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Hydro Newsletter

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FERC Issues Declaratory Order Finding Waiver of State Section 401 Authority

On April 16, 2020, the Federal Energy Regulatory Commission (FERC or Commission) [issued](#) yet another order finding that the California State Water Resources Control Board (Water Board) waived its authority under Section 401 of the Clean Water Act (CWA) to issue a water quality certification (WQC) in the ongoing relicensing of Nevada Irrigation District's (NID) Yuba-Bear Hydroelectric Project. NID filed its petition in response to the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) [decision](#) in *Hoopa Valley Tribe v. FERC* and FERC's subsequent [declaratory order](#) in *Placer County Water Agency*.

NID initially filed its 401 application with the Water Board in March 2012, and subsequently withdrew and resubmitted its application each year between 2013 and 2018 at the direction of the Water Board. In January 2019, the Water Board denied NID's application without prejudice on the basis that the California Environmental Quality Act (CEQA) process and consultation under the Endangered Species Act (ESA) were not yet complete, and encouraged NID to file a new request. NID did not file a new request, but instead filed a request with FERC for a waiver determination.

FERC granted NID's request, finding that the Water Board waived its Section 401 authority through the repeated withdrawal and refile of NID's application for WQC. Consistent with its decisions in *Placer County Water Agency*, *Southern California Edison Co.*, and *Pacific Gas and Electric Co.*, FERC held that a formal agreement between a licensee and a state is not necessary to support a finding of waiver. In response to arguments from the Water Board that NID voluntarily withdrew its application each year to avoid a denial without prejudice, FERC found that the Water Board expected and encouraged NID to withdraw and resubmit its application to avoid the CWA's one-year waiver deadline.

FERC also rejected arguments that the 401 certification process was held up by the CEQA process, for which NID was the lead agency and controlled the timing. It concluded that the Water Board's contention that NID alone is responsible for the delay in issuance of a WQC ignores the Board's own role in the process." Further, it found that "[t]he state's reliance on a regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete does not excuse compliance with the CWA." FERC also rejected the contention that waiver would serve no purpose because FERC cannot issue the license until ESA consultation is complete. FERC found that "[r]egardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies."

This is FERC's fourth waiver determination issued for a hydropower project in 2020, and several other waiver requests currently remain pending.

FERC Proactively Determines Water Quality Certification Waived

On April 15, 2020, FERC [issued](#) a new license for the Brassua Hydroelectric Project in Maine, in which it determined that the Maine Department of Environmental Protection (Maine DEP) had waived its authority to issue a Section 401 WQC for the project by failing to act on the WQC application within one year from receipt of the application. This is the second known instance since the D.C. Circuit's decision in *Hoopa Valley* that FERC has proactively ruled that a state agency waived its 401 authority where the license applicant did not request such a determination.

The licensees in the case filed their initial WQC application in 2010. They withdrew and resubmitted their application each year between 2011 and 2019 at least in part at the direction of Maine DEP. On this basis, and consistent with its post-*Hoopa Valley* waiver orders, FERC held that refiling of the WQC application did not restart the one-year clock and Maine DEP waived its authority to issue a WQC for the relicensing. FERC found that the 10-year pattern of withdrawing and resubmitting the application amounts to an ongoing agreement with the licensees that let the Maine DEP usurp FERC's control over whether and when to issue a new license for the project. It also concluded that the additional information submitted by the licensees to the Maine DEP since 2010 did not delay the one-year clock or render the certification application to be a "new" application. To support its conclusion, FERC restated its position in *McMahan Hydroelectric, LLC* that in order for the submission of additional information to restart the one-year clock, it must involve a material change to a project's plan of development (i.e., significant changes to a project's physical features).

On the same day, FERC also [issued](#) a new license for the Barker's Mill Project in Maine. In contrast to the Brassua license order, FERC did not even raise the issue of whether Maine DEP waived its Section 401 authority, even though the applicant had withdrawn and resubmitted its application, a practice found to be inconsistent with the CWA in *Hoopa Valley*. In this case, rather than withdrawing simply to give the state more time, the applicant explained that it was withdrawing and resubmitting its application to provide itself "additional time to negotiate fish passage measures with state and federal resource agencies and to avoid potential inconsistencies between certification conditions and [Federal Power Act] section 18 prescriptions." Maine DEP issued a 401 certification in November 2019, which the licensee is currently appealing.

