



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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WATER QUALITY CERTIFICATION RULING

Hoopa Valley Tribe v. FERC

WHEN DOES ONE YEAR MEAN ONE YEAR?

by Richard M. Glick, Davis Wright Tremaine (Portland, OR)

Introduction

On January 25, 2019, the U.S. Court of Appeals for the D.C. Circuit (Court) rendered a highly significant opinion with respect to State water quality certification under section 401 of the Clean Water Act (CWA). *Hoopa Valley Tribe v. FERC*, 913 F. 3d 1099 (D. C. Circuit 2019). The Court rejected the commonly used workaround of the one-year statutory limit on State action by allowing — some would say demanding — multiple cycles of withdrawal-and-resubmittal of applications, holding that the States of Oregon and California had waived their authority by acceding to this practice. As discussed below, however, the case was decided under the specific facts presented to the Court.

Section 401 provides that before a federal agency can approve a project that may result in a “discharge to the navigable waters” the applicant must obtain water quality certifications from the affected State. The courts have construed this authority broadly, which means section 401 is a powerful tool to impose State policy on projects where the federal agency would otherwise have preemptive authority. *See*, for example, *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) and *S.D. Warren v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006), in which the U.S. Supreme Court is expansive in discussing State conditioning authority under section 401. Like the *Hoopa* case, these decisions involved hydroelectric power licensing under the Federal Power Act. However, the State is deemed to have waived its delegated authority under section 401 if it “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.” Clean Water Act, 33 U.S.C. § 1341(a)(1).

Determining the water quality effects and appropriate mitigation for hydroelectric facilities that have been in place for over half a century is a complex undertaking. Additional study and data are often needed, which could take more than one year to complete. Moreover, since relicensing brings out a myriad of stakeholders seeking an opportunity to influence the next license term, 401 issues are frequently addressed through multi-party settlement negotiations, which can also take a long time to resolve. This has led State 401 agencies and applicants to enter into understandings under which the applicant would withdraw its application before the end of one year and then resubmit it to *reset* the clock. Such withdrawal and resubmittal cycles have often stretched over a period of many years.

The D.C. Circuit was plainly put off by this common practice, particularly on the facts of this case. The context in which this case arises is central to the Court’s indignation and its holding, so an introduction would be helpful to the discussion.

Water Quality Certification

Adjudication

Settlement Agreements

Congressional Approval

Dam Removal

Withdrawal & Resubmittal

The Water Report

(ISSN 1946-116X)

is published monthly by
Envirotech Publications, Inc.
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Eugene, OR 97402

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www.TheWaterReport.com

Subscription Rates:

\$299 per year

Multiple subscription rates
available.

Postmaster: Please send
address corrections to
The Water Report,
260 North Polk Street,
Eugene, OR 97402

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The Klamath Settlements

PacifiCorp owns a series of hydroelectric projects on the Klamath River, in Oregon and California (FERC Project No. 2082). The 50-year federal license for Project No. 2082 expired in 2006, and the projects have operated under annual licenses since then. Federal Power Act, 16 U.S.C. §§ 791-828C. PacifiCorp timely filed an application at FERC for a new license, and filed section 401 applications to Oregon and California. Coincident with these applications, Oregon was conducting a decades-long water rights adjudication for the Klamath River Basin. Extensive negotiations ensued over a period of years between PacifiCorp, federal and State resource agencies, Indian tribes, farmers, ranchers, and conservation groups concerning water rights and the fate of the Klamath River hydroelectric projects.

The result was execution in 2010 of two related but separate settlement agreements. The Klamath Hydroelectric Settlement Agreement (KHSA) was to facilitate removal of the four PacifiCorp dams on the mainstem Klamath River, whereas the Klamath Basin Restoration Agreement (KBRA) promoted cooperative efforts to protect fisheries and water supplies. The original KHSA relied on congressional approval, and when that was not forthcoming, the parties returned to the bargaining table and produced the Amended Klamath Hydroelectric Settlement Agreement (AKHSA) in 2016. The AKHSA was designed to require only FERC approval and not that of Congress.

