

*Section of Environment, Energy, and Resources
American Bar Association*

Environment, Energy, and Resources Law: The Year in Review 2019

Chapter O • Hydro Power

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Chapter O: HYDRO POWER 2019 Annual Report¹

I. JUDICIAL DEVELOPMENTS

A. *Hoopa Valley Tribe v. FERC*

On January 25, 2019, in [*Hoopa Valley Tribe v. FERC*](#) (*Hoopa Valley Tribe*),² the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) held that a Federal Energy Regulatory Commission (FERC) hydroelectric licensee’s “withdraw[al] and resubmission of water quality certification requests” under Section 401 of the Clean Water Act (CWA)³ pursuant to a written agreement with state water quality agencies does not trigger a new one-year period for state water quality review.⁴ The case has significantly altered the landscape of CWA Section 401 in the context of FERC hydroelectric and natural gas proceedings.

Under Section 401 of the CWA, any applicant seeking a federal license for an activity that “may result in any discharge into the navigable waters” must first seek a water quality certification from the state(s) in which the project is located.⁵ FERC may not issue a new license authorizing the continued operation of a hydroelectric project unless the state water quality certifying agency has either issued a 401 certification or waived certification by failing to act on the request for certification within a reasonable period of time, not to exceed one year, from receipt of the request.

The *Hoopa Valley Tribe* case arose in connection with the relicensing of the Klamath Hydroelectric Project (Project), located on the Klamath River in Oregon and California. In 2010, after years of disputes with federal and state resource agencies over the appropriate environmental conditions to be included in a new license for the Project, the licensee entered into a settlement that provided for the future removal of four Klamath River dams. As a condition of the settlement, California, Oregon, and the licensee agreed to defer the one-year statutory deadline for Section 401 certification by annually withdrawing and re-filing the 401 applications related to the relicensing to avoid waiver of the States’ 401 authority under the CWA.⁶

In 2012, the Hoopa Valley Tribe (Tribe) filed a petition for declaratory order asking FERC to find that the licensee had failed to diligently prosecute relicensing and thus should be required to remove the dams at its own expense, or, alternatively, that the state agencies had waived their authority to issue 401 certifications for the Project and that FERC should promptly issue a new license with appropriate environmental protections.⁷ FERC denied the petition, finding that while the arrangement was inconsistent with the spirit of the CWA, the withdrawal and resubmission of a 401 application is a new request that establishes a new one-year deadline for the state’s action under the CWA.⁸

On appeal of the denial by the Tribe, the D.C. Circuit found that the licensee’s withdrawals and resubmissions were not new requests and did not restart the one-year

¹This report, which covers significant decisions in the area of hydropower during 2019, was authored by Sharon White and Ani Esenyanyan, attorneys at Van Ness Feldman, LLP.

²913 F.3d 1099 (D.C. Cir. 2019).

³33 U.S.C. § 1341 (2018).

⁴*Hoopa Valley Tribe*, 913 F.3d at 1099.

⁵33 U.S.C. § 1341(a)(1).

⁶*PacifiCorp*, 147 F.E.R.C. ¶ 61,216 at P 4, *reh’g denied*, 149 F.E.R.C. ¶ 61,038 (2014).

⁷*Id.* at P 8.

⁸*Id.* at PP 16-17.

clock for the States to act on the requests.⁹ Instead, the court found that the States' actions constituted a failure or refusal to act under the plain meaning of the CWA, constituting a waiver of their authority.¹⁰ The court held that, as a consequence, FERC acted arbitrarily and capriciously by not concluding that the States had waived their water quality authority under Section 401.¹¹ The court determined that the coordinated withdrawal-and-resubmission scheme under the settlement did not exploit a statutory loophole, but rather circumvented the exclusive authority delegated to FERC by Congress over hydropower licensing. The D.C. Circuit concluded that if the withdrawal-and-resubmission scheme was permitted to continue, it could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters. In response to the argument that a one-year review period could result in incomplete applications and premature decisions, the court found that "it is the role of the legislature, not the judiciary, to resolve such fears."¹²

On December 9, 2019, the U.S. Supreme Court [denied](#) a petition for a writ of certiorari in the case filed by California Trout and Trout Unlimited,¹³ so the case is now final. As discussed further below, the case has radically altered the Section 401 process and could potentially resolve a major source of delay in the FERC licensing process.

B. *CWA Section 401 in the Aftermath of Hoopa Valley Tribe v. FERC*

The *Hoopa Valley Tribe* case has prompted several hydropower and natural gas pipeline owners to seek FERC determinations of waiver of state Section 401 authority in permitting proceedings long delayed due to the Section 401 process.

