

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
SILVER STAR HYDRO, LTD. )  
For Reconsideration of Denial of )  
Water Quality Certification for )  
the Sonora Peak Water Power )  
Project. (Water Right Application) )  
No. 29162, Mono County, FERC )  
No. 9156-002). Our File No. C-006 )  
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ORDER NO. WQ 92-03  
(\$401 Certification)

BY THE BOARD:

Silver Star Hydro, Ltd. (petitioner) filed a timely petition for review of the denial of water quality certification for the Sonora Peak Hydroelectric Project. The Executive Director of the State Water Resources Control Board (State Water Board), denied certification, without prejudice, because information needed to complete the environmental documentation necessary to consider certification of the project had not been submitted.

I. BACKGROUND

Petitioner has applied for a hydropower license from the Federal Energy Regulatory Commission (FERC). (FERC No. 9156-002.) Pursuant to Section 401 of the federal Clean Water Act, FERC cannot issue the license unless the State certifies that the project complies with applicable water quality requirements, or the State waives certification. (33 U.S.C. § 1341(a).) The State Water Board has authority for certification in California. (Cal. Water Code § 13140.) This authority may be exercised by the Executive Director of the State Water Board. (23 Cal. Code

Regs. § 3838.) If the Executive Director denies certification, the applicant may petition for reconsideration by the State Water Board. (Id. § 3867.)

On February 13, 1989, petitioner filed a request for issuance of water quality certification. Petitioner had previously filed water right Application 29162 for the same project. As described in petitioner's FERC application, which was included as part of petitioner's application for water quality certification, the Sonora Peak Hydroelectric Project was to be a 1.5 megawatt (mw) project diverting water for hydroelectric power generation from Silver Creek in Mono County. As described in water right Application 29162, however, the proposed project was to be a 5.8 mw facility diverting water from Silver Creek and Wolf Creek.

From the outset, there was an unusual amount of uncertainty about the proposed project. By letter dated February 17, 1989, petitioner advised the State Board that it had determined that the 1.5 mw facility would be the "environmentally preferred" alternative, but the water right application was never amended accordingly.

In addition, the files show that on April 5, 1988, the Division of Water Rights asked petitioner to submit maps of the proposed project in accordance with Sections 715, 717, and 720 of Title 23 of the California Code of Regulations. Petitioner requested and was granted an extension of time until July 23, 1988 to submit the necessary project maps. Following considerable additional correspondence concerning various aspects

of the project, petitioner was notified on August 9, 1990 that the State Water Board still had not received adequate project maps and that the water right application was subject to cancellation if the maps were not submitted within 60 days. Petitioner was also advised that the State Water Board had not received an engineering drawing which clearly shows the location of the proposed diversion works and size of the proposed facilities. The required maps and drawings were not submitted and the water right application eventually was cancelled on October 25, 1990.

The continuing lack of information concerning the proposed project also impeded preparation of the environmental documentation required by the California Environmental Quality Act (CEQA) for issuance of water quality certification. By letter dated July 11, 1989, State Water Board staff notified petitioner and numerous interested parties of a CEQA scoping session to be held on July 19, 1989 to determine what studies would be necessary to complete the environmental review. Nine representatives of five different agencies were present, but petitioner did not attend. Petitioner was advised by letter dated September 6, 1989 of the additional information and studies determined to be necessary following the CEQA scoping session. Petitioner responded with a letter dated September 12, 1989 which complained about various aspects of the regulatory process, but which did not provide the information about the project requested in staff's letter of September 6, 1989.

Petitioner's application for water quality certification was denied by letter from the Executive Director dated January 19, 1990. The letter stated that the engineering and environmental studies needed to prepare an environmental document in compliance with CEQA had not been provided to the State Water Board. Therefore, the State Water Board could not prepare, circulate, and adopt an environmental document meeting CEQA requirements by February 23, 1990 which was the date by which FERC wanted action on petitioner's application for water quality certification. Petitioner was advised that its application for water quality certification was denied without prejudice to filing a new application, but that engineering and environmental information would have to be provided on a timely basis in order to allow the State Water Board to make its determination on any new application within the timeframe established by FERC.