Under the AKHSA, Project No. 2082 would be split into two licenses. One would be for the four mainstem dams that PacifiCorp proposes to remove, while the other covered the facilities PacifiCorp wishes to retain. The first renewed license would be transferred to a new non-profit entity, the Klamath River Renewal Corporation (KRRC), which would implement the dam removal. If the dams could be successfully removed, KRRC would surrender the license. If the dams could not be removed, the facilities revert to PacifiCorp. Funding for the AKHSA is derived from special bond issues, legislation, and regulatory approvals in both Oregon and California. FERC has approved dividing the license into two, but has not yet acted on the transfer to KRRC.

As part of the settlement, the parties agreed that pending the necessary approvals and funding for removal of the mainstem dams, PacifiCorp would withdraw and resubmit its section 401 applications each year before the one-year statutory review period expired. This withdrawal and resubmittal has occurred each year by means of a letter from PacifiCorp that proposes the same project, unchanged from that described in the previous application.

The Hoopa Valley Tribe (Tribe), whose reservation straddles the Trinity River near the confluence with the Klamath River and downstream of the projects, participated in the Klamath settlement discussions. However, the Tribe chose not to sign the resulting agreements. Frustrated by the slow pace of efforts to remove the dams, the Tribe petitioned FERC for a declaratory order that Oregon and California waived their certification authority under section 401 by failing to timely conclude their processes. The Tribe argued that the States, by allowing the repeated withdrawal and resubmittal, impeded FERC from advancing its own process.

The D.C. Circuit Decision

Jurisdiction

FERC denied the petition and the Tribe appealed to the D.C. Circuit. Oregon and California declined to intervene in the litigation, asserting sovereign immunity under the 11th Amendment to the US Constitution. In an *amicus* brief, Oregon took this one step farther and argued that both States are indispensable parties to the Tribe's appeal because it could result in a waiver of State authority. Since the State could not be forced to join the litigation but is at the same time an indispensable party, Oregon averred that the Court lacks jurisdiction.

The Court rejected this argument, finding that the States are not indispensable parties:

Hoopa's petition does not involve a state's certification decision or a state's application of state law, but rather *a federal agency's order*, a matter explicitly within the purview of this Court when petitioned by an aggrieved party.

Hoopa, infra at 1103. Citing Fed. R. App. P. 15, 16 U.S.C. § 825(b). (emphasis original).

Waiver under 401

As noted, section 401 provides a one-year limit on State action. If 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," the State's authority is deemed waived. 33 U.S.C. § 1341(a)(1). In its *amicus* brief, the State of Oregon argued that the State's obligation to act is only on the application before it:

Water Quality Certification

New Deadline?

Deadline Purpose

Extended Delays

Circumventing Authority

Usurping FERC Control

Limited Precedent?

By its plain terms, the statute provides that any potential waiver is triggered by a specific request from the applicant, and that potential waiver is measured based on the state’s response to that specific request. The statutory text does not justify an interpretation that waiver is determined by looking at any previous or other request. ...As FERC correctly concluded here, therefore, when PacifiCorp withdraws and resubmits its application, it has given the state a new deadline. The certification authority is not waived unless the state fails to act in a timely manner in relation to the new deadline.

Brief of Amicus Curiae the State of Oregon in Support of Respondent Federal Energy Regulatory Commission and Supporting Affirmance, at 21-22.

Moreover, citing legislative history, Oregon argued that the purpose of the one-year deadline is to protect the applicant — not a third party like the Tribe — from a State killing a project by sitting on an application. That purpose, however, does not apply when it is the applicant withdrawing its application and filing a replacement:

While, to be sure, the legislative history indicates that Congress was concerned with “frustrating the Federal application” by state delay or inactivity, that history provides no indication that Congress was troubled by the prospect of an *applicant’s voluntary choice* to withdraw its application from a state’s review process and resubmit it at its discretion. In such an event the application is not “frustrated by any state delay or inaction; rather, it is the applicant who has chosen to withdraw and resubmit its application.

Id. at 25 (emphasis original).

