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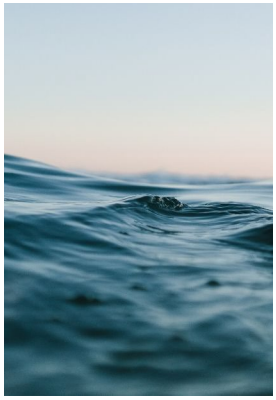

Recent D.C. Circuit Case Limits Opportunity to Assert Waiver of State Section 401 Water Quality Certification Authority

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The requirement to obtain a state water quality certification pursuant to Section 401 water of the Clean Water Act ("CWA") has become a significant source of delay and complication in the federal permitting of any project—including hydropower, natural gas pipelines, liquefied natural gas terminal projects—that involves a discharge to a navigable water.

The U.S. Court of Appeals for the D.C. Circuit's decision in *Village of Morrisville v. FERC* decided May 16, 2025, is the most recent decision in a line of cases decided over the last several years that address whether a state has waived its certification authority through delay. This decision further narrows the circumstances under which the court will determine that the state has waived its authority, and thus increases the burden on project proponents to demonstrate that a waiver has occurred.

Background

Under Section 401, applicants for federal licenses or permits whose activities may result in discharges into U.S. waters must obtain water quality certification from the state where the discharge will occur. This provision allows states to impose conditions to ensure compliance with state water quality standards or to deny certification if the discharge will not comply with these standards, which effectively vetoes the federal license or permit. However, the CWA specifies that if a state "fails or refuses to act" on a certification request within a reasonable period, not exceeding one year, the state waives its certification authority.

Courts have clarified that this waiver provision prevents states from indefinitely delaying federally licensed projects through untimely certification decisions. For Federal Energy Regulatory Commission- ("FERC") regulated projects, courts have directed that FERC holds the authority to determine whether a state has waived its Section 401 certification authority or not.

Despite this time limitation, states have developed procedural mechanisms to extend review beyond the one-year period. For many years, states avoided this one-year limitation by requesting that project applicants withdraw their 401 certification requests before the expiration of the one-year deadline. The state would then encourage applicants to re-file identical requests to initiate a new one-year period for review. FERC had been prevented from issuing new licenses in these cases for

years, and in some cases decades, while the state orchestrated the annual ritual of withdraw-and-re-file.

The D.C. Circuit offered hope for FERC's ability to reassert control of its licensing timelines from Section 401 delays when it decided *Hoopa Valley Tribe v. FERC* in 2019. In that case, the court determined that a written agreement between an applicant for water quality certification and the States of California and Oregon, by which the applicant annually withdrew and re-filed the same request while the parties pursued a dam removal settlement, constituted a "waiver of authority" by the states.

Spurred by *Hoopa Valley Tribe*, FERC found waiver in a number of cases in California. These cases were based on California's entrenched practice, not limited to *Hoopa Valley Tribe*, of encouraging hydroelectric applicants to withdraw their certification requests just prior to expiration of the one-year deadline.

In more recent decisions, however, the D.C. Circuit has limited the circumstances in which it will uphold FERC waiver determinations and/or has upheld FERC's determinations that no waiver occurred. In *Turlock Irrigation District v. FERC*, the D.C. Circuit addressed a variation on the "withdraw and resubmittal" scheme where the state instead repeatedly "denied without prejudice." When Turlock and Modesto Irrigation Districts challenged the state's repeated denials as effectively waiving certification authority, FERC determined that denial "without prejudice" still constituted an "act" under Section 401. On appeal, the D.C. Circuit upheld FERC's interpretation, dismissing concerns that states could extend review indefinitely through successive denials without prejudice.

Village of Morrisville v. FERC

The Village of Morrisville, Vermont ("Morrisville") operates a hydroelectric project, for which it needed to renew its FERC license. Under Section 401, Morrisville needed a water quality certification from the Vermont Agency of Natural Resources ("VANR") before FERC could issue a new license. Through this process, VANR raised concerns about certain environmental aspects of the project. Facing these concerns and the potential conditions VANR sought to impose, Morrisville twice withdrew and resubmitted its certification application. Eventually, VANR issued a conditional certification with requirements that Morrisville found onerous.

After exhausting its challenges in Vermont state courts, Morrisville changed tactics and argued that VANR had waived its Section 401 authority by allowing the withdrawals and resubmissions to extend beyond the statutory one-year timeframe. FERC disagreed, finding that VANR had not waived its Section 401 authority because Morrisville had withdrawn and resubmitted its application "unilaterally and in its own interest," rather than "at the behest of the state."

Morrisville then appealed FERC's decision to the D.C. Circuit, which upheld FERC's decision. The D.C. Circuit took a narrow view of its decision in *Hoopa Valley Tribe*, and explained that unlike *Hoopa Valley Tribe*, where the state and an applicant had a written agreement to circumvent the one-year time limit, the Court found no

evidence of any mutual agreement between VANR and Morrisville to delay the certification process. VANR's awareness of or accession to Morrisville's withdrawal requests did not make the state a participant in any scheme to evade statutory deadlines.

The court observed that Morrisville, not VANR, sought and benefited from the additional time. Both withdrawals came at Morrisville's request to afford more time for review and negotiation of more favorable conditions under the water quality certification.

Finally, the D.C. Circuit concluded that the record indicated that VANR permitted these withdrawals as an alternative to either denying the certification outright or granting it with conditions Morrisville hoped to avoid.

Implications

After the D.C. Circuit's decision in *Turlock*, going forward states are more likely to deny certification requests without prejudice rather than request applicants withdraw and resubmit applications to avoid a potential waiver. Thus, decisions, like *Morrisville*, that address withdrawal and resubmittal may only apply in limited circumstances. Nevertheless, the *Morrisville* decision remains important for applicants who have previously been subject to the withdrawal and resubmittal scheme and may be seeking a waiver determination based on past state practice. While the D.C. Circuit stopped short of finding that a waiver determination could only be found if there is a written agreement between the applicant and the state, it remains unclear what evidence of agreement between the parties will be sufficient to support a waiver of a state's certification authority. However, it appears that an applicant seeking a waiver determination is going to have to provide affirmative evidence that the state coerced the applicant into withdrawing and refiling, and the state was acting in its own interest in requesting the withdrawal and resubmittal.

For More Information

Van Ness Feldman closely monitors and counsels clients on the permitting of large infrastructure projects, including hydropower projects and natural gas pipelines. If you would like more information about the impact of the Clean Water Act on permitting of infrastructure projects, please contact Jenna Mandell-Rice, Michael Pincus, or any member of our Land Use, Water, or Natural Resources practices in Seattle, WA at (206) 623-9372 or Washington, D.C. at (202) 298-1800.