In [Placer County Water Agency](#),¹⁴ for example, a licensee requested a FERC declaratory order that the California State Water Resources Control Board (Water Board) waive its Section 401 authority by directing the licensee each year between 2012 and 2018 to withdraw and resubmit its Section 401 application to restart the one-year clock. Like the licensee in *Hoopa Valley Tribe*, Placer County Water Agency (PCWA) sent a short letter to the Water Board each year indicating its withdrawal and resubmission, and did not change or even submit a new copy of the application itself. On April 18, 2019, FERC granted the declaratory order, finding that the Water Board had waived its Section 401 authority in the relicensing.¹⁵ FERC found that while PCWA and the Water Board did not have a written agreement to withdraw and refile each year as the parties did in *Hoopa Valley Tribe*, the record indicated that the process was intended to delay a certification decision in the same way.¹⁶ On [rehearing](#), FERC rejected the Water Board's argument that it lacked the resources to timely act on the 401 application, finding that the one-year timeline cannot be tolled due a state's alleged lack of resources.¹⁷ FERC also found that the Water Board's 401 certification, issued one day before FERC's declaratory order, was of "no legal significance," though FERC noted that where time permits, it would review any conditions included in an ineffective 401 certification as

⁹*Hoopa Valley Tribe*, 913 F.3d. at 1104.

¹⁰*Id.* at 1104-05.

¹¹*Id.* at 1104.

¹²*Id.* at 1105.

¹³Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019).

¹⁴167 F.E.R.C. ¶ 61,056 at P 6, *reh'g denied*, 169 F.E.R.C. ¶ 61,046 (2019).

¹⁵*Id.* at P 1.

¹⁶*Id.* at P 18.

¹⁷169 F.E.R.C. ¶ 61,046 at P 20.

recommendations under Section 10(a) of the Federal Power Act (FPA), rather than mandatory conditions.¹⁸

In *McMahan Hydroelectric, LLC*,¹⁹ FERC issued an original license for a project in which it determined that the state water quality agency waived its Section 401 authority by failing to act within one year of receipt of the application. The licensee filed an initial Section 401 application with the North Carolina Department of Environmental Quality (NCDEQ) in 2017. NCDEQ requested additional information and indicated that the application would be placed on hold until the information, as well as FERC's draft Environmental Analysis (EA), was received. The licensee submitted the additional information, but FERC did not issue its EA within one year of the 401 application. NCDEQ instructed the licensee to withdraw and resubmit its application, which it did in 2018 and again in early 2019. FERC found that consistent with *Hoopa Valley Tribe*, the refiling of the Section 401 application did not restart the one-year clock, and that neither a request for nor submittal of additional information tolls the one-year deadline under the CWA.²⁰ In a dissenting opinion, Commissioner Glick suggested, however, that the submission of additional information resulting in a significant modification to a pending Section 401 application would justify an exception to the one-year limit.²¹

In *Constitution Pipeline Co., LLC* (Constitution),²² FERC reversed its prior declaratory order and held that the New York State Department of Environmental Conservation (New York DEC) waived its Section 401 authority for a proposed gas pipeline project. Constitution first applied for a 401 certification in 2013 and twice withdrew and resubmitted its application at the State's request. In 2016, New York DEC denied the application on grounds that Constitution had failed to provide additional information requested by the State. In 2018, FERC denied Constitution's request for a finding of waiver due to the state's failure to act within one year, based on FERC's longstanding interpretation that withdrawal and resubmittal of a 401 application restarts the one-year waiver period.²³ Constitution sought review before the D.C. Circuit, and while the case was pending, the court issued its decision in *Hoopa Valley Tribe*.²⁴ After the court granted a voluntary remand of the case for reconsideration, FERC reversed its prior decision and found that New York DEC waived its Section 401 authority.²⁵ Because of its waiver, New York DEC's later denial of the 401 application was deemed by FERC to have "no legal significance."²⁶ FERC also rejected the State's argument that construction of the pipeline without a 401 certification would result in significant environmental harm, finding that it did not depend on a forthcoming 401 certification to conclude that project-related environmental impacts would be acceptable and the project should be authorized.²⁷

¹⁸*Id.* at P 24, n.60; 16 U.S.C. § 803(a) (2018).

¹⁹168 F.E.R.C. ¶ 61,185 (2019). Rehearing of the order remains pending at the time of this publication.

²⁰*Id.* at PP 37-38.

²¹*Id.* at P 4 (Glick, R., concurring in part and dissenting in part).

²²168 F.E.R.C. ¶ 61,129, *reh'g & stay denied*, [169 F.E.R.C. ¶ 61,199](#) (2019).

²³*Constitution Pipeline Co., LLC*, 162 F.E.R.C. ¶ 61,014, *reh'g denied*, 164 F.E.R.C. ¶ 61,029 (2018).