The D.C. Court of Appeals was not persuaded. One could observe that withdrawal and resubmittal is not always the “applicant’s voluntary choice,” but that is not what interested the Court. Rather, the Court expressed amazement that such extended delays in the 401 certification process have become so prevalent:

The pendency of the requests for state certification in this case has far exceeded the one-year maximum. PacifiCorp first filed its requests with the California Water Resources Control Board and the Oregon Department of Environmental Quality in 2006. Now, *more than a decade later*, the states still have not rendered certification decisions. FERC “sympathizes” with Hoopa, noting that the lengthy delay is “regrettable.” According to FERC, it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state’s water quality certification, and four of those had been pending for *more than a decade*.

Hoopa, infra at 1104 (emphasis original).

Under the facts of the instant case, the Court suggested that PacifiCorp, Oregon, California, and FERC were co-conspirators to subvert the statutory deadline. Using particularly strong language to reject the arrangement underlying the KHSA, the Court wrote:

The record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place, and therefore, we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a “new request” such that it restarts the one-year clock. This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp’s withdrawals-and-resubmissions were not just similar requests, they were not new requests at all. The KHSA makes clear that PacifiCorp never intended to submit a “new request.” Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same...*in the same one-page letter...for more than a decade*. Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.

While the statute does not define “failure to act” or “refusal to act,” the states’ efforts, as dictated by the KHSA, constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon’s deliberate and contractual idleness defies this 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.

Id. at 1104 (italicized emphasis original, underscored emphasis added).

As discussed below, the case represents a flat out denunciation of withdrawal-and-resubmittal for the Klamath projects, however, the precedent for other cases is unclear. The Court was careful to limit its rulings to the facts of the specific case, but the language used indicates that this method of avoiding statutory deadlines will be viewed with a jaundiced eye.

Takeaways

The *Hoopa* case upsets the manner in which applicants, States, and FERC have long interrelated in the section 401 context. What are the implications going forward?

- The respondents in the case may seek rehearing by the three-judge panel or by the D.C. Circuit *en banc*. So, the case may not be over.
- If rehearing is denied or results in the same outcome, FERC will proceed with the applications before it without benefit of State 401 certifications. However, FERC may still choose to give meaning to the settlement agreements, which represent hard won, comprehensive resolutions of disputes among many stakeholders in the Klamath Basin. The settlement is before FERC, and Oregon and California can be expected to vigorously advocate for it. FERC has often incorporated such settlements in its licensing decisions.
- The case before the D.C. Circuit concerned water quality certification for FERC relicensing of Project No. 2082, but does not speak to PacifiCorp's proposal to transfer the license to the KRRC so that it could be surrendered following dam removal, pursuant to the settlement agreement. Moreover, the decision does not upset FERC's decision to address the license transfer before considering a new license.
- The *Hoopa* court was careful to limit its ruling on the specific facts before it. There will be instances, unlike in *Hoopa*, in which a section 401 application is withdrawn and a new one submitted with substantive changes to the project. Such resubmittals are not uncommon when the applicant and the State are negotiating mitigation measures that require more evaluation and study. How much change is needed to avoid the *Hoopa* outcome is a question for another court to decide.
- *Hoopa* is a significant case in the context of hydropower licensing, but it is not the first to find that the one-year deadline in section 401 means one year. In *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207 (W.D. Wash. 2003), the project under consideration was the addition of a third runway to Sea-Tac airport, which required approval by the US Army Corps of Engineers. The Department of Ecology's 401 certification was appealed to the Pollution Control Hearings Board (PCHB), which imposed additional conditions, but that review process exceeded the one-year 401 period. The court held that the Corps was not bound by the PCHB's new conditions and the State would have to find alternative means of imposing its will:

Lastly, in its amicus brief, the State of Washington argues that requiring a state to complete its certification process, including judicial review, within one year violates due process and state sovereignty and puts the CWA in significant tension with the 10th and 11th Amendments.

This argument is not persuasive. Under the Corps' interpretation, a state is still free to pursue its own independent avenues for certification and review of certification. Section 401 only impacts the way in which *federal* agencies must respond to a timely state certification. If a state is concerned about losing its ability to inject its requirements into the federal process in a timely manner, the state can take other measures to ensure its involvement. For instance, the state can issue its certification in the form of an independently enforceable order such that at the end of the judicial review process, there are independent state requirements above and beyond the federal requirements.

Id. at 1217 (italicized emphasis original, underscored emphasis added).

