likewise awaiting a joint ESA assessment, in no way is the pendency of a water quality certification action interfering with the issuance of a FERC license.

NID suggests that the history of its Project water quality certification filings is “practically identical” to the scenario the court described in *Hoopa*. It is not. For example, the documents included by NID with its February 7, 2019 submittal show clearly that the State Water Board never entered into an agreement with NID to hold in abeyance all state permitting reviews, including Section 401 water quality certification, “in an unsuccessful attempt to circumvent FERC’s regulatory authority of whether and when to issue a federal license” (*Hoopa*, 913 F.3d at p. 1103), which was a foundational factor in the D.C. Circuit’s *Hoopa* decision.

NID appears to admit that the State Water Board never failed or refused to act on a request for water quality certification within one year of a pending request, as its own documents show that NID voluntarily and unilaterally withdrew its previously pending requests for water quality certification before the one-year deadline for action lapsed. NID asks the Commission to conclude in effect that the State Water Board’s failure to reject NID’s own action – voluntary withdrawal of its request for certification – is the legal equivalent of a failure or refusal to act on the initial request. NID’s characterization of the history of water quality certification for the Project ignores the impacts its own actions had on the State Water Board’s process. At no point prior to the February 7, 2019 submittal has NID ever suggested there was an agreement in advance, in any of its voluntary application withdrawals submitted to the State Water Board. (See e.g. NID March 1, 2013 letter to State Water Board [“At this time and by copy of this letter, NID formally withdraws without prejudice its May [sic] 15, 2012 application for water quality certification for the Project relicensing.”].)

Presumably, NID requested withdrawal of its request for water quality certification because it viewed a voluntary withdrawal as preferable to the State Water Board denying NID’s request. The State Water Board, by its own regulations, must act on a request for certification before the federal period for certification expires. (Cal. Code Regs., tit. 23, § 3859.) Absent NID’s voluntary withdrawal, the State Water Board would have denied NID’s request for certification under California Code of Regulations, title 23, section 3837, subdivision (b)(2). The State Water