²⁴913 F.3d at 1099.

²⁵168 F.E.R.C. ¶ 61,129 at P 1.

²⁶*Id.* at P 40 (quoting *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700-01 (D.C. Cir. 2017)).

²⁷*Id.* at PP 47-49.

II. LEGISLATIVE DEVELOPMENTS

A. *Implementation of America's Water Infrastructure Act of 2018*

As reported last year, on October 23, 2018, President Trump signed into law the [American's Water Infrastructure Act of 2018](#) (AWIA),²⁸ a comprehensive water resources law that includes provisions specifically targeted to promote new hydropower development. In 2019, FERC instituted rulemakings and issued various orders to fulfill its obligations under the AWIA.

On April 18, 2019, FERC issued a [Final Rule](#) establishing rules for a new expedited licensing process (ELP) “for qualifying facilities at existing nonpowered dams and closed-loop pumped storage projects,” as required by the AWIA.²⁹ The Final Rule became effective on June 23, 2019. The Final Rule does not alter FERC’s existing licensing processes, but establishes procedures for FERC to determine, on a case-by-case basis, whether applications for an original license at a qualifying project meet the criteria to participate in the new ELP.³⁰ The ELP does not apply to relicensing proceedings.³¹ The ELP modifies the post-application process for qualifying facilities with the goal of FERC issuance of a final decision no later than two years after receipt of a completed license application. Applicants must include with their license application a request for authorization to use the ELP.³² FERC will act on the request to use the ELP within 180 days from the date of application filing.³³

To qualify for the ELP, an applicant must demonstrate that its proposed project meets both the statutory criteria for qualifying facilities under the AWIA³⁴ and FERC’s additional eligibility criteria. Applicants seeking to use the ELP also must document consultation with stakeholders, including federal and state agencies, tribes and dam owners.³⁵

For projects at existing nonpowered dams, the facility must generate electricity by using “withdrawals, diversions, releases, or flows from the associated nonpowered dam [and] . . . not result in any material change to the storage, release, or flow operations of the associated nonpowered dam.”³⁶ Qualifying nonpowered dams must have been constructed for the “control, release, or distribution of water for agricultural, municipal, navigations, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes.”³⁷

For closed-loop pumped storage projects, FERC adopted a definition that “focuses on the extent and type of a project’s use of surface or groundwater rather than on its physical, hydraulic connection to such features.”³⁸ Qualifying pumped storage projects must demonstrate that they:

²⁸[America's Water Infrastructure Act of 2018](#), Pub. L. No. 115-270, 132 Stat. 3765.

²⁹Hydroelectric Licensing Regulations Under the America's Water Infrastructure Act of 2018, 84 Fed. Reg. 17,064 (Apr. 24, 2019) (to be codified at 18 C.F.R. pt. 7).

³⁰*Id.* at 17,066.

³¹*Id.* at 17,067.

³²*Id.* at 17,068, 17,076.

³³*Id.* at 17,072, 17,074.

³⁴*Id.* at 17,069.

³⁵84 Fed. Reg. 17,064, at 17,066.

³⁶16 U.S.C. § 823e(e)(1) (2018).

³⁷*Id.* § 823e(e)(3).

³⁸84 Fed. Reg. at 17,068.

(1) cause little to no change to existing surface and groundwater flows and uses; (2) are unlikely to adversely affect species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act; (3) use only reservoirs situated at locations other than natural waterways, lakes, wetlands, and other natural surface water features; and (4) rely only on temporary withdrawals from surface waters or groundwater for the sole purposes of initial fill and periodic recharge needed for project operation.³⁹

FERC also has retroactively applied certain provisions of the AWIA in 2019 to promote hydropower development. For example, the AWIA authorized FERC to extend the time a licensee has to commence construction for up to eight years beyond the two years allocated under the license.⁴⁰ Prior to enactment of the AWIA, FERC could extend the license once for no more than two years. In *Eagle Crest Energy Co.*,⁴¹ FERC retroactively extended the deadline to commence construction for a proposed project that had already passed its commence construction deadline when the AWIA was enacted. FERC found that it was not limited to granting additional extensions of time to projects licensed following passage of the AWIA.⁴²

The AWIA also amended the FPA to increase the initial term of preliminary permits from three years to four.⁴³ It also increased the amount of time by which FERC may extend preliminary permits from two years to four beyond the initial four-year term, for a maximum permit term of eight years. In *Columbia Basin Hydropower*, FERC reinstated an expired preliminary permit on the basis of AWIA and extended it for two years.⁴⁴ The initial three-year preliminary permit to study the project expired in 2016 and was extended until 2018. FERC initially denied a request by the permittee for an additional extension, finding that Congress had recognized that five years should be a sufficient amount of time for a permittee to develop and file a license application absent an extraordinary circumstance.⁴⁵ The permittee requested rehearing after Congress passed the AWIA, and FERC reversed its decision. While FERC found that enactment of the AWIA was not an extraordinary circumstance, it found that Congress has now recognized that longer permit terms are needed to provide permittees with sufficient time to develop and file a license application.⁴⁶

