Alert

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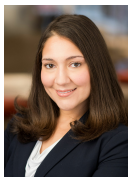
COZEN O'CONNOR

# D.C. Circuit Upholds Strict One-Year Deadline for State Waivers of Water Quality Certifications

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The D.C. Court of Appeals has weighed in again on state waivers of the Section 401 permitting requirement under the Clean Water Act (CWA), 33 U.S.C. § 1341, in relation to application approval from the Federal Energy Regulatory Commission (FERC). In *Hoopa Valley Tribe v. FERC*, 2019 U.S. App. LEXIS 2454 (D.C. Cir. Jan. 25, 2019), the D.C. Circuit reaffirmed the strict, one-year deadline for a state agency to act on a Section 401 application. The decision is the first to clarify that the repeated withdrawal and resubmittal of identical applications at the agency's prompting may be ineffective to avoid waiver.

Prior to FERC approval, a Section 401 permit is needed for any construction or operational activity that may result in a discharge into navigable waters — i.e., water quality certifications. 33 U.S.C. § 1341(a)(1). This requirement may be waived where the state "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*. This waiver provision was a topic of a 2018 FERC decision, *In re Constitution Pipeline Company, LLC*, 162 FERC ¶ 61,014. In that proceeding, FERC issued an order finding the waiver period for Section 401 permits would stop upon withdrawal of a permit application and start again when the application was resubmitted "no matter how formulaic or perfunctory the process of withdrawal and resubmission." FERC turned a blind eye to state agencies using withdrawal and resubmission as a procedural mechanism to delay Section 401 decisions, despite identical resubmissions and clear pressure on applicants to resubmit solely to avoid waiver. *Hoopa Valley* calls that regulatory response into serious question.

*Hoopa Valley* involved the licensing of a hydropower project under the Federal Power Act. Applicant PacifiCorp sought to relicense (and transfer) a series of dams along the Klamath River in California and Oregon, with a portion of the dams intended for decommissioning. PacifiCorp filed its initial application with FERC in 2004 and filed Section 401 applications in 2006 with the California Water Resources Control Board and Oregon Department of Environmental Quality. In 2010, PacifiCorp entered into an agreement with the states that explicitly held the Section 401 decisions in abeyance and required PacifiCorp to withdraw and refile its applications before the one-year deadline to avoid waiver, with that agreement amended in 2016. The Hoopa Valley Tribe (downstream of the project) was not part of the agreements or negotiations. Over a decade after the Section 401 applications were initially filed, the certification decisions remained pending per the agreement to withdraw and resubmit applications while the parties attempted to figure out a feasible relicensing and decommissioning scheme. This prompted the tribe to bring a petition alleging the states had waived their Section 401 review, along with an argument that PacifiCorp failed to diligently prosecute the licensing proceeding. FERC denied the tribe's petition, which was then challenged in the D.C. Circuit under the Administrative Procedure Act.

The court narrowed the waiver issue to one question: "whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year." The court found that the resubmission of identical Section 401 applications pursuant to an agreement was "deliberate and contractual idleness" intended to usurp FERC's control over the licensing process and, potentially, undermine FERC's jurisdiction and ordered FERC to proceed with a licensing determination. The court began its analysis by noting that FERC's own interpretation of the CWA was not entitled to any deference. The court also rejected the argument that a case from the Second Circuit Court of Appeals, *NYDEC v. FERC*, 884 F.3d 450 (2d Cir. 2018), supported a different conclusion. In *NYDEC v. FERC*, the Second Circuit was faced with concerns from the New York Department of Environmental Conservation (NYDEC) that certifications would be issued prematurely under an overly strict interpretation of the statute. In

dicta, the Second Circuit reasoned that the concern was misplaced because the state agency would have several options to meet the deadline, including requesting that the applicant withdraw and resubmit its application. 884 F.3d at 456. The *Hoopa Valley* case rejects this as a blanket approach to avoiding waiver.

While the facts of the *Hoopa Valley* are unique in that an explicit agreement existed to delay water quality certification decisions, it conflicts with FERC's stated position on the issue of withdrawals and resubmissions to date. It remains to be seen how far FERC will look behind withdrawal and resubmission (or other procedural) mechanisms used by state agencies to avoid waiver, but FERC can no longer ignore state agencies relying on technicalities as a means of delaying Section 401 permit decisions. The *Hoopa Valley* case makes clear that state agencies can neither use formalities to avoid waiver nor delay decisions on the basis of practicalities alone. For those with Section 401 permits lingering in the agency stratosphere, now may be the time to (re)consider whether the agency's review has been waived or whether a discussion with the state agency regarding the one-year timeline may be beneficial for your project.