By letter dated February 19, 1990, petitioner asked for reconsideration and requested that its application for water quality certification be reinstated. Petitioner stated that it would agree to a three month extension of the twelve month period allowed for completion of an environmental impact report. (California Code of Regulations, Title 23, Section 15108.) In the alternative, petitioner requested that a new application for water quality certification be accepted with the fees paid on the previous application to be applied to the new application.

## II. ISSUES RAISED BY THE PETITION

Petitioner alleges that the State Water Board prevented petitioner from complying with CEQA in a timely manner.

Petitioner also alleges that the delay in preparing an environmental document meeting CEQA requirements was not due to a lack of engineering and environmental studies prepared by the petitioner.

A. Sufficiency of Engineering and Environmental Information Provided by Applicant

Before issuing a water quality certification, the State Water Board must evaluate the potential environmental impacts of a proposed project in accordance with the requirements of CEQA. (Public Resources Code Section 21000 et seq.) The first step in identifying potential environmental impacts is defining the project that is the subject of review. In this case, that initial step was never completed.

Although petitioner advised the State Water Board on February 17, 1989, that a 1.5 MW project was considered the environmentally preferred design, petitioner never amended its water right application to reflect that determination. Thus, there was considerable uncertainty regarding the size of the proposed project for which an environmental impact report was to be prepared. In addition, petitioner's failure to provide adequate maps and engineering drawings made meaningful assessment of potential environmental impacts impossible. As noted above, petitioner's failure to submit the required maps and drawings ultimately resulted in cancellation of the water right application.

In addition to uncertainty concerning the size and location of the proposed project, environmental review of the

proposed project was impeded by the lack of technical data and scientific information regarding various aspects of the project. Public Resources Code Section 21160 provides that a public agency from which a permit, certificate, or other entitlement is requested may require the applicant to submit data and information which may be necessary either to determine whether the proposed project may have a significant effect on the environment or to prepare an environmental impact report.

In this instance, petitioner alleges that the engineering and environmental studies which it had prepared were accepted as adequate by FERC. Petitioner also contends that State Water Board staff's delay in completing an initial study and notice of preparation of environmental impact report "prevented us from resolving the last few technical issues remaining in otherwise very complete engineering and environmental studies." Contrary to petitioner's characterization, however, the documents in our files establish that FERC and numerous other federal, state and local agencies had serious concerns about major unresolved issues regarding the Sonora Peak Project.

By letter dated March 7, 1989, for example, the California Regional Water Quality Control Board for the Lahontan Region (Regional Board) advised petitioner that the Regional Board considered the report of waste discharge filed by petitioner to be incomplete because it did not include information about pollutant discharges during construction or information about pollutant discharges during project operation,

such as silt and sediment released from intake and storage ponds. The Regional Board also advised petitioner of the need to submit a detailed erosion control plan for construction and operation of the project. In a subsequent letter dated March 15, 1989, the Regional Board noted several problems or deficiencies with the information provided by petitioner regarding the effects of the proposed project on vegetation.

Similarly, in a letter dated March 10, 1989, the Department of Fish and Game (DFG) advised petitioner of several deficiencies in the Exhibit E ("Environmental Report") portion of petitioner's FERC application. Deficiencies identified by DFG include inadequate information concerning effects of the project on fish, failure to consider the cumulative effects of the project in conjunction with effects of a hydroelectric project proposed by the United States Marine Corps, and failure to identify alternatives to the proposed project. DFG stated that it does not concur with the mitigation measures proposed by the petitioner and that the project would result in unacceptable impacts to Lahontan cutthroat trout.

In a letter dated March 14, 1989, State Water Board staff noted several deficiencies in the environmental report submitted to FERC including: the lack of documentation or a survey to support the conclusion that no rare plants exist in the project area; inadequate information on stream flows in the project area; lack of scientific data to support the assumption that effects of the project on riparian vegetation would be minimal; no data on pre-project versus post-project fishery

habitat; and the inconsistency between the diversion rate of 13 cubic feet per second stated in the FERC application and 60 cubic feet per second stated in the water right application.