III. ADMINISTRATIVE DEVELOPMENTS

A. *EPA Proposes Reforms to the CWA Section 401 Process*

On April 10, 2019, President Trump issued [Executive Order 13868](#) to encourage efficient permitting of energy infrastructure projects and reduce regulatory uncertainties that discourage new investment in such projects.⁴⁷ The Executive Order included several proposals to potentially address the “confusion and uncertainty” of the Section 401

³⁹*Id.* at 17,068-69.

⁴⁰America’s Water Infrastructure Act of 2018 § 3001(b).

⁴¹167 F.E.R.C. ¶ 61,117 at P 1 (2019).

⁴²*Id.* at PP 4, 8.

⁴³America’s Water Infrastructure Act of 2018 § 3001(a).

⁴⁴165 F.E.R.C. ¶ 61,258 at P 2 (2018).

⁴⁵*Id.* at PP 5, 13.

⁴⁶*Id.* at P 13.

⁴⁷Exec. Order No. 13868, 84 Fed. Reg. 15,495 (Apr. 10, 2019).

process.⁴⁸ Among other directives, it directed the U.S. Environmental Protection Agency (EPA) to review its existing guidance on Section 401 to determine whether any provisions should be clarified to promote investment in energy infrastructure. The Executive Order also directed EPA to revise its regulations implementing Section 401 consistent with the goals of the Executive Order.

Consistent with the Executive Order, on June 7, 2019, EPA issued its updated Section 401 [guidance document](#) (Updated Guidance)⁴⁹ that clarifies and provides recommendations to states and tribes concerning their implementation of Section 401. The Updated Guidance supersedes a prior EPA guidance document issued in 2010 under the Obama Administration.⁵⁰ The Updated Guidance introduced several procedural and substantive reforms to the Section 401 process. First, it clarified that the one-year timeline under Section 401 begins when the state agency receives the certification request, not when the state deems an application complete.⁵¹ If the state does not grant, deny, or waive its Section 401 authority within one year, the Updated Guidance notes that the federal permitting agency may determine that Section 401 has been waived and issue the federal permit. The Updated Guidance also recommends that the scope of Section 401 conditions should be limited to those addressing water quality impacts from the project.⁵² The Updated Guidance further notes that, to evaluate a certification request, a state need only “the application materials submitted for the federal permit,” and that an outstanding request for additional information does not toll the timeline for action on the 401 application.⁵³

On August 8, 2019, as directed by Executive Order 13868, EPA released a [proposed rule](#) (Proposed Rule) that seeks to codify a number of the reforms to Section 401 that were previewed in the Updated Guidance.⁵⁴ For example, EPA proposes that a certifying agency’s Section 401 review be “limited to considerations of water quality,” and that the federal permitting agency may determine if certification conditions are beyond the scope of certification.⁵⁵ Additionally, the Proposed Rule would limit a certifying agency’s review to water quality impacts from point source discharges, rather than the entire activity associated with a federally licensed project.⁵⁶ With regard to procedural aspects of Section 401, the Proposed Rule notes that “there is no tolling provision to stop the clock at any time” in Section 401.⁵⁷ The Proposed Rule explicitly prohibits a certifying authority to direct a project proponent to withdraw and resubmit a 401 application to restart the one-year clock.⁵⁸ Lastly, under the Proposed Rule, the

⁴⁸*Id.* at 15,496.

⁴⁹ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 401 GUIDANCE FOR FEDERAL AGENCIES, STATES AND AUTHORIZED TRIBES at 1 (June 7, 2019) [hereinafter Updated Guidance].

⁵⁰OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, ENVTL. PROT. AGENCY, [CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES](#) (Apr. 2010).

⁵¹Updated Guidance, *supra* note 49, at 3.

⁵²*Id.* at 4.

⁵³*Id.* at 3, 5.

⁵⁴Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (proposed Aug. 22, 2019) (to be codified at 40 C.F.R. pt. 121).

⁵⁵*Id.* at 44,094, 44,106.

⁵⁶*Id.* at 44,099.

⁵⁷*Id.*

⁵⁸*Id.* at 44,108.

federal permitting agency, and not the state, is responsible for enforcing Section 401 conditions once they are incorporated into a federal license.⁵⁹

EPA received nearly 1,000 public comments on its Proposed Rule, and is expected to issue a final rule by May 2020.

⁵⁹*Id.* at 44,116.