In the hydropower licensing setting, it may not be so easy for States to issue "independently enforceable" orders. A wide swath of State regulation has been held to be preempted by the Federal Power Act, which is in large part why States rely on section 401 to assert authority in the FERC process. See, *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946); *California v. FERC*, 495 U.S. 490 (1990). Some States require agreements with applicants to give the States contractual remedies in the event FERC determines it lacks authority or declines to enforce section 401 conditions. These agreements may take on new urgency among State 401 agencies to implement State policy. Can the States insist on applicants entering such agreements?

- The result in *Hoopa* was to vacate FERC's rejection of the Tribe's petition to find waiver by the States, and to remand back to FERC for further proceedings. That suggests that FERC will be making the initial decision in future cases as to whether waiver has occurred, which will also lead to more litigation.

Conclusion

While the *Hoopa* case can be seen as a victory for the hydropower industry, or at least a victory for more timely regulatory review, it likely will result in more litigation and delay, and push the States to react in problematic ways. California has indicated it might start denying section 401 applications without prejudice as an alternative to prolonged withdrawal/resubmittal cycles. But that would likely invite more litigation to question whether such a practice is just a different species of subterfuge, resulting in a similar outcome.

Water
Quality
Certification

FERC's Options

License Transfer

Specific Facts

One-Year Limit

State Order

Federal
Power ActContractual
Remedies

Timely Review

Water Quality Certification

Workaround Value?

Another possible response by States is to make hasty decisions to beat the 401 clock, which could include imposition of conditions that are onerous and expensive to implement, but not that well thought through. In other words, in exchange for speedy 401 decisions and the short-term carrying cost of the process, applicants could be stuck with more expensive open-ended, long-term mitigation requirements — or be forced to challenge such requirements.

As is often the case, natural resources litigation can produce surprising results and long-term implications. The withdrawal/resubmittal workaround has been a frustration for many applicants, resulting in long delays and expense in reaching an accommodation with the States. The irony in the *Hoopa* case is that the workaround was being employed in the service of a comprehensive settlement fully supported by the applicant and most stakeholders, and which promised lasting ecological benefits. It is also ironic that the challenge leading to this important decision came not from the applicant, but from a third party that shares the same goals as the applicant and other stakeholders supporting the settlement agreement, but wanted to accelerate the process. Time will tell if a faster process for state section 401 and FERC review of hydroelectric projects ultimately results.

FOR ADDITIONAL INFORMATION:

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Post-Printing Update

Since this article went to print, intervenors American Rivers, California Trout and Trout Unlimited have submitted a petition for rehearing by the three-judge D. C. Circuit panel or the panel en banc. They argue that other circuits and FERC have accepted the withdraw-and-resubmit practice for decades, and that the practice is a proper exercise of cooperative federalism as envisioned by Congress between the Federal Power Act and Clean Water Act. That is, the ability to extend review beyond year provides the opportunity for states to have meaningful impact in the relicensing process. They also argue that the delaying practice is similar to FERC tolling orders, and that if the if the *Hoopa* decisions remains in place, it be applied prospectively.

In addition, FERC issued a notice inviting supplemental briefing on the implications of the *Hoopa* case in the Constitution Pipeline proceeding (FERC Docket Nos. CP18-5-000 and CP18-5-001). Constitution had filed for review before the D. C. Circuit, but FERC filed an unopposed motion for voluntary remand to allow the litigants the opportunity to argue the significance of *Hoopa*.

Richard M. Glick is a partner in the Portland, Oregon, Office of Davis Wright Tremaine LLP, where he practices water, environmental, and energy law. Prior to entering private practice, Rick was staff counsel at the California State Water Resources Control Board, and then Deputy City Attorney for the City of Portland, where he advised the City's Bureaus of Water Works, Hydroelectric Power and Environmental Services. He was the first president of the American College of Environmental Lawyers, served as chair of the Oregon State Bar Section on Environmental and Natural Resources Law, and was a founder of the National Water Resources Law Forum and a member of the Water Resources Committee of the ABA Section on Environment, Energy, and Resources. He has written and presented on numerous occasions on water rights, environmental, and natural resources law issues.