California State Water Resources Control Bd. v. FERC—Acquiescence in irrigation districts' requests to withdraw and resubmit water quality certification applications did not waive State Board's CWA Section 401 authority to provide such certifications prior to FERC relicensing review

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), provides in part that "any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates[.]" This requirement terminates "[i]f the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request[.]" *Id.* Among the "Federal license[s] or permit[s]" referred to is a hydroelectric project licensing or relicensing determinations by the Federal Energy Regulatory Commission. By FERC rule, "[a] certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification." 18 C.F.R. § 4.34(b)(5)(iii); *see also id.* § 5.23(b)(2).

The California State Water Resources Control Board is responsible for issuing CWA Section 401 certifications. Prior to state law amendments not relevant here, review by the State Board under the California Environmental Quality Act was a predicate for such certifications. Because compliance with CEQA is time-consuming, completion of the certification process within the Section 401(a)(1) maximum one-year period is "often not feasible." The State Board, as well as certifying entities in other States, therefore developed a process

> whereby project applicants withdraw their requests for certification before the end of the one-year review period and resubmit them as new requests, rather than have their original requests denied. The theory behind this practice is that a withdrawn-and-resubmitted request starts a new one-year review period, affording the project applicant more time to comply with procedural and substantive prerequisites to certification and the state more time to decide whether and under what conditions it will grant the certification request.

"FERC accepted the withdrawal-and-resubmission practice for many years" despite some "misgivings[.]" However, a recent decision, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), found waiver in a situation where the withdrawal-and-resubmission process was used by the involved States to delay water quality certification through a contractual arrangement with an applicant and other stakeholders with the object of ameliorating the impact of immediate FERC dam relicensing and decommissioning. *See id.* at 1104 ("California and Oregon's deliberate and contractual idleness defies [the Section 401(a)(1) reasonable-period-of-time] requirement. By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters.").

Pending at the time of *Hoopa Valley*'s issuance were Section 401 certification requests to the State Board from the Nevada Irrigation District, the Yuba County Water Agency, and Merced Irrigation District (collectively "Project Applicants") in connection with FERC relicensing applications. The

administrative record for each of the Project Applicants' interaction with the Board was similar in all material respects, with multiple withdrawal-and-resubmission requests routinely approved just prior to the expiration of the one-year deadline and without the Project Applicants ever preparing a CEQA evaluation that would commence the Board's review. Shortly after *Hoopa Valley*, however, the Board denied without prejudice the Project Applicants' renewed certification requests because they had either not begun or not completed the CEQA process. The Project Applicants responded by separately seeking declaratory orders from FERC that the Board had waived its Section 401 authority by failing or refusing to act on the certification applications. FERC agreed in each instance, concluding in essence that the Board had "coordinat[ed] in a withdrawal-and-resubmission scheme" with the Project Applicants designed to circumvent the one-year requirement. On judicial review, the Ninth Circuit held otherwise, vacated the FERC orders, and remanded for further proceedings consistent with its opinion. *Cal. State Water Res. Control Bd. v. FERC*, Nos. 20-72432 et al., 2022 WL 3094576 (9th Cir. Aug. 4, 2022).

As the panel explained, "FERC has applied *Hoopa Valley* not only to cases involving express agreements to delay certification through withdrawal-and-resubmission, like the agreement at issue in *Hoopa Valley* itself, but also to cases involving what FERC has deemed more informal, coordinated schemes." It further explained that "[i]n defining its standard for waiver, FERC draws a line between a 'coordinated' scheme and a 'unilateral' withdrawal-and-resubmission by the project applicant. In its brief to our court, FERC takes the position that 'an applicant's unilateral withdrawal and resubmittal is not imputed to the State' and therefore does not trigger a waiver." But "where the state has sought a withdrawal-and-resubmission for its own purposes—perhaps, for example, because it lacks an adequate basis to deny certification but needs more time to craft certification conditions—the state has engaged in a coordinated scheme to avoid the one-year deadline for action."

The panel deemed it unnecessary to "whether the coordination standard FERC advances is consistent with the text of Section 401 because ... the evidence shows only that the State Board acquiesced in the Project Applicants' own decisions to withdraw and resubmit their applications rather than have them denied." After discussing the communications between the Board and each Project Applicant, the panel rejected any suggestion that, as was the situation in *Hoopa Valley*, the Board sought to benefit from withdrawal-and-resubmission process:

> [F]or all three projects, it seems that the State Board, unlike the Project Applicants, would have had an interest in moving along the environmental-review process. The Project Applicants were operating under interim, annual licenses that were not subject to state-imposed water quality conditions. ... Completing the Section 401 certification process would have allowed the State Board to impose conditions on any eventual new license. The evidence shows that, for all three projects, the State Board was at least actively engaged in relicensing proceedings by, for example, participating in the pre-application process to design the necessary environmental studies, submitting comments on FERC's draft environmental analyses, and providing regular status updates to FERC on pending certification requests. The Project Applicants, by contrast, stood to benefit from any delays because a Section 401 certification likely would have imposed additional environmental-protection measures.

The panel later added that "[i]n short, the records in all three orders under review demonstrate that the Project Applicants chose to withdraw and resubmit their certification requests because they

had not complied with California's CEQA regulations. Without a complete CEQA evaluation, the State Board was legally obligated to deny the requests without prejudice, and the record suggests that the State Board was prepared to do so."

Finally, the panel observed that "[t]he Fourth Circuit recently reached the same conclusion in a case" where "the correspondence between the certifying agency and the project applicant was not substantial evidence of coordination." *See N.C. Dep't of Env't Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021). It also

> agree[d] with the Fourth Circuit's observation in NCDEQ that "it must take more than routine informational emails to show coordination" because the states' "rights and responsibilities to ensure compliance with their own water-quality standards are too important to be so easily stripped away." ... Because the default term of a federal license is forty years, a state's waiver could result in a hydroelectric project's being noncompliant with a state's standards for decades. Considering those dramatic consequences, FERC's coordination findings cannot rest on such thin evidence as a simple courtesy email reminding an applicant of an impending deadline.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/04/20-72432.pdf