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Section 401 Water Quality Certification Waiver/Hydroelectric Relicensing: Federal Energy Regulatory Commission Addresses Southern California Edison Company Request for Declaratory Order

03/03/2020

The Federal Energy Regulatory Commission (“FERC”) issued a February 20th document titled:

Declaratory Order on Waiver of Water Quality Certification (“Order”)

The Order addresses a petition filed by Southern California Edison Company (“Edison”) requesting that the FERC declare that the California State Water Resources Control Board (“California”) waived its authority to issue a certification for the relicensing of certain hydroelectric projects under Section 401 of the Clean Water Act.

Edison is stated to be an applicant for six projects within the Big Creek Hydroelectric System (“Projects”).

Section 401 of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable state water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license. Because a federal license was needed from the FERC, Edison was required by Section 401 of the Clean Water Act to apply for a water quality certification.

If the state fails or refuses to act on a request for certification in a timely manner, the certification requirements are waived with respect to such federal application.

The FERC cites in its February 20th Order the January 25, 2019, United States Court of Appeals for the District of Columbia Circuit Opinion in *Hoopa Valley Tribe v. FERC*. The D.C. Circuit held that where a state and applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived certification.

California argued that *Hoopa Valley* should not be retroactively applied to the Edison water quality certification application. It states that determining that withdrawal and resubmittal of a certification request is grounds for waiver departs from the FERC’s past practice and should only be applied prospectively.

The FERC responded to this argument by stating that *Hoopa Valley* “simply enforces the plain language of the existing statute, as opposed to invalidating a rule previously in force or announcing a wholly new rule.” It states that the FERC is not announcing a new policy. Instead, it is stated to be following *Hoopa Valley’s* articulation of the plain meaning of Section 401 of the Clean Water Act.

The FERC further states:

. . . As we have long held, once a state agency has waived its authority to act on a water quality certification application, the water quality conditions are not mandatory and acceptance of the conditions is a matter within the federal agency’s discretion. Accordingly, in the individual relicensing proceedings, the Commission will consider all of the May 31, 2019 certification conditions as recommendations under section 10(a)(1) of the Federal Power Act.

As a result, the FERC concluded that the Petition for Declaratory Order should be granted, holding that the Board waived its water quality certification with respect to the relicensing of:

- Big Creek Nos. 2A, 8
- Eastwood Project No. 67
- Big Creek No. 3 Project No. 120
- Mammoth Pool Project No. 2085
- Vermilion Valley Project No. 2086
- Portal Project No. 2174
- Big Creek Nos. 1 and 2 Project No. 2175

A copy of the Order can be downloaded [here](#).