

# D.C. Circuit Holds Withdrawal-and-Resubmission of Water Quality Certification Requests Under Section 401 of the Clean Water Act Does Not Trigger New Statutory Periods of Review for Hydroelectric Project

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In a unanimous decision issued on January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit, in Hoopa Valley Tribe v. Federal Energy Regulatory Commission,<sup>[1]</sup> held that “withdrawal-and-resubmission” of a water quality certification request under Section 401 of the Clean Water Act (“CWA”) does not trigger new statutory periods of review for the Klamath Hydroelectric Project (“Klamath Project”).

Under Section 401 of the CWA, applicants seeking a federal permit for a project that “may result in any discharge into the navigable waters” must first seek certification from the states in which the project is proposed to be located that such discharge will comply with applicable state water quality standards.<sup>[2]</sup> Section 401 further provides that state certification requirements are waived if a 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.”<sup>[3]</sup>

The Klamath Project is located along the Klamath River in Oregon and California. The original FERC license for the Klamath Project expired in 2006. In 2004, PacifiCorp filed a relicensing application with FERC. In 2010, PacifiCorp entered into a settlement agreement with California, Oregon, and other parties to resolve issues that had arisen regarding certain conditions of the new license. The settlement agreement provided, in pertinent part, the following: “PacifiCorp shall withdraw and re-file its application for Section 401 certifications as necessary to avoid the certification being deemed waived under the CWA during the Interim Period.”

In May 2012, Hoopa Valley Tribe petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project. FERC found that California and Oregon had not waived their CWA 401 water quality certification authority and that PacifiCorp had diligently prosecuted its relicensing application for the Project.

The Court was asked to decide whether a state waives its CWA 401 authority when an applicant repeatedly withdraws and resubmits its CWA 401 certification request pursuant to an agreement between the state and the

applicant. The Court found that the text of CWA Section 401 is clear and requires action by a state on a Section 401 application within a year, which is the “absolute maximum” time period within which to act to avoid waiving its authority. Here, the Court stated that “California and Oregon’s deliberate and contractual idleness defies this [statutory] requirement.” The Court explained that the agreement between PacifiCorp and the states “does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, condition, and developing of a hydropower project.” Such agreements could “be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction.”

The Court noted that PacifiCorp’s CWA 401 request had been pending for over a decade pursuant to the withdrawal and resubmission agreement. The Court further explained that when PacifiCorp withdrew its request, it did not submit a new one in its place – it repeatedly submitted the same request.

Although the facts in this case are unique, this decision could have far-reaching implications, not only for other hydroelectric power projects, but also for natural gas pipelines and other projects subject to CWA Section 404 permits, each of which requires an applicant to obtain a CWA 401 certification. As the Court’s ruling mentions, there are a number of hydroelectric projects where pending CWA 401 certifications have delayed FERC relicensing. There are also interstate natural gas pipeline projects for which Section 401 certifications have been either delayed or denied by state agencies, and disputes regarding whether states waived their CWA 401 authority are currently pending before FERC and the courts.

If you have any questions regarding Section 401 of the Clean Water Act, please feel free to contact Brendan Mooney at (516) 357-3757 or via email at [bmooney@cullenanddykman.com](mailto:bmooney@cullenanddykman.com), or Neil Yoskin at (609) 279-0900 or via email at [nyoskin@cullenanddykman.com](mailto:nyoskin@cullenanddykman.com).

[1] No. 14-1271 (D.C. Cir. Jan. 25, 2019)

[2] 33 U.S.C. § 1341(a)(1)

[3] Id.

## Practices

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