The concerns about the effects of the project on vegetation were echoed in a March 22, 1989 letter from the United States Fish and Wildlife Service which suggested that the petitioner should contact DFG and the Toiyabe National Forest to develop a revegetation plan.

A letter dated April 17, 1989, from the United States Marine Corps stated that the project will have a direct effect on the Marine Corps Mountain Warfare Training Center and that the Marine Corps had not been consulted previously. Specific concerns of the Marine Corps included the problem that the project was proposed to be built at the site of Marine Corps office trailers which were not scheduled to be moved and adjacent to a sewage treatment facility which was slated for expansion. The Marine Corps expressed concern about interference with training and maneuvers caused by the location of the headworks and diversion pond of the proposed project. In addition, the Marine Corps expressed concern that the petitioner's estimated flow figures were unrealistically high and that the project would be inconsistent with a much smaller project which the Corps was considering.

In a letter dated July 19, 1989, the Department of the Interior advised FERC that based on the information provided by the Fish and Wildlife Service, the Department of Interior recommended that no license be issued until sufficient



information was developed to allow for a fully informed decision. The letter contains detailed comments regarding potential problems caused by the project and states that critical information needed to evaluate the project's effects on Lahontan cutthroat trout had not been provided.

In a detailed letter to FERC dated July 26, 1989, DFG reiterated the concerns expressed in earlier letters regarding the proposed project and stated that the proposed project would be detrimental to the Lahontan cutthroat trout, in conflict with the Endangered Species Act and Fish and Game Code Section 5937. DFG recommended that FERC either require correction of numerous deficiencies in the information submitted by petitioner or deny the request for license. Following the receipt of an additional letter from the petitioner, dated June 29, 1989, DFG advised petitioner on July 31, 1989, that the information provided still failed to adequately describe the project or its environmental impacts in sufficient detail to allow development of measures to offset adverse impacts to fish and wildlife.

By letter dated July 28, 1989, the United States Fish and Wildlife Service described the deficiencies in the fishery information provided by petitioner and advised the petitioner that issuance of a hydropower license for the proposed project would be incompatible with the management plan for reintroduction of the Lahontan cutthroat trout.

The United States Marine Corps renewed its objections to the proposed project, and the insufficient information

provided by the petitioner, in a letter to FERC dated October 11, 1989. Concerns expressed by the Marine Corps include the noise levels generated by the powerhouse in the billeting area for 1,000 troops, and the effect of the proposed project on decreasing flow in the stream reach of the Marine Corps water supply facilities. These concerns and others were repeated in a letter dated November 15, 1990 from the Marine Corps to the State Water Board.

Letters objecting to the proposed project and the insufficient information provided regarding the project were also received from Mono County (letter dated December 4, 1990), and the United States Forest Service (letter dated December 13, 1990).

Contrary to petitioner's allegation that FERC considered the environmental information regarding the project to be complete, petitioner was notified by letter dated August 16, 1991 that FERC dismissed the application for a federal power license due to petitioner's failure to provide requested information despite having been given an extension of time to do so. The requested information concerned flow requirements of the Lahontan cutthroat trout, a federally listed threatened species.

Based on the record discussed above, it is evident that numerous state and federal agencies, including FERC, share the view that the information provided by petitioner was insufficient to allow for adequate environmental review of the proposed project. We agree with and affirm the Executive Director's decision that petitioner failed to provide sufficient information

for the State Water Board to complete an adequate environmental document meeting the requirements of CEQA.

Moreover, even in the absence of statutory requirements under CEQA, issuance of water quality certification requires that the State Water Board be provided sufficient information about a proposed project to determine if the beneficial uses of the affected watercourse will be protected. In this instance, the record is clear that petitioner did not provide the necessary information.