FERC Commissioner Update

Last month, we reported that on March 12, 2020, the U.S. Senate voted to confirm James Danly, FERC's then General Counsel, as a FERC Commissioner. On March 31, 2020, Danly was sworn in as a FERC Commissioner. Danly is the fourth member of the Commission and the third Republican, the maximum number of Commissioners permitted from one party. However, FERC Commissioner Bernard McNamee, a Republican, has announced that he will not seek another term. His current term expires on June 30, 2020.

Danly was originally nominated by President Trump in October 2019. While the Senate Energy and Natural Resources Committee approved Danly's nomination, the full U.S. Senate failed to vote on the nomination by the end of 2019. Under Senate rules, nominations that are not acted on during the session in which they are made must be reissued by the President before the Senate can take up the nomination. President Trump reissued the nomination in February 2020, which was approved by the Committee in early March.

Supreme Court Announces New Test for Whether Discharge of a Pollutant that Travels through Groundwater Is Subject to NPDES Requirements

On April 23, 2020, the U.S. Supreme Court in [County of Maui v. Hawaii Wildlife Fund](#) [announced](#) a new test to determine whether a discharge of a pollutant that travels through groundwater is subject to CWA National Pollution Discharge Elimination System (NPDES) permitting requirements. The Court held that an NPDES permit is required not only for a direct discharge from a point source, but also when there is the "functional equivalent of a direct discharge." The Supreme Court vacated the U.S. Court of Appeal

for the Ninth Circuit's (Ninth Circuit) "fairly traceable" test and remanded the case back to the Ninth Circuit to determine whether the County wastewater facility's discharge of wastewater through injection wells that then migrated through groundwater into the Pacific Ocean was a "functional equivalent of a direct discharge" into the ocean.

This highly anticipated decision was expected to provide clarity to the regulated community on whether a point source discharge of a pollutant that travels through groundwater before reaching a federally-jurisdictional navigable water requires an NPDES permit. While the Ninth Circuit's analysis of the facts of the *County of Maui* case on remand is likely to provide some additional clarity, ambiguity as to what exactly constitutes a "functional equivalent of a direct discharge" is likely to be the source of continued litigation. For a more detailed analysis of the case, see our [issue alert](#).

Final WOTUS Rule to Become Effective in June 2020

As reported in our [February Hydro Newsletter](#), on January 23, 2020, the Environmental Protection Agency and the U.S. Army Corps of Engineers (Corps) released a pre-publication version of a final rule re-defining the term "waters of the United States" under the CWA (Final Rule). On April 21, 2020, the Final Rule was published in the Federal Register. The rule will become effective on June 22, 2020.

The Final Rule narrows the scope of waters subject to regulation under the CWA. Specifically, the Final Rule removes interstate streams as a separate jurisdictional category; excludes ephemeral streams and water features; requires rivers, streams, and other natural channels to directly or indirectly contribute flow to a territorial sea or traditional navigable water; and excludes wetlands that are not adjacent to non-wetland jurisdictional water. Additionally, the Final Rule confirms that groundwater is not subject to regulation under the CWA, and thus, that surface water features connected only by groundwater are also not jurisdictional.

Although most hydropower projects are located on traditional navigable waters or their tributaries, the Final Rule has some potential implications for hydropower projects. For example, if an upstream or downstream waterbody is no longer a "water of the United States," dam structures may no longer be subject to CWA permitting. Additionally, because the Final Rule requires that impoundments must be impoundments of jurisdictional waters and have surface flow releases to a traditional navigable waterway to be jurisdictional, some impoundments may no longer be regulated under the CWA. Also, hydropower projects located on conduit systems or discharging to underground conveyance systems may not be jurisdictional under the CWA. For more information on the Final Rule, please see our [issue alert](#).

Yuba Water Agency Purchases Narrows 1 Hydroelectric Project

On March 31, 2020, Yuba Water Agency (YWA) closed on its purchase of the Narrows 1 Hydroelectric Project from Pacific Gas and Electric Company (PG&E). The Narrows 1 Project is located downstream of the Corps' Englebright Dam on the Yuba River in Nevada County, California. YWA owns and operates the Yuba River Hydroelectric Project, which includes the Narrows 2 Powerhouse, also located just downstream of the Corps' Englebright Dam. The Yuba River Hydroelectric Project is currently in relicensing and the Narrows 1 Project license expires on January 31, 2026. As part of the sale, YWA and PG&E proposed to remove a number of project features and land from the Narrows 1 Project license and move the transmission line for the Narrows 1 Project to PG&E's Narrows No. 2 Transmission Line Project. FERC approved the license transfer and amendments in May 2019.

[Sharon White](#) and [Rachael Lipinski](#) contributed to this issue.

FOR MORE INFORMATION

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm's [hydroelectric](#) practice.

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