B. Delay in Preparing Environmental Documents

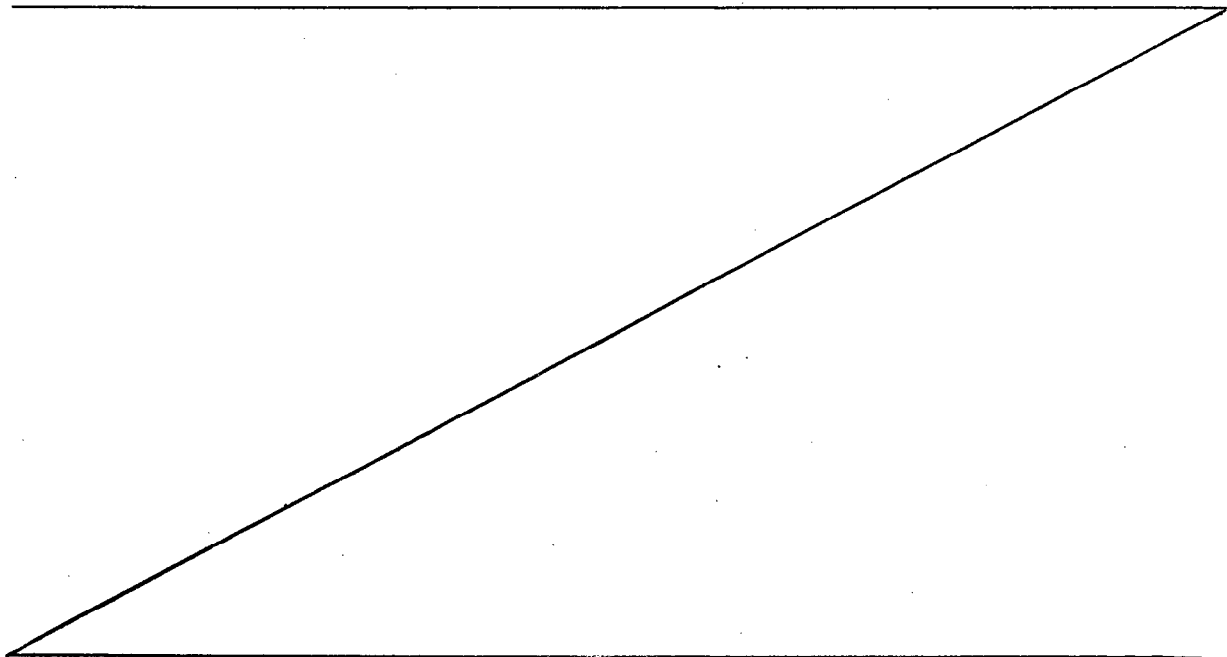
This Board's inability to prepare environmental documentation within the timeframe specified by FERC for the Board to act upon the application for Section 401 water quality certification was a direct result of petitioner's failure to provide sufficient information about the proposed project as discussed above. Thus, denial without prejudice of the application for Section 401 certification was appropriate. Having concluded that denial without prejudice of the application for water quality certification was appropriate, we find there is no basis for applying petitioner's previous application fees to any future application for water quality certification which petitioner may decide to submit.

In practical effect, petitioner's request amounts to a request that the filing fee for a subsequent application be waived, or that the filing fee for the previous application be refunded with the refund applied to a subsequent application. State Water Board regulations make no provision for waiver of

filing fees. (23 Cal. Code Regs. § 3833(c).) Fees may be refunded if certification is waived. (Id. § 3833(d); see id § 2200(h).) We need not decide here whether there are circumstances where a refund is appropriate after denial of certification, because such a refund clearly is inappropriate if the staff costs devoted to review of the application exceed the application fee. (See id. § 2200(h).) In this case, the staff costs devoted to reviewing the information submitted by petitioner and in seeking the additional information necessary to process the application clearly exceed the \$500.00 fee paid by petitioner.

### III. CONCLUSION

The Executive Director's denial of water quality certification, based upon petitioner's failure to submit the information necessary for environmental review of the project, was appropriate and proper.



IV. ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration of the denial of water quality certification for the Sonora Peak Water Power Project (FERC No. 9156-002) is denied.

CERTIFICATION

The undersigned, Administrative Assistant 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 19, 1992.

AYE: W. Don Maughan  
Eliseo M. Samaniego  
John Caffrey  
Marc Del Piero

NO: None

ABSENT: None

ABSTAIN: James M. Stubchaer

  
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Maureen Marché  
Administrative Assistant to the Board